

VANCOUVER
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COURT OF APPEAL
REGISTERED

Court of Appeal File No. CA036762

COURT OF APPEAL

ON APPEAL FROM the Order of the Honourable Mr. Justice Ehrcke of the Supreme Court of British Columbia pronounced the 15th day of December, 2008

BETWEEN:

DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST
VIOLENCE SOCIETY and SHERYL KISELBACH

Appellants
(Plaintiffs)

AND:

THE ATTORNEY GENERAL OF CANADA

Respondent
(Defendant)

**MEMORANDUM OF ARGUMENT AND AUTHORITIES ON AN APPLICATION
FOR LEAVE TO INTERVENE**

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The Applicant

1. The Intervenor, the Trial Lawyers Association of British Columbia, was incorporated as a society in British Columbia on July 11, 1980.
2. The TLABC has over 1,100 members, most of whom are actively involved in representing litigants in civil and criminal proceedings in British Columbia.
3. Almost a quarter of its membership is comprised of lawyers who practice criminal law and who act almost exclusively for the defendants. In addition TLABC operates a listserver for criminal defence lawyers. The listserver provides a means for its subscribers to exchange views on a confidential basis on matters of interest relating to criminal law and practice.
4. TLABC also publishes *The Verdict* magazine and circulates that to members and others. *The Verdict* includes in each of its editions articles, notes and case comments, including a digest of criminal statute and case law developments and a regular criminal law column. TLABC regularly organizes and presents for the benefit of its members and others continuing legal education conferences. Included among those are continuing legal education conferences relating to criminal law and practice.
5. There is no other organization in British Columbia which represents criminal defence lawyers as a group.

6. TLABC members represent many of the individuals who appear in B.C. courts, and in particular, many personal injury plaintiffs, family law litigants, and accused persons in criminal proceedings. Many clients of TLABC members are persons of modest means.

7. One of the central purposes of TLABC is to actively support efforts to secure access to justice. The mission statement of TLABC is:

To support and promote diligence and excellence in advocacy and jurisprudence on behalf of consumers in British Columbia. Together we strive to: protect the rights of individuals, preserve the jury system, enhance trial practice, **ensure access to the courts**, advance the interests of innocent parties, and maintain judicial integrity and independence.

8. This appeal concerns aspects of criminal law and practice and issues relating to standing of public interest advocacy groups and other interested persons. Given its position as a representative of criminal defence lawyers in British Columbia, and its mandate to protect access to the courts, TLABC is in a unique position to provide the court with a perspective on those matters that otherwise may not be presented.

The principles that are applied on applications for leave to intervene

9. "In *Canadian Council of Churches v. Canada* [1992] 1 S. C. R. 236, Cory J. for the Court, set out the principles for granting status:

It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

10. Cory, J. also noted:

Public interests organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts.

Canadian Council of Churches v. Canada [1992] 1 S. C. R. 236, p. 256

11. Rowles, J.A. has summarized the principles that are generally considered on an application for leave to intervene, stating

Generally speaking, before an applicant will be allowed to intervene, the court should consider whether the applicant has a direct interest in the litigation or whether the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties. When an application for intervention is made on a public law issue, the application may be allowed even though the applicant does not have a direct interest in the appeal.

EGALE Canada Inc. v. Canada (Attorney General), 2002 BCCA 396, 170 B.C.A.C. 204

12. As stated by Newbury, J.A. in *R. v. Watson and Spratt*, 2006 BCCA 234 at para. 3 (Chambers):

Where the applicant does not have a "direct" interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a "public" law issue); whether the case has a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or "perspective" that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues or whether, as noted in *Ward v. Clark*, [2001] B.C.J. No. 901, the proposed intervenor is likely to "take the litigation away from those directly affected by it".

Position on the Appeal

13. It is the submission of TLABC that a narrow approach to public interest standing impedes access to justice, and prevents persons with limited

resources from bringing cases of public importance. If granted leave to intervene TLABC will argue:


- (a) that although the constitutionality of the provisions of the *Criminal Code* has been the subject of discussion among the defence bar for some time, there are practical obstacles to mounting a challenge to the constitutionality of the relevant provisions of the *Criminal Code* in the context of a criminal proceeding involving individuals who are charged with soliciting for the purposes of prostitution; and
- (b) that the proceeding brought by the Appellants is the most efficient manner in which to bring this issue before the courts and the one most likely to involve a full and comprehensive airing of the elements of this complex challenge.

14. TLABC will bring a perspective to a consideration of the issues that differs from those of the parties on the third part of the test for standing, namely whether there are other reasonable and effective ways of bringing the issues raised in the Plaintiffs' claim before the Court. As practitioners with the task of advising and representing clients faced with such charges, TLABC members can speak to the limited opportunities as well as the financial and organization hurdles to preparing and presenting a thoroughly researched, evidence-based challenge to the constitutionality of these provisions.
15. These offences carry the taint of scandal. Consequently whether the accused is a sex worker or a sex purchaser, whether they are a spouse who lives off the avails, or someone who operates an escort agency, it is likely that the accused wishes to avoid public exposure. Sex workers and purchasers of sex are rarely charged, except in response to a complaint or a civic concern about such activities occurring openly in specific geographical areas. Even when charged, many are diverted,

remaining subject to the operation of the criminal law, but effectively removing any incentive to challenging the provisions. Most such accused women are primarily concerned with minimizing the potential consequences, a goal usually achieved by making a plea-bargain. Unless minors are involved, penalties for conviction under prostitution-related offences are minor compared to the cost of mounting a constitutional challenge. A case involving minors is not one in which a constitutional challenge would likely be recommended by counsel.

16. It appears that no constitutional challenge to prostitution-related provisions has been brought by a sex worker in British Columbia for more than 20 years. In 1995 Jamie Lee Hamilton, who sought to open a brothel on the theory that it would provide a safe working place for women, and was public about her intentions, was prosecuted. Her counsel, brought a constitutional challenge, and the case resulted in a stay of proceedings. Given that the Crown Counsel may decide to stay proceedings, for many reasons, including limits to its own resources, accused persons cannot be assured that their efforts will result in a judgment at the first instance or on appeal.
17. If there is indeed a serious issue as to the invalidity of the law as it applies to the these most marginalized and vulnerable members of society, it appears axiomatic that the alternative possibilities are insufficient to provide them with the access to the courts that they need.

All of which is respectfully submitted, this 14th day of May, 2009.


Counsel for the Applicant