

COURT FILE NO.: 07-CV-329807PD1
DATE: 20090702

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TERRI JEAN BEDFORD, AMY LEBOVITCH
and VALERIE SCOTT

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

and

ATTORNEY GENERAL OF ONTARIO

Intervenor

Application under rule 14.05(3)(g.1) of the Rules of Civil Procedure

BEFORE: MATLOW, J.

COUNSEL: Ranjan K. Agarwal, for the Moving Parties

Alan Young, for the Applicants

Michael Morris, for the Respondent

Shelley Hallett, for the Intervenor

HEARD: June 19, 2009, at Toronto

ENDORSEMENT

[1] This motion, brought by Christian Legal Fellowship, REAL Women of Canada and Catholic Civil Rights League for leave to intervene in this application as a friend of the Court

pursuant to rule 13.02 of the Rules of Civil Procedure is dismissed for the reasons which follow. If there is any claim for costs which cannot be resolved, I will fix a time to hear submissions.

[2] The pending substantive application is brought pursuant to rule 14.05(3)(g.1) before a single judge of this Court for the following relief;

- a) an order declaring that s. 210 (keeping common bawdy house), s. 212(1)(j) (living on the avails of prostitution) and s. 213(1)(c) (communicating for the purpose of prostitution) of the Criminal Code of Canada violate s. 7 of the Charter of Rights and Freedoms and as such are unconstitutional and of no force or effect;
- b) an order declaring that s. 213 (1)(c) of the Criminal Code of Canada violates s. 2(b) of the Charter of Rights and Freedoms and as such is unconstitutional and of no force effect.

[3] Section 7 of the Charter, which is headed "Legal Rights", reads as follows;

7. Life, liberty and security of person – Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[4] Section 2(b) of the Charter, which is headed "Fundamental Freedoms" reads as follows'

2. Fundamental freedoms – Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[5] The principal grounds relied on by the applicants for their constitutional challenge relate to the alleged impact of the impugned statutory provisions on the safety and security of sex trade workers ("workers"). The essence of the allegations is that, by making various activities related to the lawful work of workers, including engaging in prostitution, criminal, Parliament has restricted the ability of workers to take steps to advance their safety and security and has forced them to rely upon a criminal element in our society to provide services for their protection.

[6] Rule 13.02 reads as follows;

Leave to Intervene as Friend of the Court

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

[7] Rule 13.02 must be distinguished from rule 13.01 which authorizes the granting of leave to a person to intervene as an added party if certain specified preconditions are met. The rights conferred on an intervenor under rule 13.01 are much broader than the right to render assistance

by making argument which is the extent of the right to participate that can be conferred on an intervenor under rule 31.02.

[8] The motion is supported by only one affidavit, that of Ruth A. M. Ross, sworn on March 2, 2009. Ms Ross ("the deponent") is a lawyer and "the Executive Director and General Legal Counsel for the Christian Legal Fellowship". She states that the moving parties "are all national, not-for-profit organizations and active in promoting traditional conceptions of family and society and morality, equality and rights issues". She then goes on to describe each moving party as follows:

Christian Legal Fellowship

5. The Christian Legal Fellowship was founded in 1978 out of the conviction that the vocation of law is a calling from God. With God's calling comes the responsibility and stewardship of integrating Christian faith and law. As Christian lawyers, law students, legal professionals and interested friends, we recognize the privilege and responsibility of joining together as a national voice to advocate for justice and affirm our Christian conviction.

6. The association, among other functions, explores the complex interrelationships between the practice and theory of law and Christian faith. While having no direct denominational affiliation, the Christian Legal Fellowship has over 500 active members from more than 30 Christian denominations working in association together.

REAL Women of Canada

7. REAL Women of Canada is a non-partisan, non-denominational organization of independent women. Their members come from all walks of life, occupations, social and economic backgrounds. Some members work full or part-time outside the home, while some mainly work in the home. REAL Women of Canada represent a broad spectrum of Canadian women who, until their formation, did not have a public forum in which to express their views.

8. REAL Women of Canada promotes equality for all women. One of their objectives is to support policies for women that provide equal opportunity in education, employment and retirement. They believe that social and economic problems and solutions for women today should be resolved by taking into account their impact of on the family and society as a whole. Their view is that the family, which is now undergoing serious strain, is the most important unit in Canadian society. They believe that the fragmentation of the Canadian family is one of the major causes of disorder in society today.

9. REAL Women of Canada has between 50,000 and 55,000 members, including individuals and groups, drawn from all walks of life, with affiliated chapters across the country.

Catholic Civil Rights League

10. The Catholic Civil Rights League is a national lay Catholic organization committed to combating anti-Catholic defamation, working with the media to secure a fair hearing for Catholic positions on issues of public debate, and lobbying government and intervening in court challenges in support of law and policy compatible with a Catholic understanding of human nature and the common good.

11. The Catholic Civil Rights League was formed in 1985. Today the Catholic Civil Rights League has more than 25,000 individual members drawn from all walks of life, and in all parts of the country

[9] The deponent then goes on to describe the objectives of the moving parties in part, as follows:

The Intervenors' Objectives

12. The Intervenors promote their values by educating members through national conferences and seminars, publishing newsletters and journals, establishing and supporting local groups and chapters, supporting Christian advocacy, and where appropriate, intervening in court cases in support of Christian values, principles and freedoms and participating in the public debate on important legal issues facing our society.

13. One of the important aims of the Intervenors is to advocate for justice with compassion, to express the concerns of members for spiritual and moral values and to promote the application of Christian values as a means of addressing social, legal and political problems in Canada.

14. The Intervenors have well-established histories of active involvement in matters of public policy and law, especially matters that involve the *Charter of Rights and Freedoms* and its interplay with the family, marriage, children and the impact of social change on families. They have developed an institutional legal knowledge and expertise on matters relating to the family, children and life issues generally, as well as the freedom of expression and liberty and security issues raised in this application.

15. The Intervenors have appeared before Parliamentary committees and made representations to provincial governments on issues of religious freedom, human rights and issues affecting the family and society.

16. In the past, the Intervenors, either separately or together, have been involved as intervenors in *Charter of Rights and Freedoms* matters. The Supreme Court of Canada and other courts have granted the Intervenors leave to intervene in the following cases:

[14 cases cited but not included here]

17. In addition, Gwen Landolt of REAL Women of Canada made submissions before the Subcommittee on Solicitation Laws of the House of Commons' Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. This Parliamentary committee canvassed many of the issues raised in this application.

18. In this proceeding, this Court is being asked to consider the constitutionality of certain laws that the Intervenor will assert have morality as one of their cornerstones. In addition, the impugned laws relate to what type of conduct the community (through Parliament) can determine to be appropriate in public as opposed to private, places. Finally, the impugned criminal provisions are designed to protect the dignity of victims of prostitution, and it is a common goal of each of the Intervenor to protect human dignity. In all of these issues, the Intervenor can provide a viewpoint that may well be different from the Attorney General's and the applicant, and the Intervenor hope that this viewpoint will be of assistance to the Court.

19. The relief sought by the Intervenor will not overly complicate the application nor burden the parties, in the Intervenor do not seek to adduce any evidence, and do not intend to repeat any submissions of the Attorney General.

[10] The respondent does not oppose the motion. In his factum, he asserts that:

- i. The moving parties may have a perspective that is different from the respondent that may be of assistance to the Court.
- ii. The moving parties seek to focus their submissions on issues relating to morality and the application of Christian values as a means of addressing social, legal and political problems in Canada.
- iii. His position, which focuses on the reduction of harm and exploitation, is that the impugned provisions are aimed at, *inter alia*, deterring and denouncing the most exploitative and public aspects of the business of prostitution, protecting exploited prostitutes and reducing the community harm associated with prostitution, including the harm to innocent bystanders and the exposure of vulnerable groups, including young people, to prostitution.
- iv. He will argue that the impugned provisions are constitutionally valid and that they serve the interests of all Canadians.

[11] The current Intervenor takes no position on the motion and has not filed a factum.

[12] The applicants, however, do oppose the motion and their counsel submits that the moving parties should not be given status as intervenors, even as friends of the Court, because they have not shown that they would be in a position to make a useful contribution to the resolution of any issue that needs to be determined. In particular, he submits that the issues in the application relate

to the personal safety and security of workers and “that the larger question of the proper moral perspective on sex work does not meaningfully address the safety issues raised in this application”. He further submits that the moving parties’ intention “to address the spiritual and moral values underlying the prohibition on prostitution is both irrelevant and distracting because the Supreme Court of Canada has already held that legal moralism is not a proper foundation to justify the enactment of a criminal prohibition. (See *R v Butler* (1992) 70 CCC (3d) 129 at par. 81).

[13] Counsel for the applicants and the respondent acknowledged that, combined, they have filed affidavits from over sixty witnesses from various disciplines and walks of life and that all of the witnesses have been cross-examined. The names of fifty-five of the witnesses and a brief description of their professional affiliations are set out at page 9 of the factum of the applicants. Unfortunately, neither the affidavits nor the transcripts of the cross-examinations were filed for use on this motion. Nor was a copy of the notice of amended application and any affidavit that may have been filed in support of the application filed. I was able to examine a copy of the notice of amended application only after I asked counsel for the applicants if he could provide one to me. Only the appellants’ factum, at page 8, discloses some scant information about the evidence given by four of the respondent’s witnesses which is said to include “both empirical data and argument about the moral value of sex work”. There is no evidence that the moving parties examined any of the affidavits of the witnesses of the applicants or the respondent or the transcripts of any of the cross-examinations. I am left to infer, however, that there will be a substantial body of evidence on both sides of the “safety and security” issue, expert and other, tendered at the hearing of the application but I have no further useful information about what most of that evidence will be. As a result, I cannot reasonably determine whether any issues of morality will properly arise in the argument of the application.

[14] It is significant that the issues between the parties to be addressed at the hearing of the application have not been more clearly defined by now and set out in the material. This concern is reflected in the following statement set out in paragraph 3 of the supplementary factum of the respondent;

3. This motion is not the forum – nor is it even possible for the Court at this stage – to assess the complex and voluminous evidence filed by any party to this application. A highly selective presentation of a small subset of that evidence – outside of a proper context – does not assist the Court in deciding the issues before it in this motion. That evidence will only be before the Court at the hearing itself. In that forum, the evidence of both sides will be contested and fully canvassed by the Applications judge.

[15] It is equally significant that the moving parties themselves have not been able to identify any specific issues on which they wish to make arguments except in very general terms. See, for example, the following:

- i. in paragraph 13 of the affidavit filed, the deponent states that the moving parties, where appropriate, intervene “in court cases in support of Christian values, principles and freedoms”;

- ii. in paragraph 18 of the affidavit filed, the deponent states that the moving parties wish to make arguments on “certain laws that the Intervenors will assert have morality as one of their cornerstones. In addition, the impugned laws relate to what type of conduct the community (through Parliament) can determine to be appropriate in public as opposed to private, places. Finally, the impugned criminal provisions are designed to protect the dignity of victims of prostitution, and it is a common goal of each of the Intervenors to protect human dignity. In all of these issues, the Intervenors can provide a viewpoint that may well be different from the Attorney General’s and the applicant, and the Intervenors hope that this viewpoint will be of assistance to the Court.”
- iii. in paragraph 35 of their factum , the moving parties state that they “intend to argue that the impugned sections are consistent with the moral framework underlying the *Criminal Code*, and are intended to protect the dignity of victims of prostitution;
- iv. in paragraph 37 of their factum, the moving parties state, after referring to “the broad values that underlie a free and democratic society”, that they “intend to argue that these broad values include concepts of morality, which must be balanced against, for example, the applicants’ freedom of speech.

[16] On the material before me and the submissions made, I make the following observations and come to the following conclusion.

[17] Every motion brought pursuant to rule 13.02 must be determined on a case by case basis on the evidence and submissions presented. Just because the moving parties have been successful in achieving intervenor status in prior cases does not necessarily mean that they should succeed in this one.

[18] I am not persuaded that the moving parties have displayed a sufficient understanding of the role of an intervenor who is granted leave to participate as a friend of the court pursuant to rule 13.02 and how it differs in material ways from the participation that the moving parties are frequently permitted when they attempt to lobby before Parliamentary committees. In particular, the material filed by them leads me to believe that they fail to understand that the application is a legal proceeding which must be decided according to law and that it does not provide a political platform where interested persons are permitted to speak in order to advance their personal views, beliefs, policies and interests at large.

[19] I am not persuaded that the moving parties have gained a sufficient understanding of the evidence that will be tendered by the parties and the arguments that will be made by counsel to demonstrate that they could still make further arguments that would be of assistance to the court. It is important to bear in mind that they would be limited by the evidence tendered by the parties and would not be allowed to tender their own evidence to support the arguments that they might wish to make.

[20] I am not persuaded that the moving parties have sufficiently described the arguments that they might wish to advance other than in the most general way. Unlike in other cases where other

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persons have successfully obtained leave to participate as friends of the court, the moving parties have not included an outline of their proposed arguments in their material.


[21] I am not persuaded that the moving parties have shown that they have any expertise or special knowledge that would entitle them to advance any arguments on issues that might be ruled relevant at the hearing. In particular, despite the claim made in paragraph 14 of the deponent's affidavit set out in paragraph 9 above, I am unable, without further explanation, to accept that all three of the moving parties have the "expertise" described. Although they and their members hold deep religious and personal beliefs and attitudes and even though the moving parties have likely served their members well by their advocacy in the past, I am not persuaded that they are experts as opposed to advocates with respect to the subjects which the moving parties say they wish to address.

[22] I am concerned that the participation of the moving parties at the hearing of the application might disrupt the hearing and unnecessarily lengthen the time required to complete it. This would increase the costs to the parties and, if the moving parties were to be exempted from any liability for costs as they now seek, they could carry on with impunity.

[23] I am concerned that the participation of the moving parties at the hearing of the application "as a friend of the court" might reasonably create the appearance that the Court had, without justification, entered into a special relationship with the moving parties and had provided them with a public platform to advance certain principles which they support, some of which would undoubtedly be very controversial and would reflect the views of only small segments of Canadian society.

[24] Accordingly, I am not persuaded that there is good reason to conclude that the Court might benefit from the participation of the moving parties as intervenors under rule 13.02 and I am concerned of the consequences that might follow if they were permitted to participate.

[25] All of these findings and conclusions have overwhelmingly led me to the result set out in paragraph 1 above.



Matlow, J.

Released: July 2, 2009.