Westendorp v. The Queen – Can a City Prohibit Street Prostitution? (1983)

In 1983, the Supreme Court of Canada decided a case about the division of powers in Canadian federalism. The Court had to decide whether the City of Calgary had the constitutional authority to make it illegal for a person to be on the street for the purpose of prostitution.

In Canada, the federal government is permitted to create laws on certain subjects, and the provinces are permitted to create laws on other subjects. Because a city can only exercise the powers that are delegated to it by the province, it is also limited to these same provincial subjects. It was important in this case that the federal government has power over the criminal law, and the provinces have power over "property and civil rights." Like other cities, Calgary has a set of by-laws dealing with the use of city streets, and these by-laws prohibit some activities. Calgary created its consolidated by-law, "The Street By-law," in 1974. It addressed issues such as pedestrians to walking in vehicle lanes, and the sale of goods on streets. In 1981, the city added a new section that made it illegal to be on the streets for the purpose of prostitution. Lenore Westendorp was charged under this section. In response, she argued that the law dealt with a criminal matter and therefore was beyond the power of the province. This argument was rejected by the majority of the Alberta Court of Appeal, but it was unanimously accepted by the Supreme Court of Canada. Defending the street prostitution section against Westendorp's constitutional challenge, the Alberta government argued that the section dealt with control of the streets, just like the other sections of Calgary's by-law. The majority of the Alberta Court of Appeal agreed with this argument. They considered the street prostitution section to be a simple attempt to deal with a public nuisance. Rather than seeing it as a way to suppress the market for sexual services, the Court of Appeal saw it as attempting to protect citizens who use the street from the "irritation and embarrassment of being unwilling participants" in the market for sexual services. Westendorp appealed this ruling to the Supreme Court of Canada. The Supreme Court did not accept the government's argument. The Court pointed out that if the purpose of the by-law was just control of nuisances on the streets, then it could have simply dealt with people gathering on the street, regardless of what the people were saying or doing. The street prostitution section, on the other hand, only applied when a person was offering sexual services. It was therefore not part of a regulatory scheme dealing with the enjoyment of property, which would be a proper use of the "property and civil rights" power. Instead, the Court saw the new section as a stand-alone provision that was intended to control and punish prostitution. The Supreme Court explained its reasoning with other examples: If a 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! The Court therefore ruled that the bylaw interfered with the federal government's authority over criminal law. Westendorp made two other arguments. The first was that the city had not been authorized by the province to create the by-law. The second was that the by-law violated Westendorp's *Charter* right to "life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The Supreme Court did not address these arguments: it was unnecessary to consider them once the Court concluded that the by-law was an unconstitutional attempt to create a criminal offence.

Westendorp v. The Queen, 1 S.C.R. 43. *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, ss. 91(27), 92(13). *Supra* note 1 at 53. *Ibid.* at 51-52. *Ibid.* at 53-54. *Canadian Charter of Rights and Freedoms*, being Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11, s. 7. *Supra* note 1 at 46.