ATTORNEY GENERAL OF NOVA SCOTIA v.
BEAVER, FULLAGER et al.
(S.C.A. No. 01397)

INDEXED AS: NOVA SCOTIA v. BEAVER et al.

Nova Scotia Supreme Court
Appeal Division
Hart, Morrison and Macdonald, JJ.A.
March 12, 1985.

COUNSEL:
Reinhold M. Endres and Randall R. Duplak, for the appellant (Attorney General of Nova Scotia);

Felix A. Cacchione, Craig M. Garson and Anne S. Derrick, for the respondents.

This appeal was heard on February 12, 1985, before Hart, Morrison and Macdonald, JJ.A., of the Nova Scotia Supreme Court, Appeal Division. The following decision of the Appeal Division was delivered by Hart, J.A., on March 12, 1985:

[1] Hart, J.A.: On October 25, 1984 the appellant, the Attorney General of Nova Scotia, representing Her Majesty the Queen in the Right of the Province of Nova Scotia, commenced an action against forty-seven women said to be prostitutes operating in the downtown area of the city of Halifax claiming that their activities constituted a public nuisance and seeking a permanent injunction to abate the same. The particular acts of nuisance are set forth in the statement of claim as follows:

> "(a) Accosting and propositioning pedestrians and motorists for the purpose of prostitution;
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> "(b) selling or offering sexual services of all kinds;
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> "(c) using public and private property, including streets, parking lots, driveways and parks, for the purpose of prostitution;
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> "(d) loitering, littering, fighting, screaming, shouting, swearing, using insulting, suggestive or obscene language or gestures, impeding, obstructing and assaulting members of the public, defecating, urinating, and all forms of carnal copulation including fellatio."

[2] It was alleged that the defendants' activities injuriously affected the quiet enjoyment of property by tenants and landowners in the downtown area and it caused the area to deteriorate and property values to diminish.

[3] On December 3, 1984 an application was made to the court on behalf of the Attorney General to obtain an interlocutory injunction against the defendants to prevent them from engaging in or causing a nuisance by way of the following activities in the downtown area of the city prior to trial:

> "(1) engaging in any public conduct apparently for the purpose of prostitution, or any public conduct which by itself, or in conjunction with the conduct of another person, causes or contributes to nuisance;
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> "(2) publicly offering or appearing to offer themselves directly or indirectly for prostitution by words, actions, gestures, loitering or otherwise;
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> "(3) using or trespassing upon any public property for the purpose of prostitution or related activity;
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> "(4) using or trespassing upon any private property for the purpose of prostitution or related activity;
>
> "(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;
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> (iv) impeding or obstructing traffic;
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> (v) defecating, urinating in an offensive manner;
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> (vi) carnal copulation, including fellatio, for the purpose of prostitution."

[4] In support of the application, which came on for hearing before Mr. Justice MacIntosh, thirty-four affidavits were filed by the Crown. Many of

these affidavits were from residents who claimed that they were bothered by the activities of the prostitutes, their pimps, their customers and curious onlookers, who together caused a great deal of noise, heavy traffic, interference with their passage in the streets, trespassing and a devaluation of their properties. The affidavits of two police officers indicated that the presence of the prostitutes on the streets was often accompanied by shouts and fighting over territorial control between the prostitutes and their pimps, and that many women of the area, were often mistaken for prostitutes and bothered by their customers. On cross-examination, however, the officers admitted that only two members of the 300-member city police force were assigned to the Morality Squad, and although most of the activities complained of were criminal offences that very little effort was made to suppress the problems by ordinary criminal procedures.

[5] Thirty-five affidavits were filed on behalf of the defendants in which other residents of the downtown area claimed that they were familiar with the presence of prostitutes, but at no time were bothered by them or other associated activities. It was further argued by the defendants that the downtown area had many beverage rooms and lounges which contributed to the heavy traffic in the evening hours, and the patrons of these establishments were often the cause of noisy activities on the streets.

[6] Mr. Justice MacIntosh, after considering the evidence before him, reached the conclusion that there were at the time of the application only about twenty prostitutes carrying on their activities in the downtown area. He further found that much of the so called nuisance was emanating from the licensed drinking establishments and that the police were hampered not only by the interpretation of the meaning of soliciting under s. 195.1 of the **Criminal Code** under the decision of **R. v. Hutt** (1978), 19 N.R. 331; 38 C.C.C. (2d) 418, (Supreme Court of Canada), but also by the reluctance of the complaining residents to participate as witnesses in any prosecutions. For these and other reasons little was being done by the civic authorities to control the activities complained of.

[7] Mr. Justice MacIntosh then reviewed the general principles upon which courts exercise their discretion to grant or withhold interlocutory injunctions and, in particular, injunctions for the abatement of a public nuisance. He then entered upon a consideration of whether or not those principles would be applicable in a case where the type of conduct sought to be prevented was of a criminal nature rather than civil. Reference was made to **R. v. Westendorp** (1983), 46 N.R. 30; 41 A.R. 306, where the Supreme Court of Canada held that the city of Calgary could not make prostitution an offence under a bylaw for the control of its streets, since prostitution was in essence a subject that fell under the federal jurisdiction in relation to criminal law. MacIntosh, J., then went on to say:

> "There is no doubt in my mind that this application is an attempt to control prostitution. The pith and substance of the application relates to prostitution. The Attorney General is attempting to control street prostitution in downtown Halifax by civil procedure. It is of no significance whether a province or a municipality attempts to usurp criminal jurisdiction by way of legislation or injunction. The point is that they are not free to invade federal jurisdiction in these matters by any means."

[8] Mr. Justice MacIntosh then proceeded to consider whether he should exercise his discretion against the granting of the injunction for another reason, that is, because there were other means available to overcome the problem. He said:

> "If the activities of the respon-

dents are as outlined in the applicant's affidavits, then as pointed out, the following sections of the **Criminal Code** are available to deal with them:

Section 169 - Indecent Acts
Section 170 - Nudity
Section 171 - Causing a Disturbance
Section 173 - Trespassing at Night
Section 176 - Nuisance
Section 193 - Keeping a Common Body House
Section 195 - Procuring
Section 244 - Assault
Section 387 - Mischief

In addition to these federal **Criminal Code** provisions, much of the unlawful conduct set forth in the applicant's affidavits are covered by provincial or municipal laws such as the **Protection of Property Act**, the **Motor Vehicle Act**, and others. In other words, there are already remedies available to the authorities to correct the alleged situation existing in the so-called downtown Halifax. The court cannot accept the contention of a Halifax Police Constable that they are powerless. If such is the case, it is little wonder where in a city of this size a Morality Squad of two men only are allotted to look after this problem.

"Surely this court is entitled to ask the applicant - why apply to this court where there are already remedies in place in the **Criminal Code** and provincial laws to most of your problems? A bit more diligence is indicated."

[9] Mr. Justice MacIntosh then turned to consider whether the criminal law should be enforced by the civil remedy of injunction, and after setting forth some of the inherent dangers in so doing as revealed in the case law, he decided to reject the application for the injunction and in doing so stated:

"All persons summoned to court for criminal misconduct in this country have an inalienable right to be tried by due process of criminal law with all its attendant protective procedural protections. On the other hand, there are those represented by the Attorney General who are entitled to a resolution of their problem. Unfortunately for the latter, I do not consider an interim injunction to be proper procedure in this particular instance. The application is therefore denied with costs which shall be for determination at trial."

[10] It is from this decision that the Attorney General has applied for leave to appeal, and since a confirmation of the decision would in fact be equivalent to a dismissal of the action I would consider it appropriate to grant the leave requested.

[11] The grounds of appeal are that the trial judge erred:

"(i) in finding that the application of the Attorney General was an attempt to usurp exclusive federal jurisdiction in the sphere of criminal law, and that it was of 'no significance whether a province or a municipality attempts to usurp criminal jurisdiction by way of legislation or injunction', ... and

"(ii) in finding that 'injunctions will not be granted to restrain **Criminal Code** offences ...', ..."

[12] We are dealing here with an application by the Attorney General to abate a public nuisance, a type of jurisdiction assumed by the common law through its courts of equity since time immemorial. Such an application must be distinguished from the tort of nuisance, which permits an individual to prevent activities which diminish the enjoyment of his property. It must also be distinguished from the cases in which a private individual is permitted to bring proceedings to abate a public nuisance personally or as a realtor of the Attorney General when he can show that he has suffered particular damage as a result of the nuisance. Here the Attorney General acts

solely on behalf of a segment of the population that he considers are being denied their rights to the enjoyment of their properties, the streets and other public places by virtue of the activities of the defendants.

[13] This type of proceeding was discussed many years ago in **Daniell's Chancery Practice** and I set forth several extracts from the Seventh Edition starting at p. 50 of vol. I:

> "Upon a like principle, actions to restrain the continuance of a public nuisance should be instituted by the Attorney General; and so should proceedings instituted for the protection of public rights; and where a claim is made against the general public, the Attorney General must be added as a defendant."

[14] At p. 1337 of vol. II, the author continues:

> "The court will interfere, by injunction, to suppress the commission or continuance of a nuisance. Nuisances are of two kinds: those which are injurious to the public at large, and those which are injurious to the rights and interests of private persons.
>
> "With regard to nuisances, the jurisdiction seems to be of very ancient date, and to be founded on the irreparable damage to individuals, or the great public injury which is likely to ensue. . .
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> "In cases of public nuisances, properly so called, an indictment lies to abate them, and to prosecute the offender; but an action will also lie to stop the mischief, and to restrain the continuance of it. . .
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> "As a general rule, a suit of this kind must be instituted by the Attorney General, or, at all events, he should be a party to it, as representing the public, even though the parties complaining are the local authority of the district; but persons who conceive themselves aggrieved may also come forward, and ask the assistance of the court to prevent a public nuisance from which they have individually sustained damage; and in the event of an individual suffering peculiar and special damage by a public nuisance, an action may be sustained by him, without making the Attorney General a party."

[15] A more modern view of public nuisance is set forth in **Salmond and Heuston on Torts** (Eighteenth Edition), p. 47:

> "A public or common nuisance is a criminal offence. It is an act or omission which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. It is not necessary to establish that every member of the public, as distinct from a representative cross-section, has been affected. The question whether the number of persons affected is sufficient to be described as a class is one of fact. One test is to ask whether the nuisance is so widespread in its range or indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings to stop it as distinct from the community at large. Examples of the crime of public nuisance are organising a festival of pop music which generates large-scale noise, traffic, and apprehension, obstructing a highway, or making it dangerous for traffic. Public nuisances are met by an indictment or by an action by the Attorney General or a local authority where an injunction is desired to put an end to the public nuisance.
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> "Public and private nuisances are not in reality two species of the same genus at all. There is no generic conception which includes the crime of keeping a common gaming-house and the tort of allowing one's trees to overhang the land of a neighbour. A public nuisance falls

within the law of torts only in so far as it may in the particular case constitute some form of tort also. Thus the obstruction of a highway is a public nuisance; but if it causes any special and peculiar damage to an individual, it is also a tort actionable at his suit. This tort has more in common with the tort based on breach of a statutory duty than with the tort of private nuisance."

[16] A Canadian view is expressed in Wright & Linden **Canadian Tort Law**, Seventh Edition, at p. 17-1:

"Public nuisance, on the other hand, has a schizophrenic character. Basically it refers to a rather motley group of criminal or quasi-criminal offences which involve actual or potential interference with the public convenience or welfare. In substance, they range from the placing of obstructions on a public highway or a navigable river to the running of an odious institution such as a brothel. Since a public nuisance may be committed and its effects may be felt almost anywhere, it has no obvious connection with interference with interests in land. Further, as this type of nuisance is by definition detrimental to the public interest, the initiative in proceeding against the perpetrator lies with an official representative of that interest. If a criminal action is considered appropriate the offender will be charged under the **Criminal Code** with committing an indictable offence and if found guilty subjected to the prescribed penalty. In the case of civil proceedings the provincial attorney general is responsible for starting an action to enjoin the continuance of the public nuisance. As long as suffering or inconvenience is general and uniformly injurious, there is no place for independent intervention by private citizens, whether it be an individual or group effort. Certainly they have the right to complain to the appropriate authorities in an attempt to stir the latter to positive action, but they cannot take upon themselves the role of champions of the public interest. In this sense a public nuisance is solely within the ambit of administrative discretion."

[17] Whether to bring an action for the abatement of a public nuisance is entirely within the discretion of the Attorney General since there is a political aspect to the matter. This point was clearly made by the Lord Chancellor in **London County Council v. Attorney General**, [1902] A.C. 165, where it was said at p. 168:

"My Lords, one question has been raised, though I think not raised here - it appears to have emerged in the court below - which I confess I do not understand. I mean the suggestion that the courts have any power over the jurisdiction of the Attorney General when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney General and not for the courts to determine whether he ought to initiate litigation in that respect or not."

[18] The fact that the Attorney General has complete discretion to bring this action and the court has complete discretion to decide whether the injunction should be granted has been recently reaffirmed by the House of Lords in **Gouriet v. U.P.W.**, [1978] A.C. 435.

[19] In the case at bar there is no challenge to the Attorney General's

right to bring his action for an alleged nuisance, but the Crown alleges that the trial judge improperly exercised his discretion in refusing the Attorney General's request. The first ground of appeal suggests that the trial judge was wrong in considering that the application was an attempt by the Attorney General to usurp exclusive federal jurisdiction in the sphere of criminal law rather than a valid attempt to abate a real public nuisance. This is a concept peculiar to Canada where there is a division of legislative powers between the federal government and the provinces, and no assistance can be obtained from the English decisions.

[20] The trial judge relied heavily upon the decision of the Supreme Court of Canada in **R. v. Westendorp**, supra, which held a Calgary bylaw prohibiting people from being on the street for the purpose of prostitution ultra vires the powers of the province and, therefore the municipality, as an invasion of the field of criminal law. Laskin, C.J.C., speaking for the court, said:

> "In examining the submission of counsel for the accused that the by-law was a colourable attempt to deal, not with a public nuisance but with the evil of prostitution, Kerans, J.A., observed that the evil of prostitution is a matter of public morality and, if the pith and substance of this legislation were an attack on this evil, it might well be a matter beyond the competence of the Legislature of Alberta. He then went on to say that 'the by-law does not strike at prostitution as such; it does not seek to suppress the market for sexual favours; it seeks only to protect the citizens who use the streets from the irritation and embarrassment of being unwilling participants in that market'.
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> "This assessment of 'pith and substance' is to me baffling when regard is had to the terms of s. 6.1. It becomes doubly baffling when Kerans, J.A., says this:
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> > 'I concede that the Calgary legislation makes it an offence for a prostitute simply to enter upon a street for the purpose of prostitution, i.e. without yet doing anything. But this is not an attack on prostitution as such. This is an attempt, by preventative measure, to regulate the activities of the prostitutes and their customers on the streets. It is, as it were, a pre-emptive strike. And as such is troubling. But it is sufficiently troubling to change the pith and substance of the legislation.'
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> "What appears to me to emerge from Kerans, J.A.'s, consideration of the by-law is to establish a concurrency of legislative power, going beyond any double aspect principle and leaving it open to a province or to a municipality authorized by a province to usurp exclusive federal legislative power. If province or municipality may translate a direct attack on prostitution into street control through reliance on public nuisance, it may do the same with respect to trafficking in drugs. And, may it not, on the same view, seek to punish assaults that take place on city streets as an aspect of street control!
>
> "However desirable it may be for the municipality to control or prohibit prostitution, there has been an overreaching in the present case which offends the division of legislative powers. I would, accordingly, allow the appeal, set aside the judgment of the Alberta Court of Appeal and restore the acquittal directed by the Provincial Court Judge."

[21] Mr. Justice MacIntosh had no doubt that the Attorney General's application was an attempt to control prostitution and went on to say that it matters not whether this attempt is by legislation or by civil action for

an injunction.

[22] The Crown takes the position that the **Westendorp** decision relates solely to the legislative division of powers and does not in any way restrict the Attorney General's ancient right to apply to the civil courts for the remedy of injunction and the abatement of a public nuisance.

[23] This question was raised many years ago in **People's Holding Company, Limited v. Attorney General of Quebec,** [1931] S.C.R. 452. In that case the Attorney General of Quebec sought to prevent a federally incorporated company from acting beyond its powers so as to defraud the public. The question for decision by the Supreme Court of Canada was whether the Attorney General of Quebec had the right to seek such an abatement when the regulation of these companies was within federal jurisdiction. Rinfret, J., said:

> "But the objection of the appellant goes deeper and it says: The People's Holding Company Limited is a federal corporation whose status cannot be impaired by provincial authority. The respondent, as an executive officer of the province, is not empowered to conduct litigation in respect of any subject within the authority or jurisdiction of the Dominion. He cannot, as such, grant a fiat for the issue of a writ to annul federal letters patent, nor can he take out such a writ himself without permission from the proper federal authority. In brief: Article 978 C.C.P., on which the respondent relies, does not apply to federal companies or, if it does apply in such cases, then the proceedings can only be brought by the Attorney General of Canada or, in the alternative, if the article is meant to apply to federal companies and if it should be interpreted as giving the alleged power to the Attorney General of Quebec, then it is pro tanto **ultra vires.**
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> "There are no decisions of the higher courts precisely in point."

[24] Rinfret, J., continued:

> "The allegations of the petition all point to violations of the law or of the Acts by which the appellant is governed, with the object of defrauding the public and of endangering the public welfare. The prosecution tends to abate the alleged violations and is declared to be instituted and carried on in the general public interest of the people of the province of Quebec in particular.
>
> "Now the Crown, as **parens patriae,** represents the interests of the whole of His Majesty's subjects, and we can discover no reason why the Attorney General for the province, acting as the officer of the Crown, should not be empowered to go before the courts to prevent the violation of the rights of the public of that province, even if the perpetrator of the deeds complained of be a creature of the federal authority. In the words of Surveyer, J., in the present case: 'le procureur-général d'une province a le droit et le devoir de reprimer les délits civils qui se commettent dans les limites de sa province.'
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> "This accords with the position taken at bar by the Attorney General of Canada who stated that he did 'not desire to contest the right of an attorney general of a province to take such proceedings as may be open to him to take, according to the practice of the courts of the province, for the purpose of compelling the observance within the province of any law, federal or provincial, which may be in force therein.'"

[25] The Supreme Court of Canada has here recognized the right of a provincial attorney general to take proceedings in the civil court for the prevention of damage being caused to the citizens of that province by breaches of the law enacted under either federal or provincial legislative powers. The constitutional restriction on the right to pass laws does not impede the province's right to demand their obser-

vance.

[26] Although the **People's Holding Company** decision referred to the violation of the rights of the people of a province by virtue of the commission of civil offences, I can see nothing wrong in principle in extending the same jurisdiction to an attorney general with relation to breaches of penal statutes, including the **Criminal Code.** The enforcement of the provisions of the **Criminal Code** rest, of course, with the provincial attorney general in any event.

[27] I would conclude therefore that the Attorney General's application here, which has been found by the trial judge to be in reality an attempt to control prostitution, a topic within the federal criminal legislative jurisdiction, is not for that reason alone improper. The fact that the activity sought to be controlled is really criminal in nature may, however, be a factor that the trial judge should take into consideration in deciding whether the remedy sought is appropriate under all of the circumstances.

[28] There is one other aspect of this issue that may have been in the mind of the trial judge. An injunction is, of course, an equitable remedy and should not ordinarily be granted if the application is in reality for an oblique motive. Here the Attorney General alleges that members of the public in downtown Halifax are being damaged and inconvenienced by the activities of the defendants and their associates. The court has been asked to tell the defendants that they cannot ply their trade even though the federal Parliament that has the jurisdiction to do so has failed to make prostitution, per se, an offence. If the injunction action should be considered a direct attempt to ban prostitution rather than abate the nuisance caused thereby this factor could well be considered by the judge in deciding whether to exercise his discretion for or against the application.

[29] In the second ground of appeal the Crown alleges that Mr. Justice MacIntosh erred in holding that an injunction was not an appropriate remedy for the enforcement of the criminal law. Since prostitution is not of itself a criminal offence, the judge in referring to this issue must have had reference to the many infractions of the **Criminal Code** which were alleged to take place by the defendants themselves and other persons associated with them in their trade. MacIntosh, J., relied upon the decision of the Appellate Division of Ontario in **Robinson v. Adams** (1924-25), 56 O.L.R. 217. In that case, in setting aside an interim injunction to prevent the picketing of a theatre and accompanying union activities, Middleton, J.A., said:

> "The equitable jurisdiction of a civil court cannot properly be invoked to suppress crime. Unlawful acts which are an offence against the public, and so fall within the criminal law, may also be the foundation of an action based upon the civil wrong done to an individual, but when Parliament has, in the public interest, forbidden certain acts and made them an offence against the law of the land, then, unless a right to property is affected, the civil courts should not attempt to interfere and forbid by their injunction that which has already been forbidden by Parliament itself. Much less should the courts interfere when the thing complained of is not within the terms of the criminal law, although it may be rightly regarded as objectionable or even immoral, for then the civil courts by injunction are attempting to enlarge and amend the criminal law. Government by injunction is a thing abhorrent to the law of England and of this Province.
>
> "The fact that the criminal law emanates from the Dominion, and the civil law from the Province, and that our courts are created by the Province, only serves to manifest the desirability of refraining from

any assumption by the civil courts of a power to regulate public conduct.

"The questions of trades unionism and of the open shop and of how far those who advocate the one as against the other should be permitted to go in endeavouring to uphold and enforce their views, are essentially matters for Parliament and quite foreign to civil courts.

"The Court of Chancery, notwithstanding all this, asserted its rights to protect property by means of its injunction. This jurisdiction was based entirely upon the idea of protecting the property of the plaintiff against the wrongful act of the defendant, and was quite independent of any consideration of the nature of the act complained of as viewed from the standpoint of the criminal law. This jurisdiction is exemplified in nuisance cases.

"It is safe to say that the Court of Chancery never granted an injunction in aid of the criminal law, or as supplementing the criminal law, if it was found to be inefficient."

[30] A slightly different view has been expressed recently by the House of Lords in **Gouriet v. U.P.W.**, supra. In that case Mr. Gouriet applied for the consent of the Attorney General to act as relator in an action for an injunction to prevent the members of the Post Office Union from delaying delivery of the mails to and from South Africa. Such an activity would in England be a crime. The Attorney General refused to give his consent to this manner of enforcing the criminal law, and Lord Wilberforce said at p. 481:

"That it is the exclusive right of the Attorney General to represent the public interest - even where individuals might be interested in a larger view of the matter - is not technical, not procedural, not fictional. It is constitutional. I agree with Lord Westbury L.C. that it is also wise.

"This is a right, of comparatively modern use, of the Attorney General to invoke the assistance of civil courts in aid of the criminal law. It is an exceptional power confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty - see **Attorney General v. Harris**, [1961] 1 Q.B. 74; or to cases of emergency - see **Attorney General v. Chaudry**, [1971] 1 W.L.R. 1614. It is one not without its difficulties and these may call for consideration in the future.

"If Parliament has imposed a sanction (e.g., a fine of £1), without an increase in severity for repeated offences, it may seem wrong that the courts - civil courts - should think fit, by granting injunctions, breaches of which may attract unlimited sanctions, including imprisonment, to do what Parliament has not done. Moreover, where Parliament has (as here in the **Post Office Act** 1953) provided for trial of offences by indictment before a jury, it may seem wrong that the courts, applying a civil standard of proof, should in effect convict a subject without the prescribed trial. What would happen if, after punishment for contempt, the same man were to be prosecuted in a criminal court? That Lord Eldon, L.C., was much oppressed by these difficulties is shown by the discussions in **Attorney General v. Cleaver** (1811), 18 Ves. Jun. 210.

"These and other examples which can be given show that this jurisdiction - though proved useful on occasions - is one of great delicacy and is one to be used with caution. Further, to apply to the court for an injunction at all against the threat of a criminal offence, may involve a decision of policy with which conflicting considerations may enter. Will the law best be served by preventive action? Will the grant of an injunction exacerbate the situation? (Very relevant this in industrial disputes.) Is the injunction likely to be effective or may it be futile?

Will it be better to make it clear that the law will be enforced by prosecution and to appeal to the law-abiding instinct, negotiations, and moderate leadership, rather than provoke people along the road to martyrdom? All these matters - to which Devlin, J., justly drew attention in **Attorney General v. Bastow**, [1957] 1 Q.B. 514, 519, and the exceptional nature of this civil remedy, point the matter as one essentially for the Attorney General's preliminary discretion. Every known case, so far, has been so dealt with: in no case hitherto has it ever been suggested that an individual can act, though relator actions for public nuisance which may also involve a criminal offence, have been known for 200 years."

[31] Viscount Dilhorne further emphasized the dangers of using the civil courts for the enforcement or prevention of criminal offences. He said at p. 490:

"An enactment by Parliament defining and creating a criminal offence amounts to an injunction by Parliament restraining the commission of the acts made criminal. If the injunction in the **Act** is not obeyed - and in these days it frequently is not - the statute normally states the maximum punishment that can be awarded on conviction. If in addition to the enactment, an injunction is granted in the civil courts to restrain persons from doing the acts already made criminal by Parliament, an injunction which does no more than embody the language of the statute, has that any greater potency than the injunction by Parliament contained in the **Act**? An injunction in the terms sought when the application in this case was made to the Attorney General does not appear to me to be one that can with any accuracy of language be regarded as 'enforcing the law.' Repetition is not enforcement. The granting of such an injunction merely imposes a liability to fine or imprisonment for contempt additional to the maximum Parliament has thought fit to prescribe on conviction for the same conduct.

"Great difficulties may arise if 'enforcement' of the criminal law by injunction became a regular practice. A person charged, for instance, with an offence under section 58 or 68 of the **Post Office Act** 1953 has the right of trial by jury. If, before he commits the offence, an injunction is granted restraining him from committing an offence under those sections and he is brought before the civil courts for contempt, his guilt will be decided not by a jury but by a judge or judges. If he is subsequently tried for the criminal offence, might not the finding of guilt by a judge or judges prejudice his trial? This question is not to my mind satisfactorily answered by saying that juries can be told to ignore certain matters. It was suggested that this difficulty might be overcome by adjourning the proceedings for contempt until after the conclusion of the criminal trial. If that was done, the question might arise then as to the propriety of imposing a punishment in the contempt proceedings additional to that imposed on conviction for the same conduct in the criminal court.

. . . . .

"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.

"One category of cases in which the Attorney General has successfully sought an injunction to restrain the commission of criminal acts is where the penalties imposed for the offence have proved wholly inadequate to deter its commission: see **Attorney General v. Sharp**, [1931] 1 Ch. 121; **Attorney General v. Premier Line Ltd.**, [1932] 1 Ch. 303; **Attorney General v. Bastow**, [1957] 1 Q.B. 514, and **Attorney General v. Harris**, [1961] 1 Q.B. 74, where the defendant had been convicted on no less than 143 occasions of breaches of the **Manchester Police Regulation Act 1844**.

"In **Attorney General v. Chaudry**, [1971] 1 W.L.R. 1614, an injunction was granted at the instance of the Attorney General in a realtor action to restrain the defendant from using a building as a hotel without a certificate under the **London Building Acts**. There was a serious fire risk and it was not possible to secure the early hearing of a summons charging the defendant with a criminal offence in so using the building without a certificate. In those circumstances an interlocutory injunction was granted prohibiting the use of the building as a hotel until the necessary certificate was granted.

"I do not wish to suggest that the cases to which I have referred are the only types of cases in which the civil courts can and should come to the aid of the criminal law by granting injunctions at the instance of the Attorney General but they, I think, serve to show that the exercise of that jurisdiction at the instance of the Attorney General is exceptional."

[32] Although the earlier Canadian cases such as **Robinson** and **Adams**, supra, and **Attorney General for Ontario v. Canadian Wholesale Grocers**, supra, suggested that injunctive aid should not be given by the courts to the enforcement of the criminal law, particularly when there is a constitutional division of power the more recent view seems to be similar to that expressed by the House of Lords in **Gouriet v. U.P.W., supra.**

[33] Recently, the Alberta Court of Appeal in **Attorney General of Alberta v. Plantation Indoor Plants Ltd.** (1982), 34 A.R. 348; 133 D.L.R.(3d) 741 decided that an injunction should be issued to prevent a merchant from remaining open on Sunday, contrary to the **Lord's Day Act**, after repeated prosecutions and small fines had been ineffective to abate this breach of the criminal law.

[34] After stating that modern law recognized the right of an attorney general to seek the aid of a civil injunction in the suppression of crime, McClung, J.A., stated:

"It is not to be assumed, on authority or principle, that injunctive relief in these cases will issue upon the bald application of the Attorney General. There must be much more as indicated in **Attorney General v. Lees v. Courtney**, infra, the history of the matter must clearly demonstrate, as it does here, an open and continuous disregard of an imperative public statute and its usual sanctions which is unlikely to be thwarted without the intervention of the court."

[35] Belzil, J.A., added:

"In the exercise of his discretion, it was proper for the learned Chambers Judge to have considered what other remedies short of injunctive relief might be available to the Attorney General. The authorities are clear that civil injunctive relief in aid of criminal law is a discretionary remedy which should be granted only in most exceptional circumstances. But in considering such other remedies, the learned Chambers Judge ought also to have considered whether these were likely to prove effective to compel obedience of the law by the respondent."

[36] This decision is now before the Supreme Court of Canada.

[37] There are these and other decisions in which courts have permitted the enforcement of penal and criminal statutes by means of civil injunction, but the various judges have been careful to preserve the discretion that must remain with the court in doing so. In my opinion, a judge when being asked by an attorney general to grant such an injunction must consider whether it is really necessary in the light of other procedures available to accomplish the same end. He should consider, as well, the dangers of eliminating criminal conduct without the usual safeguards of criminal procedure available to an accused. He should also consider whether the evil complained of should more properly be eliminated by a change in legislation. Only in very exceptional cases where by reason of lack of time or otherwise no other suitable remedy is available should such an injunction be granted to prevent the commission of a crime.

[38] If Mr. Justice MacIntosh had based the exercise of his discretion solely on the ground that the Attorney General was attempting to usurp exclusive federal jurisdiction in the sphere of criminal law or on the ancient equitable doctrine that injunctions should not be used for the enforcement of criminal law, as alleged in the notice of appeal, I would find that his discretion had been improperly exercised. It appears to me from reading his decision as a whole, however, that much more was involved. He started with the assumption that prostitution per se was not against the law and then recognized the difficulties of prosecuting cases of soliciting, because of the **Hutt** decision. He found that the application was in pith and substance an attempt to control prostitution rather than for the purposes of abating a public nuisance. He referred to the activities alleged to constitute the nuisance and showed that they, for the most part, amounted to individual offences against the **Criminal Code**, for the commission of which the persons named as defendants or other persons actually committing them could be prosecuted and penalized. It should be noted that none of the defendants has ever been charged with any of these offences. He referred to other provincial laws that could be utilized to control the situation, and the fact that only a minimal police effort was used by the city of Halifax to assist in controlling the problem.

[39] Mr. Justice MacIntosh also referred to the evidence indicating much of the so called disturbance emanated from sources other than the defendants, and that the region in which the injunction is sought was only to a very limited extent residential. He considered whether an injunction was the appropriate type of remedy and made reference to the warnings about enforcing criminal law in this manner recently referred to in the House of Lords. In conclusion he rejected the application as he did not consider an interim injunction to be a proper procedure under all the circumstances.

[40] In a somewhat similar application by the Attorney General of British Columbia the discretion of the trial judge was exercised in favour of the injunction. In that case, **Attorney General for British Columbia v. Couillard**, McEachern, C.J., in an unreported decision dated July 4, 1984, stated:

> "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."

[41] I understand that this case is now on appeal, and I mention it only to show that two judges in somewhat similar circumstances have exercised their discretion in the one case for and in the other case against the granting of injunctive relief.

[42] All the authorities to which I have referred have repeatedly spoken of the wide latitude that must be given to the exercise of a trial judge's discretion in deciding whether an injunction of this type should be granted. In my opinion the matters considered by Mr. Justice MacIntosh fall generally within that latitude, and I cannot say that his discretion was not exercised in accordance with proper principles. I would therefore dismiss the appeal with costs.

Appeal dismissed.