COURT OF APPEAL OF YUKON

Citation: *R. v. Hadvick,*
2023 YKCA 8

Date: 20230731
Docket: 22-YU890

Between:

Rex

Appellant

And

Jared Marcus Alexander Hadvick

Respondent

Restriction on publication: A mandatory publication ban has been made in this case restricting the publication, broadcasting, or transmission in any way of information which could identify the complainant and a witness pursuant to Section 486.4 of the *Criminal Code*.

Before: The Honourable Mr. Justice Grauer
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated September 2, 2022 (conviction) (*R. v. Hadvick*, Whitehorse Docket 21-01507).

Oral Reasons for Judgment

Counsel for the Appellant: K. M. Eldred

Counsel for the Respondent: J. Whysall

Counsel for the Interveners, Women's Legal Education & Action Fund and Liard Aboriginal Women's Society: E. M. L. Bolger

Place and Date of Hearing: Vancouver, British Columbia
July 31, 2023

Place and Date of Judgment: Vancouver, British Columbia
July 31, 2023

Summary:

The Women's Legal Education and Action Fund ("LEAF") and Liard Aboriginal Women's Society ("LAWS") apply for leave to intervene in the Crown's appeals from the respondent's acquittal on charges of sexually assaulting a person under sixteen years of age and related offences. The complainant is a young Indigenous woman. The respondent advanced the defence of mistake of age at trial. The basis of the Crown's appeal is that the trial judge erred in admitting certain evidence about the complainant that was unknown to the accused at the time of the relevant events. LEAF and LAWS contend that they will offer an important perspective in arguing about the use of such evidence of the need to avoid, among other things, negative gendered stereotypes about Indigenous women and girls rooted in racism and colonialism.

Held: Application for leave to intervene dismissed. Two key issues in intervener applications are whether the proposed interveners bring a "unique perspective" that will be of assistance to the Court and whether the appeal raises issues of public law. Here, LEAF and LAWS propose to make arguments already advanced by the Crown. The appeal in question does not raise Charter or public law issues beyond what frequently arises in criminal cases, although it raises important issues of interest to the interveners. Moreover, courts are reluctant to permit intervention in criminal cases unless it can be done without placing an undue burden on the accused and giving rise to a risk of prejudice. Here, requiring the respondent to join issue not only with the state, but also with two prominent organizations amplifying the state's already powerful voice, would place an undue burden on the respondent and give rise to the possibility of prejudice.

GRAUER J.A.:

1. Overview

[1] The Women's Legal Education and Action Fund ("LEAF") and Liard Aboriginal Women's Society ("LAWS") apply for leave to intervene in this appeal (the "Applicants").

[2] The Crown appeals from the acquittal of the respondent (the "accused") after a 9-day jury trial on charges of touching a person under sixteen years of age with a sexual purpose (section 151 of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*]), sexually assaulting a person under the age of sixteen years (section 271 of the *Code*), and breaking and entering with intent to commit an indictable offence in the premises (section 348(1)(a) of the *Code*).

[3] The alleged victim of these offences is L.M., who was 14-years old at the time of the incident in question. The accused was 31.

[4] L.M. is an Indigenous woman.

[5] At trial, the accused advanced a defence of mistake of age, arguing that he believed L.M. was at least 19 years old because he saw her being served alcohol on the night in question. The jury acquitted the accused of all charges.

[6] The trial judge admitted evidence about L.M. that the Crown says was unknown to the accused. This, the Crown argues, was an error of law.

2. Background

[7] I do not propose to review the factual background in detail, other than to reiterate that L.M. was a 14-year old at the time of the alleged incidents. She is of an Indigenous background and worked as a server in the only restaurant in Faro, where she lived.

[8] On the evening in question, L.M. was at the Faro Hotel bar, drinking a pop. She was waiting to meet someone for a job interview.

[9] The accused was at the bar with a few friends, shooting darts. While it is disputed whether the accused bought L.M. drinks or whether L.M. bought the drinks herself, L.M. testified to having at least seven drinks, including tequila, beer, and “Sour Puss”.

[10] L.M. has no memory of the night after she began drinking, except she recalls being inside a house with the accused, topless. She recalls that he was not wearing pants. The house was in a complex that was being renovated.

[11] The accused testified that they did not have sex, because he was wearing pants when he woke up the next morning to go to work. He said he tried to rouse L.M., but did not succeed, so he covered her with a towel and left.

[12] The owner of the complex being renovated attended the site early in the morning and discovered L.M. lying naked, in a chair, covered with a bath towel.

[13] At trial, the accused advanced the defence of mistake of age. He argued that he believed L.M. was of legal age because she was served and was consuming alcohol at the hotel bar. He said he knew nothing else about her background and it never crossed his mind what her age was.

[14] The crux of the issue of the accused's guilt was whether he took reasonable steps to ascertain L.M.'s age.

[15] The trial judge admitted some evidence going to L.M.'s level of maturity, including information that was unknown to the accused, such as the age of her friends, how she dressed, her possible drug use, and evidence that she sometimes skipped school.

[16] The trial judge ruled that the jury could use evidence unknown to the accused to "corroborate [his] evidence … regarding the degree of maturity that he observed." For example, the trial judge ruled that the jury could consider "general evidence" of L.M. hanging out with an older crowd for the purpose of assessing her maturity. He also ruled some of the evidence irrelevant, including the fact that L.M. ran away from home or played poker late at night with a member of the Faro community.

[17] The Crown appeals on the basis of two alleged errors of law:

a) Ground 1: The trial judge erred in law in admitting evidence unknown to the accused for the purpose of assessing the complainant's level of maturity.

b) Ground 2: The trial judge erred in law in charging the jury regarding the use the jury could make of evidence unknown to the accused and the scope of the evidence the jury could consider.

[18] Of particular relevance to the intervention application is the Crown's contention that the trial judge admitted evidence unknown to the accused that appealed to myths and stereotypes about Indigenous women and girls.

[19] The Crown argues in its factum that "[w]here the evidence unknown to the accused is entirely disconnected from what the accused knew or saw, it is, at best, probative of nothing. More likely, it invites lines of reasoning based on myths, stereotypes, and prejudices."[1] In particular, the evidence about L.M.'s drug use and alcohol consumption is said to have invited the jury to find L.M. less worthy of equal protection under the law while having no probative value whatsoever. This, the Crown argues, contravenes the Supreme Court of Canada's directive in *R. v. Williams*, [1998] 1 S.C.R. 1128 that courts are to be a bulwark against racism against aboriginals, "including stereotypes that relate to credibility, worthiness and criminal propensity" (*Williams* at para. 58). The trial judge is alleged to have failed to apply the appropriate safeguards against similarly pernicious stereotypes here.

3. The Proposed Intervention

[20] The Applicants argue that this appeal raises important questions of law regarding the admissibility, use, and scope of evidence unknown to the accused in sexual offence prosecutions where the accused advances the defence of mistake of age. The Applicants also contend that this appeal raises important questions of law about how trial judges should instruct juries on the use and scope of such evidence in order to avoid negative stereotypes about Indigenous women and girls.

[21] If granted leave to intervene, the Applicants will submit that the evidence unknown to the accused must not be admitted and considered in ways that will perpetuate harmful stereotypes about Indigenous girls, which are rooted in colonialism and systemic racism. In addition, the Applicants will emphasize that the trier of fact must be conscious of the hypersexualization of Indigenous girls as a harmful stereotype to be avoided when considering evidence unknown to the

[1] Crown's Factum at para. 86.

accused in determining whether the accused took all reasonable steps to ascertain a complainant's age.

[22] In these circumstances, the Applicants ask: (1) that leave be granted to intervene in this appeal and the style of cause amended accordingly; (2) that they be entitled to file a factum of no more than 20 pages in length and make 15 minutes of oral submissions; (3) that they be entitled to receive electronic copies of filings; and (4) that they be granted an order that no costs be awarded against them for this application or appeal.

[23] The Crown supports the application. The accused opposed it.

4. Discussion

4.1 Legal Framework

[24] The Court of Appeal of Yukon has rules for intervention applications in civil appeals, but not for criminal appeals.[2] However, Section 2 of the *Yukon Territory Court of Appeal Criminal Appeal Rules* states that "*[t]he Court of Appeal Rules*, *Yukon Territory, 1974 (Civil)*, as amended from time to time, apply to appeals on matters that are not expressly provided for in these *Rules*": 1993, SI/93-53, section 2(1).

[25] Leave to intervene may be granted in one of two situations:

a) When a decision could have a direct impact on a person; or

b) When a case raises issues involving public interests.

Commission Scolaire Francophone du Yukon No 23 v Yukon Territory (Attorney General), 2011 YKCA 11 at paras 10–11.

[26] The latter category is at issue in the instant case.

[27] The Court of Appeal of Yukon often relies on the Court of Appeal for British Columbia’s jurisprudence for the grounds concerning leave to intervene:

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[2] *Court of Appeal Rules,* 2005, s 36.

Commission Scolaire at para 9. There is nothing in the *Yukon Court of Appeal Rules*, 2005, that suggests practices and procedures pertaining to interveners differ between British Columbia and the Yukon: *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14 at para 13, leave to appeal ref'd [2013] SCCA No. 106.

[28] Whether to grant leave to intervene is a fundamentally discretionary decision: *Commission Scolaire* at para. 9.

[29] In *Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 66, the Court of Appeal for British Columbia explained that deciding an application for leave to intervene typically involves an analysis of the following four non-exhaustive factors:

a) Does the proposed intervener have a broad representative base?

b) Does the case legitimately engage the proposed intervener's interests in a public law issue raised on appeal?

c) Does the proposed intervener have a unique and different perspective that will assist the Court in the resolution of the issues?

d) Does the proposed intervener seek to expand the scope of the appeal by raising issues not raised by the parties?

[30] The key issue in intervener applications is whether the proposed interveners bring a "unique perspective" that will be of assistance to the Court: *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 3 at paras. 12, 18. Also important in this application is whether the case legitimately engages the proposed interveners' interests in a public law issue raised on appeal. The court should also consider factors that may weigh *against* an intervention, such as the possibility that granting intervener status would create an undue burden or injustice for the parties to the appeal: *Thomas v Rio Tinto Alcan Inc.*, 2022 BCCA 415 at para 30, citing *Friedmann v MacGarvie*, 2012 BCCA 109 at para 19.

[31] I turn to consider the four factors elaborated in *Beaudoin*, as well as other relevant issues that may militate against granting leave to intervene.

4.2 Application

a) Do LEAF and LAWS have a broad representative base?

[32] On the evidence, they clearly do, so the first *Beaudoin* factor weighs in their favour.

b) Does the case legitimately engage the proposed interveners' interests in the public law issues raised on appeal?

[33] There is a close connection between the Applicants' broad public law interests and the issues on appeal. But this case raises no *Charter* issues. The issues are straightforward and twofold: (1) was the evidence in question admissible in law? and (2) if not, did the accused take reasonable steps in the circumstances to ascertain the complainant's age? While these two issues arise in a context that raises matters of particular interest to the proposed interveners, they are not specifically issues of public interest beyond what is frequently found in criminal cases. They are not in themselves issues of public law. This weighs heavily against granting leave.

c) Do LEAF and LAWS have a unique perspective that will assist the Court in the resolution of the issues on appeal?

[34] This is one of the key considerations on this application for leave to intervene. In my view, it, too, weighs against granting the application.

[35] The Applicants argue, and I accept, that they have a long-standing interest and expertise in challenging gendered stereotypes of women's and girls' personal and sexual behaviour, as well as in addressing the disproportionate victimization of Indigenous women and girls, the impact of colonialization, and barriers to access to justice faced by Indigenous women and girls.

[36] LEAF reports that it has intervened in over 60 Supreme Court of Canada cases, including ones that have set precedent in the law of sexual offences. LEAF has also intervened in appellate court cases across the country, including in British Columbia, Alberta, Ontario, Quebec, and Saskatchewan. LAWS report that it

specializes in representation of First Nation women and girls in remote, Northern communities.

[37] If granted leave to intervene, the Applicants will make arguments to the effect that: (i) sexual assault engages the equality rights of marginalized people; (ii) that Indigenous women and girls are subjected to harmful stereotypes and disproportionate rates of violence; and (iii) evidence unknown to the accused can result in stereotypical assumptions about Indigenous women and girls, and accordingly. should be limited in its admission and use by triers of fact.

[38] However, these arguments are already advanced by the Crown, including at paras. 53–60 and 96–98 of the Crown's factum. Accordingly, the Applicants are not poised to offer the Court a "unique perspective." Rather, they seek to add the weight of their focused community perspective to points already raised by the Crown. As Justice Abrioux explained in *R v Smyth*, 2020 BCCA 141, a case where community climate activism organizations sought to intervene in a criminal contempt appeal: "[w]hile the applicants may offer a broader perspective through their representation and engagement with diverse community interests, the subject of their proposed submissions is not sufficiently distinguished from the Crowns' position in these proceedings" (at para. 26).

d) Do LEAF and LAWS seek to expand the scope of the appeal by raising issues not raised by the parties

[39] LEAF and LAWS assert that they will not seek to expand the scope of the appeal by raising issues not raised by the parties, but their perspective essentially means that the accused must face the submissions of more than one prosecutor. In my view, this factor, too, weighs against the applicants in the circumstances of this case, and brings me directly to the next consideration.

e) Additional considerations

[40] This is a Crown appeal from an acquittal. Criminal prosecutions, and appeals, are matters between the accused and the state. To permit the intervention sought in this case would force the accused to face not only the state, but also two prominent

organizations seeking to add their considerable weight to legal issues already raised by the Crown. Granting the Applicants leave to intervene would thus expose the accused to an undue burden and potential injustice: see, for instance, *Thomas* at para. 30.

[41] It is for this reason that courts have been reluctant to allow interveners in criminal matters unless it can be demonstrated that such intervention would not be a burden on the accused: *R. v. Bornyk*, 2014 BCCA 450; *R. v. Rhodes*, 2011 MBCA 90. In my view, that is not the case here. The proposed interveners' interest in the appeal is indirect, given that the principal question is one of law concerning the admissibility of evidence, and the Crown ought not to have its position bolstered by interveners seeking to amplify the already powerful voice of the state.

[42] Cases upon which the applicants rely focus primarily upon intervention at the Supreme Court of Canada, where different considerations apply, or, in cases at the appellate level, where policy issues are front and centre, for example, *R. v. Ellis*, 2022 BCCA 278 (a sentencing appeal).

[43] In the circumstances of this case, I am satisfied that the legitimate concerns raised by the interveners will be ably advanced by the Crown, and it would not be in the interests of justice to require the accused to join issue with both the Crown *and* two additional organizations on appeal.

Disposition

[44] For these reasons, the Applicants' request for leave to intervene is dismissed. I am inclined to order no costs.

[Discussion with parties re: seeking costs]

[45] **GRAUER J.A.**: No costs. Thank you.

"The Honourable Mr. Justice Grauer"