Supreme Court of British Columbia
B.C. (A.G.) v. Couillard
Date: 1984-07-04

J. M. Giles, Q.C. and R. S. Anderson, for plaintiff.

T. L. Robertson, for G. C. Austin.

P.D. Angly, for D. M. Couillard.

J. F. R. Chouinard, for S. R. DeMacurio, B. E. Hall, D. F. Hall.

R. Sterling, for K. L. Woods.

D. R. Corrigan, for P. M. Hansen.

A. P. Serka, for L. H. Jung, R. Gonzales, M. T. Klompenhouner, B. A. Hecocks.

(Vancouver No. C842812)

[1] 4th July 1984. MCEACHERN C.J.S.C. (orally):- I grew up in this city and I have always lived here. Although I have never been a resident of the West End, it has obviously been one of the most interesting and livable areas in the city. It is said to be the most densely populated residential area in Canada as it is within easy walking distance of downtown Vancouver. What has happened in the West End is an urban tragedy that should never have occurred.

[2] What has happened is that a small but persistent and probably changing group of young men and women have taken over the streets and sidewalks of a part of the West End for the purpose of prostitution to the great discomfort of the neighbourhood. It is argued that they have a legal right to do this. We hear much of individual rights in these courts, and I take second place to no one in my defence of lawful legal rights, but even the rights and freedoms enshrined in our Charter are expressly subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[3] It is not necessary in this case to decide whether anyone has the right to be a prostitute. All private rights are subject to reasonable limits, the principal limitation often being the correlative rights of other citizens and of society itself. As Holmes J. said in *Schenck v. U.S.,* 249 U.S. 47 at 52, 63 L. Ed. 470 (1919):

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.

What is in question in this case is whether prostitution may be practised at the expense of a neighbourhood.

[4] The Attorney General, on behalf of all the citizens of British Columbia, including those living in the West End, has established beyond the slightest shadow of a doubt that all of the named defendants served with this notice and many others were, at the commencement of these proceedings, using the streets, lanes, sidewalks and other public and private amenities of the West End for the purposes of public, aggressive and disorderly male and female and transsexual prostitution.

[5] The Attorney General has further established that such conduct, in the circumstances described in the affidavits, constitutes an obvious and serious public nuisance.

[6] None of the respondents on this motion have filed any material in any way denying either the conduct as described in the affidavits or questioning in any way the basic facts from which I have concluded a public nuisance has existed. In fact, most counsel for the respondents have very properly expressed sympathy and concern for the residents of the West End.

[7] In these circumstances, the Attorney General seeks an interim injunction restraining until trial and further order the conduct constituting this public nuisance in a specific residential portion of the West End bounded by Thurlow, Beach, Bidwell and Nelson Streets, which the Attorney General says is a residential community.

[8] Some time after the Attorney General commenced this action and just a few days before this motion was to be heard, many or all of the respondents and all or almost all other prostitutes removed themselves from and discontinued their impudent conduct in the residential area in question, but the material discloses that they propose to carry on these activities in another nearby area in downtown Vancouver. The respondents by their counsel and others first said they do not propose to return to the residential West End for

the purposes of prostitution, but counsel did not foreclose the possibility that the respondents may at some time resume their activities in this area.

[9] Counsel for the respondents oppose the application on numerous grounds relying in part upon the language of some of the Law Lords in *Gouriet v. Union of Post Office Wkrs.,* [1978] A.C. 435, [1977] 3 W.L.R. 300, [1977] 3 All E.R. 70 (H.L.), particularly the speeches of Lord Wilberforce at p. 83, and of Viscount Dilhorne at pp. 90-91. The respondents particularly stress that an injunction in a case such as this is unprecedented, such activities never having previously been banned anywhere in the western world.

[10] While I doubt that that is a completely accurate assertion, I have instructed myself in accordance with Their Lordships' admonitions. I note, however, that the applicant in *Gouriet* was not the Attorney General, and at p. 91 Viscount Dilhorne said:

> An Attorney-General is not subject to restrictions as to the applications he makes, either ex officio or in relator actions, to the courts. In every case it will be for the court to decide whether it has jurisdiction to grant the application and whether in the exercise of its discretion it should do so. It has been and in my opinion should continue to be exceptional for the aid of the civil courts to be invoked in support of the criminal law and no wise Attorney-General will make such an application or agree to one being made in his name unless it appears to him that the case is exceptional.

[11] In answer to the submissions of the respondents, I can say that so far as I know, blatant aggressive disorderly prostitution has never before been practised or tolerated in a residential area and, to the extent that special, exceptional or even very special circumstances are required, I have no hesitation in finding that the circumstances I have mentioned are not just special or very special, but extraordinary.

[12] With respect, I must reject Mr. Corrigan's submission that because Canada is a federal state, the Attorney General is limited to actions designed to enforce or support matters falling within provincial jurisdiction. He says that this action in its pith and substance is to ban prostitution, a federal matter, and that the Attorney General therefore has no standing to bring this action.

[13] While I do not think this distinction is of any significance in the disposition I propose to make of this application, I understand that, in a proper case, the Attorney General has

standing to bring proceedings for enforcing any law within the province. The real question is not the standing of the Attorney General, but rather the jurisdiction of the court.

[14] It was argued by Mr. Giles that the Attorney General is in a special position and that, as he represents the public as a whole, the court will normally, but in the exercise of its discretion, grant an application made by the Attorney General for an injunction to restrain public nuisance: *A.G. v. Harris,* [1961] 1 Q.B. 74, [1960] 3 W.L.R. 532, [1960] 3 All E.R. 207 (C.A.).

[15] I do not have to dwell or rely upon that interesting proposition because in this case I am content to apply the usual tests for the granting of an injunction described in *Amer. Cyanamid Co. v. Ethicon,* [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504 (H.L.), and many other judgments of our Court of Appeal, namely, the court must be satisfied that the claim is not frivolous or vexatious in the sense that there is a serious question to be tried.

[16] *Thompson-Schwab v. Costaki,* [1956] 1 W.L.R. 335, [1956] 1 All E.R. 652 (C.A.), is direct authority for the proposition that conduct for the purpose of prostitution far more discreet than what is described in the affidavits in this case may be a private nuisance. In this case, Lord Evershed M.R. quoted with approval from Clerk and Lindsell on Torts, 11th ed. (1954), p. 561, as follows [p. 653]:

> A private nuisance may be and usually is caused by a person doing on his own land something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his acts are not confined to his own land but extend to the land of his neighbour by … (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.

[17] I add that other cases extend this principle not just to nuisances emanating upon the land of the defendant, but also emanating from land or places occupied by the alleged wrongdoer. Lord Evershed then went on to say at pp. 653-54:

> The forms which activities constituting actionable nuisance may take are exceedingly varied, and there is the highest authority for saying that they are not capable of precise or close definition. If the principle is rightly stated in the passage which I have read, then it must depend on the facts of each particular case, whether the conditions, which I have stated as required to constitute a nuisance, are satisfied;

> and in considering whether they are satisfied or not the court must apply to the matter the usages of civilized society as they may be at the relevant date.

And then Lord Evershed quoted [at p. 654] from *Sedleigh-Denfield v. O'Callaghan (Trustees for St. Joseph's Soc. for Foreign Missions),* [1940] A.C. 880, [1940] 3 All E.R. 349 (H.L.), where Lord Wright said at p. 364:

> "It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or, more correctly, in a particular society. The forms which nuisance may take are protean."

[18] The authorities also establish that a public nuisance is one which affects citizens generally as opposed to a private nuisance which only affects particular individuals, but a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of similar private nuisances: *A.G. v. P.Y.A. Quarries Ltd.* [1957] 2 Q.B. 169, [1957] 2 W.L.R. 770, [1957] 1 All E.R. 894 (C.A.).

[19] In that case, Denning L.J., as he then was, at p. 908, declined to say how many private nuisances are necessary to make a public nuisance. Instead, he said at p. 908:

> I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

[20] The uneradicated facts established by the forty or so affidavits filed by the Attorney General on this application establish by an overwhelming preponderance of evidence that a case for an interim injunction has been made out and, subject to what I am about to say, an injunction must, as a debt of justice to the citizens of British Columbia generally and to the residents of the West End particularly, be forthwith issued enjoining the particulars of this public nuisance.

[21] All counsel for the respondents pointed out that the affidavits do not implicate their clients in any specific activity - just that they are prostitutes and they have been observed in the West End. As I mentioned during counsel's argument, I do not think a jury would have the slightest difficulty inferring as I do that the individual respondents contributed to

the nuisance, particularly in the absence of any denial by any of them regarding their activities.

[22] It is sufficient to refer to two textbook authorities on this point. In Fleming on Torts, 5th ed. (1977), p. 393, the learned editors say:

> Because of the large variety of situations encompassed by the term [nuisance], the crucial point is easily obscured that nuisance is a field of tort liability rather than any particular type of tortious conduct. Its unifying element resides in the general kind of harm caused, not in any particular kind of conduct causing it.

[23] In Salmond's [and Heuston's] Law of Torts, 18th ed. (1981), p. 66, it is stated:

> Two or more persons may jointly create or continue a nuisance and then they will be joint tortfeasors. But it is also no defence that the act of the defendant would not amount to a nuisance unless other persons acting independently of him did the same thing at the same time. Thus if 20 factories pour out smoke and fumes into the atmosphere, the contribution of each may be so small and its detrimental effect so inappreciable that it does *not per se* amount to a nuisance. Yet the aggregate quantity may be the cause of serious harm or discomfort. In such a case each of the contributors is liable in nuisance and for his own proportion of the total damage.

[24] In addition, as this is only an application for an interim injunction, the Attorney General need only show there is a serious question to be tried and that test has been satisfied.

[25] Before I turn to the terms of my order, I wish to make it clear that I do not base my judgment solely on the ground that the West End is a residential area. That prostitutes should invade a residential community is, as I have said, an extraordinary circumstance, but a public nuisance in any area would equally be enjoinable upon proper circumstances being shown. The streets and sidewalks belong to all of us.

[26] For reasons which are not material to this application, it is apparent that a small group of prostitutes has assumed, quite incorrectly, that causing public inconvenience for the purpose of prostitution is lawful subject only to prosecution under the Criminal Code, Authorities such as *Hutt v. R.,* [1978] 2 S.C.R. 476, [1978] 2 W.W.R. 247, 1 C.R. (3d) 164, 38 C.C.C. (2d) 418, 82 D.L.R. (3d) 95, 19 N.R. 330, suggest that there may be some practical problems in the prosecution of soliciting under the Criminal Code at the present time, but that does not mean that public misconduct is lawful. It is not, and if it amounts to

a public nuisance anywhere in the province, it may be enjoined upon a proper application being made by the Attorney General.

[27] Those who would defile our city must understand that in addition to the criminal law, the citizens of this country are protected by the common law which is a statement of the accumulated wisdom of history. But it is a dynamic force which is always ready to respond to the reasonable requirements of civilization.

[28] Over 90 years ago, Noyes P. J., a Pennsylvania judge, said in *Hague v. Wheeler,* 27 A. 714, 157 Pa. St. 324 (1893) (S.C.), that the common law is a growing tree, its principles must be continually adapted to new facts and the changing conditions of modern life.

[29] Noyes P. J. went on to say that the legislatures have the responsibility to change the law, that the courts have the duty to ensure that the law remains current with the times. The case at bar is a perfect example of how the common law supplements legislation for the protection of the public. Public nuisance for the purpose of prostitution has had too long a grasp upon this city and it is time for its dreadful regime to come to an end. If the legislative branch of the government has failed in this regard, the common law will not be found wanting.

[30] I turn next to the terms of the injunction which the court will pronounce. The Attorney General asked me to restrain the respondents and anyone having knowledge of the injunction from engaging in or causing a nuisance in the defined residential area, and for greater certainty, but without restricting the generality of the foregoing, from:

(1) purchasing or attempting to purchase sexual services of any kind;

(2) selling or attempting to sell sexual services of any kind;

(3) engaging in any conduct or activity, including soliciting, pimping, pandering or procuring, which is done for the purposes of male or female prostitution;

(4) using any public or private property, including streets and alleys, for the purposes of male or female prostitution;

(5) engaging in any other conduct, including:

(i) loitering, littering, fighting, screaming, shouting or swearing;

(ii) using insulting, abusive, suggestive or obscene language or gestures;

(iii) assaulting, harassing, impeding, obstructing, threatening with violence or otherwise intimidating any person or child;

(iv) defecating, urinating or any form of carnal copulation including fellatio and sodomy;

so as to constitute or cause a nuisance.

[31] I think there is merit in the submissions of counsel for the respondents who urge me not to attempt to enjoin prostitution, which is what paras. 1, 2 and 4 of the notice of motion would prohibit. Parliament has never sought to prohibit prostitution. Instead, Parliament has at different times prohibited various offensive public activities, and I think I should follow that course in the first instance, not because of any philosophical or constitutional concerns, but merely because I think the court should proceed cautiously. Because of the exaggerated and totally indiscreet conduct of the respondents and others in the past, I am going to go further than otherwise might be the case, but the respondents have brought this on themselves.

[32] It may be a matter of comment that what I am about to order is directed only at male and female prostitutes and not at their customers. This is because I think it is the responsibility of Parliament, not the court, to extend the sanction of the law in that direction if Parliament decides to do so. It is to be hoped that this entire question will receive the attention of Parliament at a very early date. In any event, I wish to make it clear that I regard the peaceful integrity of a community to be more important than policy considerations, and if what I am about to order is deficient, then upon application I shall be prepared to consider rephrasing my order in different language. No one should be in any doubt that prostitution as it has been practised in the West End must be discontinued.

[33] The order I propose to make shall be in the form of the first unnumbered paragraph of the notice of motion, but the particulars shall be as follows. I will not read the first

paragraph as it is substantially in the form set out in the notice of motion. The particulars will be:

1. Engaging in any public conduct or activity apparently for the purposes of male or female prostitution, or any public conduct or activity which is calculated by itself or in conjunction with any conduct or activity by another person or persons to cause or contribute to a nuisance;

2. Publicly offering themselves or publicly appearing to offer themselves directly or indirectly for the purposes of male or female prostitution by words or without words, or by actions, gestures, loitering or otherwise;

3. Using or trespassing upon any public property, including streets, lanes, sidewalks, boulevards, parks or school properties, for the purposes of male or female prostitution;

4. Trespassing upon any private property for the purposes of male or female prostitution;

5. Engaging in any other conduct, including:

(i) loitering, littering, fighting, screaming, shouting or swearing;

(ii) using insulting, abusive, suggestive or obscene language or gestures;

(iii) assaulting, harassing, impeding, obstructing, threatening with violence or otherwise intimidating any person or child;

(iv) defecating, urinating or any form of carnal copulation, including fellatio and sodomy;

so as to constitute or cause a nuisance.

[34] Lastly, with respect to the geographical limits of my order, I am naturally concerned about the affidavit filed by a respondent and sworn by a lady who says she is a co-founder of an alliance of prostitutes. She says that the prostitutes who created this nuisance have decided to move en masse to an area bounded by Drake, Nelson, Burrard and Pacific Boulevard. I cannot help but recognize that if these respondents and others can move en masse to that location, they may also move to other areas inside or outside the area described by the Attorney General in his notice of motion, and the court is not disposed to

secure such portion of the West End at the expense of another portion or of an adjacent area. Neither is the court prepared to tolerate such an artificial attempt to evade its authority. To paraphrase Winston Churchill, what kind of people do these prostitutes and their associates think British Columbians are that they would tolerate such indecency on a continuing basis? The answer is that by and large, we are peaceful, law-abiding people who respect the rights of others under the rule of law, and we expect others to do the same. Those who are prohibited from unlawful conduct in one area should not presume to carry on such lawlessness across the street or down the block or anywhere else.

[35] But even in the face of such an affront to decency, the court must proceed with caution. The West End of Vancouver is a geographic unit. While there may be differences of opinion about its eastern boundary, it is not completely arbitrary to say that it begins at the east property line of Granville Street. The area covered by the injunction, if the Attorney General requests it, will therefore be the area of downtown Vancouver north of False Creek and English Bay, and west of the east property line to Granville Street. As mentioned, the court will not be reluctant to extend its protection to any other area where a nuisance may arise, and in such cases I would expect the court to extend the territorial operation of this order, if at all, not by streets or blocks, but rather to large geographic areas of the city as may be required or threatened.

[36] If the threat just mentioned is carried out by these or any prostitutes having notice of this injunction, I shall entertain an immediate application to extend this order not just to the threatened area, but to the larger geographic unit of which such area is a part. If the Attorney General does not seek the wider territorial operation of this order as I have described it, then he may take an order for the area described in the notice of motion. The order, of course, is effective immediately, but in the circumstances I think I should actually sign the order.

[37] [Submissions as to costs.]

Application allowed.