2012 ONSC 4539
Ontario Superior Court of Justice

Barbra Schlifer Commemorative Clinic v. Canada

2012 CarswellOnt 9727, 2012 ONSC 4539, [2012] O.J. No. 3712, 103 W.C.B. (2d) 391, 219 A.C.W.S. (3d) 794

Barbra Schlifer Commemorative Clinic, Applicant and Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada, The Commissioner of Firearms, The Registrar of Firearms and The Chief Firearms Officer, Respondents

D.M. Brown J.

Heard: August 3, 2012
Judgment: August 5, 2012
Docket: CV-12-453809

Counsel: A. Lokan, for Moving Party, City of Toronto
E. Shaffir, for Applicant
G. Scarcella, for Respondent, Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada, the Commissioner of Firearms and the Registrar of Firearms

***D.M. Brown J.*:**

I. Motion by The City of Toronto for leave to intervene as a friend of the court

1 On April 5, 2012, Bill C-19, *An Act to amend the Criminal Code and the Firearms Act* (the "Act"), received Royal Assent. [1] Broadly speaking, the Act repealed the federal legislative regime which required the registration of non-restricted firearms, the so-called long-guns. Section 29(1) of the Act requires The Commissioner of Firearms to "ensure the destruction as soon as feasible of all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms and all copies of those records under the Commissioner's control."

2 On May 16, 2012, the applicant, the Barbra Schlifer Commemorative Clinic, commenced this application seeking declarations that most of the provisions of the Act violate rights guaranteed by sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* and are of no force and effect. A previous order of this Court set dates in March, 2013 for the hearing of the application on its merits.

3 On July 30, 2012, I heard argument on the motion by Her Majesty the Queen in right of Canada, the Commissioner of Firearms and the Registrar of Firearms (the "Canada Respondents") to strike out the Notice of Application under Rule 21.01(1)(b) of the *Rules of Civil Procedure* as disclosing no reasonable cause of action. Due to timing constraints, I have reserved judgment on that motion until I hear the motion by the applicant on September 13, 2012 for an injunction restraining the destruction of all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited nor restricted firearms until the hearing of the application on the merits.

4 The City of Toronto has moved under Rule 13.02 for leave to intervene on the injunction motion and in the application as a friend of the Court. The applicant supports the City's motion. The respondent, The Chief Firearms Officer of Ontario, took no position on the motion. The Canada Respondents opposed the City's motion.

II. Governing legal principles

5 Rule 13.02 of the *Rules of Civil Procedure* provides as follows:

> 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.

In *Bedford v. Canada (Attorney General)* [2] the Court of Appeal re-iterated the principles which apply to a motion for leave to intervene as a friend of the court:

> 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:
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> > 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]

III. Analysis

A. The nature of the case

6 This application involves a challenge to federal legislation under the *Charter*. The Amended Notice of Application seeks declarations that the provisions of the Act repealing the long-gun registry regime violate sections 7 and 15(1) of the *Charter* and are of no force and effect. The prayer for relief includes a request for a declaration that section 29 of the Act, which mandates the destruction of long-gun registry data, is of no force and effect.

7 The Clinic provides services to women who have experienced domestic violence. The applicant pleads in its Amended Notice of Application that the Act's provisions "are particularly relevant to women who experience domestic violence" and "cause harm to women". The Clinic pleads that "the victims of domestic violence are predominantly women" and alleges that "the changes to the existing gun control regime will increase the risk of physical violence, forcible confinement at threat of physical violence, serious physical harm, serious psychological harm and homicide to women in situations of domestic violence". In respect of its claim under section 7 of the *Charter* the Clinic alleges:

> Bill C-19 infringes the rights to life, liberty and security of the person by causing physical harm to women, who are the predominant victims of domestic violence.

As to the claim under section 15(1) of the *Charter* the Clinic pleads:

> Bill C-19 creates a distinction based on an enumerated or analogous ground — that is, women, who are the predominant victims of domestic violence. The provisions of Bill C-19 will have a disproportionate impact on women who experience domestic violence by putting them at increased risk of injury or death due to their gender.

Those, then, are the issues for adjudication as framed by the Clinic's Amended Notice of Application.

8 As to the pending motion by the Clinic for an injunction to restrain the destruction of data in the long-gun registry, certainly an issue on that motion will concern the balance of convenience. In *RJR-MacDonald Inc. v. Canada (Attorney General)* [4] the Supreme Court of Canada made the following observations about the "public interest" dimension of the balance of convenience analysis in constitutional cases:

> Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:
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> > While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.
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> It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups. [5]

9 Let me now turn to consider whether the City of Toronto has demonstrated that it has a real, substantial and identifiable interest in the subject matter of this proceeding, or it has an important perspective distinct from the immediate parties, or that it is a well recognized group with a special expertise and a broadly identifiable membership base.

B. Does the City have a real, substantial and identifiable interest in the subject-matter of this proceeding?

10 The Canada Respondents submitted that the City has not demonstrated that it has a unique legal perspective on violence against women that cannot be addressed by the Clinic and that the City's demonstrated interest involves issues which go beyond those raised in this application. The Canada Respondents argued that the City "by its intervention seeks a platform to tell the court why guns are dangerous. This is not appropriate."

11 I do not accept that submission. The evidence filed by the City to demonstrate its interest in the issue before the Court disclosed that it has addressed the issue of gun control in a very public way for many years. Although the statements by the City over the years have touched upon a variety of gun-related issues, including issues concerning hand-guns, the materials also revealed that the City has expressed interest in issues relating to the impact of guns on domestic violence, a central allegation raised by the Clinic in its Notice of Application. For example, in May, 2008 the City's report, *City-Based Measures to Address Gun Violence*, specifically recommended that Council advocate against the repeal of the long-gun registry, and a recent July 9, 2012 City of Toronto Public Health Briefing Note identified, as one of the public health impacts of firearms violence, that access to firearms is a "significant risk factor for domestic violence...and it often perpetuates the cycle of violence, including violence against women..." That same note, in describing the "positive health impacts of Canada's firearms legislation and long-gun registry", stated:

> Over the past decade, the rate of firearms-related spousal homicide decreased by 70%, while the rate of non-firearm related spousal homicide decreased by 9%.

The Briefing Note also addressed the impact which the destruction of the long-gun registry data might have on the ability of the City's police force to investigate gun-related crime.

12 Accordingly, upon a review of the City's record as a whole, I conclude that the City has demonstrated a real, substantial and identifiable interest in the subject-matter of this proceeding as framed by the Amended Notice of Application.

13 I do not accept the submission of the Canada Respondents that the City is trying to expand the issues raised in this application or that its perspective is evidence-based. The City has made it clear that it seeks to intervene as a friend of the court and will accept, and not add to, the record created by the parties. In those circumstances, no risk exists that the City can expand the issues framed by the parties. If it attempts to do so, the Court can control its own process and act to ensure that the City keeps to the issues raised in the Amended Notice of Application.

C. Has the City demonstrated that it has an important perspective distinct from the immediate parties, or that it is a well recognized group with a special expertise and a broadly identifiable membership base?

14 The City, of course, is a well-recognized senior, municipal government and, based upon my review of the affidavit of Dr. Barbara Yaffe, its Associate Medical Officer of Health, I am satisfied that the City can offer assistance from its stated perspective that firearms violence is a serious threat to public health and safety. As a public institution, the City can also provide assistance on the "public interest" component of the balance of convenience analysis.

15 The Canada Respondents submitted that since the City lacks any legislative authority to implement its own long-gun registry, it can offer no helpful perspective on the issues in this application. The usefulness of an intervenor's assistance to the Court does not depend upon its power or authority to legislate on a matter. Indeed, most intervenors in constitutional cases are non-governmental bodies who lack any legislative authority.

D. Impact of the City's intervention on the hearing of this proceding

16 In paragraph 50 of its Factum the City stated that if it was granted leave to intervene as a friend of the court, it would not seek to file evidence on the injunction motion, would avoid duplication of arguments made by other parties, would file a factum of no more than 15 pages and would not seek costs of its participation. In oral submissions the City's counsel stated that it would seek the right to make oral argument of up to 30 minutes in length.

17 From the terms of intervention sought by the City I see no risk that granting it leave to intervene would delay or prejudice the hearing of the injunction motion or the application, in the event I determine the application should not be struck out.

E. Conclusion

18 Accordingly, I conclude that the City has demonstrated that it can offer assistance to the Court in this proceeding, and I grant it leave to intervene in the application as a friend of the court. I set the following terms for the City's participation on the September 13, 2012 injunction motion:

(i) The City must take the record as formed by the parties and it cannot file evidence, including evidence in the guise of social science literature contained in a brief of authorities;

(ii) It may file a factum of up to 15 pages in length addressing the issues in dispute between the parties, and it may make oral submissions of up to 20 minutes in length at the hearing of the Clinic's injunction motion;

(iii) The City shall not seek its costs of participating in the injunction motion, nor will it be liable for the costs of any party for that motion;

(iv) The City shall serve its factum shortly after delivery of the Clinic's factum so that the Canada Respondents can respond to both factums. I have no doubt that counsel can work out an appropriate schedule. The City will not be entitled to file a reply factum; and,

(v) Since I have reserved on the Rule 21 motion brought by the Canada Respondents, I defer considering the terms of the City's participation in the hearing of the application until I determine whether the application will proceed to a hearing on the merits.

19 There shall be no costs of this motion.

Motion granted.

Footnotes

1 S.C. 2012, c. 6.

2 (2009), 98 O.R. (3d) 792 (Ont. C.A.)

3 *Ibid.*, para. 2.

4 [1994] 1 S.C.R. 311 (S.C.C.).

5 *Ibid.*, paras. 65 and 66.