CITATION: Bedford v. Canada (Attorney General), 2009 ONCA 669
DATE: 20090922
DOCKET: C50823

COURT OF APPEAL FOR ONTARIO

Goudge, Cronk and Epstein JJ.A.

BETWEEN:

Terri Jean Bedford, Amy Lebovitch and Valerie Scott

Applicants (Respondents)

and

Attorney General of Canada

Respondent (Respondent)

and

Attorney General of Ontario

Intervenor (Respondent)

APPLICATION UNDER Rule 14.05(3)(g.1) of the *Rules of Civil Procedure*

Derek J. Bell, Ranjan K. Agazwal and Alexie S. Landry, for the appellants Christian Legal Fellowship, REAL Women of Canada and Catholic Civil Rights League

Ron Marzel, for the respondents, Terri Jean Bedford, Amy Lebovitch and Valerie Scott

Roy Lee and Michael H. Morris, for the respondent Attorney General of Canada

Christine Bartlett Hughes, for the respondent Attorney General of Ontario

Heard: September 10, 2009

On appeal from the order of Justice P. Theodore Matlow of the Superior Court of Justice dated July 2, 2009.

By the Court:

[1] Pursuant to Rule 13.02, the appellants unsuccessfully sought leave to intervene as a friend of the court in the application brought by the respondents Terri Jean Bedford, Amy Lebovitch and Valerie Scott. That application seeks a declaration that certain sections of the *Criminal Code* criminalizing activities related to prostitution violate the *Charter of Rights and Freedoms*.

[2] The relevant jurisprudence provides considerable guidance to a court hearing such a motion. Where the intervention is in a *Charter* case, usually at least one of three criteria is met by the intervenor: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well recognized group with a special expertise and a broadly identifiable membership base. See: *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 32. Most importantly, the over-arching principle is that laid down by Dubin C.J.O. in *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 at 167:

> Although much has been written as to the proper matters to be considered in determining whether an application for

> intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

[3] Finally, while Rule 13.02 accords considerable deference to the court hearing the motion, that discretion is not immune from appellate scrutiny. See: *GEA Group AG v. Ventra Group Co.* (2009), ONCA 619. That discretion cannot be exercised for reasons that clearly misapprehend the record before the court.

[4] In this case, the record leaves no doubt that the appellants meet several of the *Dieleman* criteria. They have a real substantial and identifiable interest in the subject matter of the application and, as acknowledged by the Attorney General of Canada, an important perspective different from the parties. The respondents do not oppose the motion on this basis.

[5] The respondents' argument at first instance was that the appellants did not show that they would be in a position to make a useful contribution to the resolution of any issue that needed to be determined. In the end, the motion judge essentially agreed with this submission. However, he did so for reasons that, in our view, are clearly erroneous.

[6] The motion judge concluded that the appellants' proposed argument was not described clearly, making it impossible to apply the test for intervention. We disagree. The record below and counsel's submissions clearly described the appellants' position, namely, that the constitutionality of the challenged laws can be supported by the moral

values of Canadian society. Indeed, before us, counsel for the respondents not only understood that this was their position but argued vigorously that it was irrelevant.

[7] The motion judge also determined that, in any event, he could not reasonably determine whether any issues of morality would properly arise in the argument of the application. That too misunderstands the material before him. The respondents were clear both below and in this court that in the application they will argue that morality cannot serve to support the constitutionality of the impugned legislation. In other words, the respondents will be putting that issue in play. The Attorney General of Canada indicated it would not be relying on Canadian moral values as a cornerstone of its defence of the legislation but made clear that there was considerable affidavit evidence in the record relating to such an argument. Whether the appellants' position ultimately prevails or not, it will provide a counterpoint to the respondents' argument that will not otherwise be made and may be useful to the court.

[8] In addition, the motion judge's view that the appellants have not shown any special knowledge entitling them to advance their arguments overlooks that the appellants do not seek to file any affidavit material. They seek only to make legal argument, not to supply the court with specialized knowledge, something that also provides a complete answer to the concern that their participation could disrupt the hearing. Also, the time limited argument means that their participation would not unduly lengthen the hearing.

[9] In summary, the basis for the motion judge's decision is clearly flawed and his conclusion therefore cannot stand. Rather, as we have indicated, given the issues at stake and the position the appellants propose to take, we conclude that the appellants may be able to make a useful contribution to the application without causing injustice to the immediate parties.

[10] We would allow the appeal and grant the motion as asked, with the addition set out in para. 19 of the factum of the Attorney General of Canada.

[11] No costs here or below.

RELEASED: September 22, 2009 ("S.T.G.")

"S.T. Goudge J.A."
"E.A. Cronk J.A."
"G.J. Epstein J.A."