THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0110

IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL REDRESS UNDER S. 16 OF THE CONSTITUTION

BETWEEN

JAVIN KEVIN VINC JOHNSON

CLAIMANT

AND

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

DEFENDANT

CONSOLIDATED WITH

SVGHCV2019/0111

IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL REDRESS UNDER S. 16 OF THE CONSTITUTION

BETWEEN

SEAN MACLEISH

CLAIMANT

AND

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

DEFENDANT

Appearances: Ms. Shirlan Barnwell of counsel for the claimant Javin Johnson;

Mr. Jomo Thomas of counsel for the claimant Sean Mac Leish.

Ms. Karen Duncan with her Mr. Kezron Walters and Mrs. Cerepha Harper-Joseph of counsel for the defendant.

Ms. Meisha Cruickshank for the applicants/proposed interested parties.

2019: Nov. 13
Nov. 20

DECISION

BACKGROUND

[1] **Henry, J.:** On July 26th 2019, Mr. Javin Johnson and Mr. Sean Mac Leish filed separate Fixed Date Claim Forms against the Honourable Attorney General in which among other things, they challenged the constitutionality of laws which penalize buggery and acts of gross indecency. They claimed that the impugned laws violate the Constitution of St. Vincent and the Grenadines ('Constitution') which guarantee certain protections such as privacy of the home, the right to personal liberty, freedom of conscience, freedom of expression, and protection from discrimination. At the first hearing[1], the claims were consolidated and case management directions were issued. The matter was adjourned for pre-trial review.

[2] In the intervening period, ten churches and ministries[2] (namely The Incorporated Trustees of the Seventh-Day Adventist Church in Saint Vincent, The Incorporated Trustees of the Evangelical Church of the West Indies, The New Testament Church of God, The Archbishop & Primate (Spiritual Baptist) of Saint Vincent & the Grenadines, The Church of God (Saint Vincent) and the Grenadines, The Incorporated Trustees of the New Life Ministries, The Light of Truth Church of God, Kingstown Baptist Church of Saint Vincent and the Grenadines, Living Water Ministries International (Saint Vincent and the Grenadines) and Hope Evangelism Outreach Ministries) ('the churches') filed a joint application in which they sought an order to be added as interested parties

[1] On 18th Sept. 2019.

[2] For convenience, they will be referred to collectively as 'the churches'.

in the claim and to be heard at all hearings of the Claim and any appeals. Their application is supported by affidavit evidence.

[3] They submitted that they are entitled to be permitted to adduce evidence and make legal submissions. They asked that an order be made appointing The Incorporated Trustees of the Seventh-Day Adventist Church in Saint Vincent to represent them.

[4] Mr. Johnson and Mr. Mac Leish opposed the application. They argued that the churches do not have a substantial or sufficient interest in the claim; and no legitimate interest in matters of health. The churches' application to be added as interested parties is granted for the reasons outlined in this decision.

ISSUE

[5] The issue is whether the churches should be granted leave to join the proceedings as interested parties?

ANALYSIS

Issue – Should the churches be granted leave to join the proceedings as interested parties?

[6] The court is empowered to add a party to proceedings[3]. It may do so of its own volition or further to an application by a party or other interested person who wishes to be made a party. An application for such joinder is usually heard at a case management conference. When exercising discretion under the CPR, the court is obligated to seek to give effect to the overriding objective which to deal justly as between the parties[4].

[7] The CPR also makes provision for addition of parties in cases involving applications for administrative orders of the type under consideration in this case. In this regard, CPR 56.13 (1) & (2) provide that the court may permit any person or body of persons who appears to have a sufficient interest in the subject matter of the claim, to make submissions by way of a written brief or otherwise. Such person or body may be permitted to do so whether he, she or it has been

[3] Rule 19.3 of the Civil Procedure Rules 2000 ('CPR').

[4] CPR 1.2.

served with the claim form.

[8] Mr. Johnson and Mr. Mac Leish objected to the present application on three grounds. They submitted that:

1. The churches have no standing to become a party pursuant to CPR 19.3.
2. The matters raised by the churches disclose an insufficient interest in the subject matter to assist the Court pursuant to CPR 56.13.
3. The churches are seeking to raise matters of health, matters concerning which, they have no legitimate interest pursuant to CPR 56.13.

[9] They argued that even if the churches are permitted to participate in the proceedings, such participation should be limited to concise written submissions on the law only. I propose to examine the objections seriatim. However, it is important to provide some context to the contention by summarizing some key aspects of the factual allegations on which Mr. Johnson, Mr. Mac Leish and the churches rely.

[10] In a nutshell, Mr. Johnson and Mr. Mac Leish claimed that the impugned laws impose severe penalties for their infringement They are avowed homosexuals and complained that the provisions amount to an invasion of their human dignity, demean them and strengthen and perpetuate the view among the wider society that homosexuals are less worthy of protection than heterosexuals in the State. The pleaded and asserted that the existence of the provisions have led to them being subjected to severe abuse from State and non-State actors which amount to breaches of the State's obligation to abstain from acts of human and degrading treatment. They also claimed that they are not free form invasions of their freedom of expression and freedom of conscience because of the existence of the impugned laws and how they are applied and perceived.

[11] The churches provided joint affidavit testimony of Terrence Haynes, Carlos Cepeda, Byron Davis, Phyllis C. Ralph-Browne, Maude Gittens, Wendell Roberts, Calvin Ledger, Cecil Richards, Paul Kirby and Rhesa Jack-Shallow. They are respectively representatives of the churches who have filed the application to be joined in the claim.

[12] The affiants attested that they collectively represent their respective congregants who are citizens

of St. Vincent and the Grenadines and are entitled to observe and protect the Constitution and fundamental freedoms. They asserted that they all have the same or similar interests. They averred that they and their fellow congregants believe that Judeo-Christian principles are the foundation of many of the laws of the State of St. Vincent and the Grenadines.

[13] They professed their belief in and commitment to uphold Judeo-Christian principles, which teach *inter alia* that:

(a) the Bible is the true word of God which instructs on human existence and conduct;

(b) sexual intercourse should occur only between a man and a woman; and

(c) marriage is a sacred union consecrated by God between one man and one woman.

The affiants deposed that the orders being sought contravene the Judeo-Christian principles upon which the laws in the State were founded and which they uphold. They asserted that if the orders are granted it would affect how they live, what they practice and teach their members; and society as a whole.

[14] They stated that they oppose the practice of buggery and acts of gross indecency between persons of the same sex generally, on biblical, medical, and social grounds. They said that this is a part of their teaching to members, adherents and congregants. They deposed further that they are aware of the public health concerns which are directly related to buggery, especially the high incidence of the spread of STDs and HIV/AIDS among persons who engage in anal penetration; and that they seek permission to bring such evidence to the court's attention.

[15] The affiants deposed that it is their view that if the claim succeeds:

(a) buggery and acts of gross indecency between members of the same sex would be facilitated and encouraged;

(b) buggery and acts of gross indecency between persons of the same sex would be publicly promoted as normal, healthy sexual behaviours; and be taught to children in school; and

(c) there would be a marked increase in new cases of STDs and HIV/AIDS among persons who engage in the act of buggery and acts of gross indecency between persons of the same sex.

[16] They stated that the Constitution provides that the fundamental rights and freedoms of an individual are subject to the respect for the rights and freedoms of others and the public interest. They deposed too that a successful outcome for Mr. Johnson and Mr. Mac Leish would have a corresponding adverse effect on them and their fellow congregants. In this regard, they averred that such an outcome would translate practically to infringement of their own constitutionally protected rights and freedoms including their right to freedom of expression, freedom of thought, conscience and belief in relation to matters concerning buggery and acts of gross indecency between persons.

[17] They expressed the concern that they will be faced with several adverse consequences in such eventuality, including that:

(a) their right and the right of their members to:
    (i) seek, receive, distribute or disseminate information, opinions and ideas in opposition to buggery and acts of gross indecency between members of the same sex through any media;
    (ii) equality before the law;
    (iii) enjoy a healthy environment;
    (iv) freedom of religion, either alone or in community with others and both in public and in private;
    (v) manifest and propagate religion in worship, teaching, practice and observance; and
    (vi) freedom from discrimination on the ground of religion;

will be adversely affected.

[18] The affiants testified that they strongly believe that if the claim is successful, it will be detrimental to the common good and interest of Saint Vincent and the Grenadines, without conferring any benefit whatsoever on society. They indicated that the aforementioned views are based on the history of decriminalization of buggery and acts of gross indecency between persons of the same sex in other countries. They stated that they would like to bring evidence of this to the court's attention.

Standing pursuant to CPR 19.3.

[19] Mr. Johnson and Mr. Mac Leish argued that their claim is against the Honourable Attorney General, who is the appropriate defendant in accordance with CPR Part 56 and section 16 of the Constitution. They submitted that they have sought no constitutional redress from the churches and did not join them in the claim. They submitted that the churches are not seeking to join them in their quest for removal of sections 146 and 148 of the Criminal Code. They reasoned that the churches cannot be a party to the proceedings and therefore their application under CPR 19.3 is misguided and has not been engaged.

[20] The churches have countered that they have not sought and are not seeking to be added as a claimant or defendant in these proceedings. They submitted that CPR 19.3 does not restrict the court to adding only a claimant or defendant; and further that 'party' does not refer only to a claimant or a defendant. They argued that it is open to the Court to consider adding them as parties pursuant to CPR Part 19.3 (1).

[21] 'Party' is defined in the definition section of the CPR[5] and 'includes both the party to the claim and any legal practitioner on record for that party, unless any rule specifies or if it is clear from the context that it relates to the client or to the legal practitioner only;'. Use of the term 'includes' denotes that the classes described (i.e. client and legal practitioner are not exhautsive). It follows that the term 'party' incorporates and covers other persons.

[22] The Court of Appeal of the Eastern Caribbean Supreme Court has Rule 19.3 of the Civil Procedure Rules 2000 considered CPR 19.3 in the case of **Mr. Fok Hei Yu et al v Basab Inc. et al**[6]. They declared that the discretion to add a party under that provision is in its widest terms, but noted that it must be exercised judicially. They highlighted the provisions of CPR 19.2 (3), and noted that they were also relevant.

[23] They remarked that 'there must be a basis warranting the exercise of the discretion.' In the written

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[5] CPR 2.4.

[6] BVIHCMAP2014/0010 at para. 11.

decision penned by the Honourable Chief Justice Dame Janice Pereira, she opined that the court may add a new party to the proceedings 'if ... it is desirable' to do so, for the court to resolve all the matters in dispute; or where there is an issue involving the proposed new party which is connected to the matters in dispute, and it is desirable to order the addition to enable the court to resolve that issue. The Court of Appeal added: 'A court is not justified in joining a party merely because that party so wishes, without more.'

[24] The learned authors of Blackstone's Civil Practice[7] also considered the UK CPR 19.2(2) which is similar to CPR 19.2 (3) (b) in this jurisdiction. They stated that for the rule to be engaged 'all that is necessary is that there is an "issue" to be determined which is connected to the matters in dispute in the proceedings, not that the issue forms part of the claim for relief against the new party.' They cited in support the case of **Shetty v Al Rushaid Petroleum Investment Co. [2011] EWHC 1460 (Ch)**. The foregoing guiding principles will be applied in considering this application.

[25] The churches averred that they believe that many of the laws of the State of St. Vincent and the Grenadines are founded on Judeo-Christian principles which they firmly believe and uphold. They argued that those principles embrace the Bible as the true word of God which instructs on human existence and conduct; that sexual intercourse should occur only between a man and a woman; and that marriage is a sacred union consecrated by God between one man and one woman. They contended further that they oppose the practice of buggery and acts of gross indecency between persons of the same sex generally, on biblical, medical, and social grounds; and that this is part of their teaching to their members, adherents and congregants.

[26] They submitted that the instant case is one in which Mr. Johnson and Mr. Mac Leish will not seek to adduce evidence in support of the constitutional validity of the impugned provisions. They reasoned unless they are made parties to the claim, there is a significant risk that pertinent information necessary to decide whether the impugned legislation is reasonably required or demonstrably reasonably justifiable in the Vincentian democratic society, might not receive any attention or prominence, given the quite different interests of the immediate parties to the action.

[7] 2013 Edition at para. 14.84.

[27] They contended that while their positions are similar to the Honourable Attorney General's, their opposition includes an additional limb that may not be contemplated by him, namely public morality. They reasoned that it is impractical for the Honourable Attorney General to properly represent the totality of their views at the hearing. This argument seems to me to be reasonable and justifiable having regard to the stated public morality and religious nuances thye have highlights as being germane to the contentions. It seems to me that although the Honourable Attorney General might make submissions on public morality, this should not and does not exclude other interested persons from adding their own perspective.

[28] Mr. Johnson and Mr. Mac Leish have attacked the impugned provisions as being unconstitutional on a number of grounds. Their claim hinges on 8 sections of the Constitution[8] and protects the right to personal liberty, privacy of the home, freedom of conscience, expression and movement; and protection from inhuman treatment, arbitrary search or entry and discrimination. Some of those constitutional provisions expressly state that legislation or exercise of authority pursuant to such laws will not be held to be inconsistent with those constitutional provisions 'to the extent that the law ... makes provision that is reasonably required for in the interests of ... public morality'[9].

[29] In view of the pronouncements made by the Courts in **Mr. Fok Hei Yu et al v Basab Inc. et al** and **Shetty v Al Rushaid Petroleum Investment Co.** I am of the considered opinion that the issues to be decided involve a public morality element. The churches represent that they are qualified and intend to address that issue from a different perspective than the Honourable Attorney General. It is desirable for the court to have all pertinent data before it to enable it to resolve all the matters in dispute. I am satisfied that this is a live issue in this case, which from a public interest standpoint involves the churches having regard to their stated concerns about the adverse consequences that a removal of the impugned provisions may have on rights and freedoms generally and on the society as a whole.

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[8] Sections 3, 5, 7, 9, 10, 12, 13 and 1 (c) of the Constitution, Cap. 10 of the Laws of Saint Vincent and the Grenadines, Revised Edition, 2009.

[9] Sections 7, 9, 10 and 12 of the Constitution.

[30] The churches have provided testimony and legal arguments which lead me to conclude that they have the requisite standing as interested parties. I find therefore that Mr. Johnson and Mr. Mac Leish's contention that the churches have no standing under CPR 19.3 is baseless.

Insufficient interest

[31] Mr. John and Mr. Mac Leish contended that procedurally, the churches may in principle apply to make representations in the proceedings pursuant to CPR 56.13. They submitted that possessing a view on a matter does not in itself grant standing. They argued that the churches' views are legally irrelevant and insufficiently material to warrant their participation in the proceedings because their declared interests relate to morality and public health concerns. I am of the view that such conclusion at this would involve a prejudgment of the matter and would not be just. I am not tempted to venture into that space.

[32] Messieurs John and Mac Leish contended that it is clear from their Notice of Application[10] and supporting affidavit that the churches desire to impose their view of morality on wider society through the criminal law. They argued that such purpose is entirely improper as demonstrated by legal precedent. They cited the decision in **Jones v the Attorney General of Trinidad and Tobago**[11] where the court considered legal submissions filed by the interested parties, including churches.

[33] Mr. John and Mac Leish argued that the posture adopted by the Trinidad and Tobago court was entirely correct. They submitted that it is for the Attorney General to raise any purported justification for the provisions being challenged. They contended that these are all matters of law. They also relied on the decision of the English Court of Appeal in **McFarlane v Relate Avon Limited**[12]. There, Laws LJ opined:

'The general law may of course protect a particular social or oral position which is espoused by

[10] Paragraphs 14 to 16.

[11] Claim No. CV2017-00720, judgment of 12 April 2018 per Rampersad J at paras. 13 to 15.

[12] [2010] EWCA Civ 880.

Christianity, not because of its religious imprimatur, but on the footing that in reason its merits commend themselves.'[13] and

'The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective.'[13]

[34] Messieurs Johnson and Mac Leish contended that the churches are seeking to do what is not allowed under the Constitution as foreshadowed in their affidavit at paragraphs 20 to 22. In those paragraphs, the churches averred that if the impugned laws are removed their rights and those of futre generations would be adversely affected in several ways including by incursion into their right to manifest and propagate religion in worship, teaching, practice and observance. Mr. Johnson and Mr. Mac Leish submitted that it is a settled position of Judicial Committee of the Privy Council that in a democracy governed by a Westminster-model Constitution the citizenry have a right to religious freedom, including a right not to believe and not to participate.

[35] They (Johnson and Mac Leish) contended that a religious group's beliefs cannot of itself form a justification for a *prima facie* breach of a constitutional right. They cited the Decision of the Privy Council in **Commodore of the Royal Bahamas Defence Force v Laramore**[14] in support. This contention pre-supposes that the churches intend to present their case to argue otherwise.

[36] While the churches' application and submissions suggest that they would formulate submissions of a similar nature it would be pre-emptive to rule that if they are joined as parties that their part or all of their case would consist of such arguments. Furthermore, the appropriate approach would be first allow them to ventilate those arguments if they are found to have a sufficient interest, and then make a determination. I make no finding on that contention at this stage.

[37] Mr. Johnson and Mr. Mac Leish submitted further that the burden rests on the Honourable Attorney General to establish an objective justification for the impugned provisions; and 'advance the general good on objective grounds'. They argued that this court's role is not to 'give effect to the force of subjective opinion'.

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[13] At paras. 23 and 24 respectively.

[14] [2017] UKPC 12; [2017] 1 WLR 2752.

[38] Mr. Johnson and Mr. Mac Leish contended that detailed submissions on subjective religiously-based views cannot properly assist the Court. They argued that no matter how sincerely or widely held, the subjective views of the churches cannot justify the infringement of the rights of others. The court is not required to make a determination on that issue at this juncture. It is concerned with whether the churches have demonstrated that they have a sufficient interest.

[39] The churches countered that guidance as to the meaning of 'sufficient interest' is outlined in CPR 56.2. It deals with applications for judicial review and provides that persons with a 'sufficient interest' in the subject matter may apply for such relief. The rule sets out an in-exhaustive list of persons who are captured by that descriptor. This includes:

(c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;

(d) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application; … [or]

(f) any other person or body who has a right to be heard under the terms of any relevant enactment or Constitution.'

[40] The term 'sufficient interest' is also used in CPR 56.13 (1) which deals with the hearing of applications for administrative orders as in the instant case. Sub-rules (1) and (2) provide:

'56.13(1) At the hearing of the application the judge may allow any person or body which appears to have a sufficient interest in the subject matter of the claim to make submissions whether or not served with the claim form.

(2) Such a person or body must make submissions by way of a written brief unless the judge orders otherwise.' (Underlining added)

[41] The churches submitted that the Court therefore has discretion to–

1. allow the intervention of interested parties to an action in which they have a sufficient interest in the subject matter of the claim;
2. determine the extent of participation of an interested party after intervention into an action; and
3. appoint one person or body to represent the interest of five or more persons or bodies

who have the same or similar interests.

[42] The churches submitted that further guidance as to the interpretation of 'sufficient interest' can be gleaned from case law. They cited the decision in **R v Inspectorate of Pollution and another, ex parte Greenpeace Ltd (No 2)**[15] in which an environmental protection organisation - Greenpeace, expressed its concerns about the levels of radioactive discharge from the respondent company's site, by applying to quash a change in its government issued authorisation to discharge liquid and gaseous radioactive waste from its premises.

[43] The churches submitted that the Court made a ruling on the 'sufficient interest' issue by applying the test outlined in **R v Monopolies and Mergers Commission, ex p Argyll Group plc**[16], where Lord Donaldson MR opined:

> 'The first stage test, which is applied on the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable …, the applicant may expect to get leave to apply, leaving the test of interest or standing to be re-applied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance.'[15]

[44] The churches contended that in the **Greenpeace case** the Court rejected the argument that Greenpeace was a meddlesome busybody. They argued that the court found that Greenpeace had a sufficient interest in the subject matter based on its national and international standing and the fact that it had some 2,500 members in the region - around which the complaint centred - who would have a genuine perception of a danger to their health and safety from a radioactive waste discharge even from testing. The churches submitted further that the Court recognised that given Greenpeace's experience in environmental matters, access to experts in science, technology and

[15] [1994] 4 All ER 329.

[16] [1986] 2 All ER 257 at pg. 349 d-f.

law, it had a unique expertise, which would help to facilitate an efficient and effective action since otherwise 'a less well-informed challenge might have mounted leading to an unnecessary stretching of the Court's resources and an absence of assistance the Court required in order to do justice between the parties.'

[45] The churches argued that this approach was followed and developed by Purchas LJ in **R v Dept of Transport, ex p Presvac Engineering Ltd**[17]. They contended that the decision of a Canadian court in **Canadian Broadcasting League v Canadian Radio-Television & Telecommunications Commission**[18] is equally instructive, as similar principles were applied there with respect to an application by the interested party, Canadian Broadcasting League ("CBL"). They submitted that the Court ruled that broadcasting was an issue affecting the welfare of all Canadians and involved non-material, pecuniary, proprietary and other material interests.

[46] The churches argued that the learned judges in that case found that CBL's well-established role and assumed responsibility as a public interest advocate in the field of broadcasting gave it a sufficient interest. The churches submitted that in arriving at that decision, the court considered that CBL had by that time been established close to 50 years; had a well-identified role during that period as an organised contributor to public policy formulation in broadcasting; represented legal counsel in Radio reference before the Supreme Court of Canada and the Judicial Committee of the Privy Council as the Canadian Radio League; played an active role as an intervener in hearings of the Canadian Radio-Television and Telecommunications Commission ('CRTC'); and its activities were supported in some measure by public funds.

[47] The churches submitted that the test to establish sufficient interest has developed into a broader test which has been applied in cases concerning interveners. They argued that this test takes into account the nature of public interest litigation and was applied in **(First) The Christian Institute, (Second) Family Education Trust, (Third) The Young Me Sufferers ('TYMES') Trust, (Fourth) CARE (Christian Action Research and Education), (Fifth) and (Sixth) James and Rhianwen**

[17] (1989) Times, 4 April.

[18] [1979] Carswell Nat 16.

McIntosh, and (Seventh) Deborah Thomas v The Scottish Ministers[19]. The court in that case examined the decision in **AXA v Lord Advocate**[20] where initially Lord Hope opined that 'sufficient interest' is demonstrated where the petitioner/applicant establishes that he or she is 'directly affected' by an impugned decision. He later expanded the scope to encompass persons who have 'a reasonable concern in the matter'. The court accepted that a third formulation exists, "whereby a person, who is purporting to act in the public interest, can "genuinely" assert that 'the issue directly affects the section of the public that he seeks to represent".'

[48] The churches also highlighted a distinction made by Lord Reed in **Walton v Scottish Ministers**[21], between 'the mere busybody and the person affected by or having a reasonable concern in the matter'. He observed that a busybody is 'someone who interferes in something with which he has no legitimate concern...'.[20] The churches contended that 'sufficient interest' is now regarded as meaning 'genuinely' asserting that 'the issue directly affects the section of the public that the petitioner or intervener seeks to represent' and that the person's intervention is 'likely to assist the Court'.

[49] They submitted that in **(First) The Christian Institute, (Second) Family Education Trust et al case,** the Court applied the broad test set out in **AXA v Lord Advocate** and **Walton v Scottish Ministers**, and ruled that the interveners in question had sufficient interest, even though it found that they probably lacked expertise in certain areas. The churches also cited the Jamaican case of **Maurice Arnold Tomlinson v The Attorney General of Jamaica**[22] as being a persuasive authority. In that case Laing J. was considering an application by a number of proposed interested parties and the Public Defender to 'intervene' in an administrative claim brought by Mr. Tomlinson a Jamaican national and homosexual.

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[19] [2015] CSIH 64.

[20] 2012 SC (UKSC) 122.

[21] 2013 SC (UKSC) 67.

[22] [2016] JMSC Civ. 119.

[50] Like Mr. Johnson and Mr. Mac Leish, Mr. Tomlinson was challenging the constitutionality of the criminal prohibition against buggery and its penalization in respect of such acts between consenting individuals who are 16 years and older. Laing J. considered many legal authorities presented to him by Mr. Tomlinson and the proposed interested parties. They include some which have been cited in the instant case by the churches and Mr. Johnson and Mr. Mac Leish.

[51] The churches contended that Laing J.'s reasoning and conclusion on the issue of 'sufficient interest' is unassailable. The learned Judge remarked:

> '[80] ... one does not need to look any further than the analysis of Morrison JA (as he then was) in **The Jamaicans for Justice case** for what can be considered to be the distilled product of these cases. As the learned Judge puts it in paragraph 71 of the judgment:
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> > "As the cases have shown, the liberal approach to standing has been at its most pronounced in cases with a public interest in preserving the rule of law or, where applicable, a constitutional dimension. In such cases it seems to me, the courts have been less concerned with the right which a particular applicant seeks to protect than with the nature of the interest."

[52] Laing J.'s pronouncement at paragraph 82 of the judgment was also quoted as being authoritative and sound. He opined:

> '[82] In adopting the more liberal and relaxed approach to standing embraced by the Courts in the plethora of authorities to which reference has previously been made, I am further fortified in the correctness of this approach because of the nature of the Claim and the public interest it has generated and continues to generate. If ever there was a matter which begged for a liberal approach to standing in order to facilitate the participation of a wide cross section of the public who have a genuine interest in the topic, this certainly is it.'

[53] Another case relied on by the churches emanates from Canada. They submitted that the decision in

Law Society of Upper Canada v Skapinker[23] supports the position that if an applicant can show its interest will be affected by the outcome of the litigation, intervener status should be granted. They submitted too that in light of the authorities advanced, they have a sufficient interest in the dispute and are not 'meddlesome busybodies' in Mr. Johnson's and Mr. Mac Leish's action concerning the Constitution, fundamental rights and their relation to human rights and human sexuality.

[54] They contended that they are all Christian churches which hold and promote Judeo-Christian beliefs as authorised by the Holy Bible; these beliefs affect their concept of family life, marriage and sexual intercourse; and consequently the orders being sought by Mr. Johnson and Mr. Mac Leish are likely to adversely affect the teachings, practice and lifestyle of their members. They argued that they advocate for and promote traditionally held views of marriage, the family, and sexual intercourse which represent the considered perspectives and ideals held by the vast majority of the Christian community in St. Vincent and the Grenadines.

[55] They also argued that they represent not only a significant proportion, but also a broad and diverse cross section of the Vincentian population. The churches contended that the issue joined between the parties in the substantive claim is undoubtedly one of significant public interest and they (the churches) have publicly advanced positions in opposition to the acts of buggery and gross indecency between persons of the same sex through their teachings. They argued that if Mr. Johnson's and Mr. Mac Leish's action is successful, their teachings; their members', adherents' and congregants' belief and lifestyle are likely to be adversely affected.

[56] They reasoned that the decriminalisation of the buggery and gross indecency laws will substantially affect the rights of citizens with Judeo-Christian beliefs, including theirs and their members. They submitted that those rights are protected by Constitutional provisions, namely section 16 (1) and 16 (2) which permits a person to seek redress from the High Court for breach of any such protected right or freedom.

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[23] (1984), 1 R.C.S. 357.

[57] They contended that their and their members rights to:

(a) freedom of expression, freedom of thought, conscience and belief in relation to matters concerning buggery and acts of gross indecency between persons of the same sex;

(b) seek, receive, distribute or disseminate information, opinions and ideas in opposition to buggery and acts of gross indecency between members of the same sex through any media;

(c) equality before the law;

(d) enjoy a healthy environment;

(e) freedom of religion, either alone or in community with others and both in public and in private;

(f) manifest and propagate religion in worship, teaching, practice and observance; and

(g) freedom from discrimination on the ground of religion;

will be adversely affected if Mr. Johnson's and Mr. Mac Leish's claims are successful.

[58] Relying on section 16 of the Constitution, the churches submitted that given the potential adverse effects on them and their members, of the removal of sections 146 and 148 of the Criminal Code; they have sufficient interest to apply to the court for redress. They argued that the Court should exercise its discretion under rules CPR 1.1(1), 1.2, and 56.13 to deal with the case justly by allowing for their intervention in Mr. Johnson's and Mr. Mac Leish's claim. This contention presents weighty considerations which coupled with the earlier submissions makes a substantive Constitution-based counter-argument to Mr. Johnson's and Mr. Mac Leish's legal assertions. It also elevates their 'concerns' to the level of 'personal interests' and cannot be brushed aside.

[59] The churches argued that the Court must consider that the potential intervener brings a different perspective to the issue, and how likely it is that the intervener will make a useful contribution to the resolution of the matter in question. They cited in support, the case of **Cook v. British Columbia (Ministry of Education)**[24]. The court declared in that matter:

'[12] Intervenors can be of assistance to the Tribunal in a number of ways including understanding the context in which a complaint arises, the perspectives of individuals

[24] 2003 Carswell 3804.

and groups other than the parties to the complaint, the factual and legal issues raised by a complaint, and the impact the Tribunal's decision may have on affected individuals and groups.'

[60] The churches submitted further that important considerations include the ability of a proposed intervener to assist the Court in a unique way to arrive at its decision. They argued that the intervener is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the action which ought to be considered by the Court. They observed that but for such intervention some pertinent issues might not receive any attention or prominence, given the quite different interests of the immediate parties to the action. They submitted that the decision in **Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)**[25] is instructive. In that case, Rouleau J. opined:

> '[20] The jurisprudence has clearly established that in public interest litigation, the Attorney General does not have a monopoly to represent all aspects of public interest.'[26]

[61] This claim has generated considerable interest among the Christian community in the State as demonstrated by the number of churches which have applied to be appointed as interested parties. The court takes judicial notice that one day after the hearing of this claim, a large group of persons held a march through the streets of Kingstown and ended with a rally at a central location in the city. It was billed in the news media as an activity to address certain churches' perception of ills in the society such as crime and violence and issues central to the challenge launched in the instant claim.

[62] Mr. Johnson, Mr. Mac Leish and the churches have relied on some of the same legal authorities presented before Justice Laing in the **Tomlinson case** from Jamaica. Mr. Johnson and Mr. Mac Leish contended that the churches must demonstrate that they have a significant and substantial interest in the subject matter of the claim, if they are to be added as interested parties. This submission is not supported by the authorities.

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[25] [1989] F.C.J. No. 446.

[26] At para. 20.

[63] I accept that the term 'sufficient interest' must be interpreted and applied liberally and broadly as articulated in the cases highlighted above. I am satisfied that the churches have presented testimony and arguments which frame a real legal, social, moral and perhaps even medical conundrum which arguably impacts the lives of the persons that the churches represent and which they hope t present for the court's consideration. I therefore do not consider the churches to be busybodies.

[64] The churches have provided testimony that their beliefs regarding the proposed repeal of the buggery and gross indecency laws are enshrined in their credo, doctrines and Judeo-Christian principles set out in the Holy Bible. Their expressed belief that the impugned laws are based on those Judeo-Christian values gives expression to firm opposition to any such repeal. Moreover, they represent several denominations that serve a significant number of persons residing in the State. Although they provided no details about the number of members represented by the 10 churches, I take judicial notice that some of the churches there represented, attract sizeable congregations to their services on Saturdays and Sundays and at other times throughout the State.

[65] The legal submissions made by the churches regarding their apprehension that their and other congregants' and adherents' constitutionally protected freedom of expression, freedom of thought, conscience and belief are likely to be affected if the claim is successful suggests to me that they have a sufficient interest in this dispute to qualify them to be joined as interested parties. I accordingly find that they have established this on a balance of probabilities.

[66] The churches contended that they should be permitted to adduce evidence at trial and make written and oral submissions at all hearings of the Claim and any appeals, in order to adequately assist the Court. They cited the decision in **MacKay v Manitoba**[27] which they submitted, emphasised that the presentation of facts is an essential prerequisite to a proper consideration of constitutional issues raised under the Canadian Charter of Fundamental Rights and Freedoms. They submitted further that this was endorsed in **Danson v. Ontario (Attorney General**.

[27] [1989] 2 R.C.S. 357.

[67] They contended that just as Mr. Johnson and Mr. Mac Leish have made factual allegations in support of their claim, so too the churches should be able to bolster their submissions by adducing evidence in opposition, to support the constitutionality of the impugned provisions. They argued that in the final analysis, the Court will be called upon to examine the Constitution from a public, economic, moral, health and social standpoint and will reasonably require expert evidence, which they will seek to adduce in order to weigh the competing considerations and have a balanced view of the issues. They relied on the Canadian case of **American Airlines Inc v Canada (Competition Tribunal)**[28].

[68] In a judgment delivered by Iacobucci C.J., the Federal Court of Appeal of Canada held in that case, that courts and tribunals have inherent power to control their own procedure and may permit interventions on terms and conditions that they believe are appropriate in the circumstances. It also held that the term 'representations' extended to the interveners being able to adduce evidence in order to establish the factual underpinnings for the arguments they might wish to make; and that fairness was a relevant determining factor in deciding the level of participation that would be afforded to interveners.

[69] Laing J. arrived at a similar conclusion in the **Tomlinson case**. He referenced the Court of Appeal of Jamaica's decision in **Michael Levy v The Attorney General of Jamaica and Jamaica Redevelopment Foundation**[29] where the court upheld 'the validity of general case management orders' granting permission to a parties in a judicial review hearing to adduce evidence. Mr. Tomlinson's opposition to this did not find favour with Laing J. As part of his case management functions, he granted permission to the interested parties to file evidence.

[70] The applicable portions of the Jamaica CPR provisions are not dissimilar to the Eastern Caribbean Supreme Court CPR. The Judge's case management functions in both jurisdictions are governed by a similar legislative and procedural framework. The Belize Supreme Court arrived at the same

[28] 1989 2 FC 88, (upheld by the Supreme Court of Canada 1989 Carswell Nat 874).

[29] [201] JMCA Civ 47.

conclusion in the case of **Caleb Orosco v The Attorney-General for Belize**[30] when presented with a similar application and after considering CPR provisions which are identical to this State's. The learned Judge granted leave to the interested church parties to call expert testimony. I see no reason to depart from the approach and practice in this jurisdiction and in this case. It seems the fair and just thing to allow the churches to supply evidence in pursuance of this court's case management powers. For these reasons, I reject the submissions by Mr. Johnson and Mr. Mac Leish that the CPR permits interested parties to participate only by making submissions or written brief.

[71] So as not to create a prejudicial situation for Mr. Johnson and Mr. Mac Leish by placing excessive or burdensome responsibilities on them in the face of additional parties, I consider it prudent and just to limit the number of affidavits which the interest parties can file. It strikes me that two affidavits should be adequate and fair. In the event that the churches might wish to provide more testimony they may make seek leave for such purpose. The churches are therefore granted leave to give evidence and to file no more than 2 affidavits.

Legitimate interest in health matters

[72] Mr. Johnson and Mr. Mac Leish submitted that the churches introduced statements about sexually transmitted diseases in their affidavit. They argued that the churches lack a nexus to matters of health because they are not a health organization and are not specially placed to make submissions on health related matters. They contended that the churches have no legitimate interest in raising the referenced health matters and do not demonstrate specialist knowledge in raising such matters. They submitted that the applicant churches and their congregations are free to practice what is preached to them including abstaining from same sex-sexual intimacy; and if the impugned provisions are removed to indulge in them after that time.

[73] Mr. Johnson and Mr. Mac Leish submitted further they do not accept the assertions the buggery and acts of gross indecency will be facilitated and encouraged and that such acts will be promoted as normal and so taught in schools or that there will be a marked increase in new STI cases

[30] (Supreme Court of Belize Claim No. 668 of 2010, Unreported decision made on 27th April 2012).

among persons who engage in such behaviours. They contended that if health is to be raised as a supposed objective justification to the impugned provisions of the Criminal Code, this must be done by the Honourable Attorney General. They provided no legal authority to support this contention. I am not aware of any. CPR Part 56 neither mentions nor alludes to any. They contended further that health as a justification for laws that criminalize same-sex intimacy has been roundly rejected in **Toonen v Australia**[31] by the United Nations Human Rights Committee, the body that interprets obligations under the International Covenant on Civil and Political Rights.

[74] There the body declared:

> '... statutes criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at risk of infection". Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.'[31]

[75] They (Johnson and Mac Leish) submitted that the churches' subjective views cannot assist the court. The argued that if permission is granted, it should be limited to a single, joint document containing concise submissions on the law only and should not concern matters of health.

[76] The churches rejoined that matters of health concern every member of the Vincentian public. They acknowledged that they have not represented themselves to be health organizations. They argued that should the Court appoint them as interested parties and permit them to adduce evidence, they will seek pursuant to CPR Part 32, to adduce expert evidence on matters of public health. They submitted that this will assist the Court in relation to the alleged detrimental effects of the removal of sections 146 and 148 of the Criminal Code.

[77] The churches argued that the court in **Caleb Orosco v The Attorney-General for Belize** permitted the interested parties to adduce expert evidence of a medical doctor. They argued further that the finding at paragraph 8.5 of **Toonen v Australia**, (on which Mr. Johnson and Mr. MacLeish relied),

[31] Communication No. 488/1992, U. N. Doc CCPR/C/50/D/488/1992 (1994) at para. 85.

is not applicable to the instant proceedings. They reasoned that it was a finding of fact based on the representations made to the United Nations Human Rights Committee in consideration of Communication No. 488/1992, and not a finding of law or a finding which binds this Court. They submitted that the Court in these will have the responsibility to consider any expert evidence adduced by any of the parties in these proceedings and make its own determination as to the public health issues concerned. I agree.

[78] As signalled by Laing J. in the **Tomlinson case**[32] and Arana J. in the **Caleb Orosco case**[33] the Court will in appropriate cases allow a party to present expert evidence in areas where the 'interested party' is not an expert, provided that the procedural requirements are satisfied. The contention that interested parties should be precluded from addressing health related matters because of their lack of expertise in health matters would be just as applicable to any other party and could result in unfairness and injustice if invoked to prevent them from doing so. Mr. Johnson's and Mr. Mac Leish's objection on this basis does not assist them.

Appointment of a Representative

[79] The Court may appoint one person or body to represent the interests of five or more persons or bodies having the same or similar interests.[34] The churches have testified that they have similar interests. This is not disputed by Mr. Johnson or Mr. Mac Leish. They have not advanced any objections to the appointment of the Incorporated Trustees of the Seventh Day Adventist Church in Saint Vincent and the Grenadines to be the churches' representative. I am satisfied that such order is appropriate in all the circumstances. It is so ordered.

[80] Having considered the many legal submissions by Mr. Johnson, Mac Leish and the churches I am satisfied that leave should be granted to the churches to be joined in these proceedings as interested parties. That is just in all of the circumstances. The churches would need to obtain a complete set of the statements of case to enable them to make representations. It is critical that the

[32] At paragraph 85.

[33] At paragraph 85.

[34] CPR 21.1(1).

Court manages this process to prevent the introduction of prolix and unnecessary material which would prolong the case, utilize a disproportionate amount of the court's resources and run contrary to the overriding objective of the CPR. I consider that one way to achieve effectiveness and efficiency is to limit the number of witnesses that the interested parties may call.

[81] It appears to me that the churches are well-placed to contain their factual contentions in two affidavits. If this is insufficient, there is no impediment to them seeking to increase that number on supplying justification. They have comprehensively canvassed the areas of their concern which signifies that they possess special interests and knowledge from which the court can benefit in arriving at a determination of the substantive and associated issues. Those issues are of such great national interest and importance and involve weighty constitutional consideration; and it is clear that the outcome of which will affect the entire society. In the premises, the court should do no less than accede to the churches' request to be so joined. They are therefore joined in this claim as interested parties 1 through 10. As such they are entitled to file evidence and make written and oral submissions at the hearings.

Costs

[82] The court may award costs pursuant to CPR 56.13 (4) in appropriate cases. I make no order as to costs taking into account the nature of the matter.

ORDER

[83] It is accordingly ordered:

1. The Incorporated Trustees of the Seventh-Day Adventist Church in Saint Vincent, The Incorporated Trustees of the Evangelical Church of the West Indies, The New Testament Church of God, The Archbishop & Primate (Spiritual Baptist) of Saint Vincent & the Grenadines, The Church of God (Saint Vincent) and the Grenadines, The Incorporated Trustees of the New Life Ministries, The Light of Truth Church of God, Kingstown Baptist Church of Saint Vincent and the Grenadines, Living Water Ministries International (Saint Vincent and the Grenadines) and Hope Evangelism Outreach Ministries are granted leave to join these proceedings as interested parties 1 through 10 respectively.

2. The Incorporated Trustees of the Seventh-Day Adventist Church in Saint Vincent is appointed as the representative of the interested parties for purposes of these proceedings
3. Mr. Javin Johnson, Mr. Sean Mac Leish and the Honourable Attorney General shall on or before December 4th 2019 serve the churches' representative with a copy of their statements of case, all supporting affidavits, documentation and written submissions and list of authorities with the full text of legal authorities.
4. Leave is granted to the churches' representative to file no more than 2 affidavits in response to those filed by the claimants, such affidavits to be filed and served on or before December 18th 2019.
5. The interested parties are granted leave to file written submissions and make oral submissions during the proceedings, in accordance with directions issued by the court.
6. No order as to costs.

[84] I am grateful to counsel for their very comprehensive and helpful written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar