Federal Court  Cour fédérale

Date: 20240208

Docket: T-1458-20

Citation: 2024 FC 215

Ottawa, Ontario, February 8, 2024

PRESENT: Associate Chief Justice Gagné

PROPOSED CLASS PROCEEDING

BETWEEN:

NICHOLAS MARCUS THOMPSON, JENNIFER PHILLIPS, MICHELLE HERBERT, KATHY SAMUEL, WAGNA CELIDON, DUANE GUY GUERRA, STUART PHILP, SHALANE ROONEY, DANIEL MALCOLM, ALAIN BABINEAU, BERNADETH BETCHI, CAROL SIP, MONICA AGARD, AND MARCIA BANFIELD SMITH

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

I. Overview

[1] Amnesty International Canadian Section (English Speaking) [**Amnesty Canada**] seeks leave to intervene in the Plaintiffs' motion to certify the class proceeding and in the Defendant's

motion to strike. If granted leave, Amnesty Canada states it will make submissions regarding the Defendant's obligations under international law that are relevant to both motions.

[2] The Defendant is the sole opponent to the proposed intervener's motion, largely on the basis that the proposed submissions are substantive in nature and not relevant to the procedural issues raised in the certification motion and motion to strike, and on the basis that, in any event, these issues are not governed by international law.

II. Facts

[3] Amnesty International and Amnesty Canada are independent organizations financed by their membership and individual donations, although they may receive some government funding for their human rights education activities. Amnesty Canada is a not-for-profit corporation incorporated under the *Canada Not-for-profit Corporations Act*, SC 2009 c 23.

[4] Amnesty International seeks to advance and promote human rights at both international and national levels. They monitor and report on human rights violations and abuses, participate in international and regional human rights meetings, intervene in domestic, international and regional legal proceedings, and prepare briefs for and participate in national legislative processes and hearings.

[5] Canadian courts have recognized Amnesty International's research as credible. Amnesty Canada has appeared before several Canadian courts and tribunals in matters of international law.

[6] Amnesty Canada's interest in this case pertains to its work towards the protection of all human rights in Canada in accordance with international human rights law, and in particular respect to issues of racial justice.

A. *Procedural Background*

[7] The Plaintiffs filed their Statement of Claim in this proposed class action on December 2, 2020. The Plaintiffs served and filed their notice of motion and affidavits in support of certification on September 2, 2021.

[8] The hearing of the certification motion was originally scheduled for September 2022. By way of motion by the Defendants, these dates were adjourned and re-scheduled for May 2023.

[9] In October 2022, the Defendant served and filed its affidavits in response to the Plaintiffs' certification motion. On the same date, the Defendant served and filed its motion to strike on jurisdictional and pleadings grounds.

[10] In November 2022, the Plaintiffs served and filed their responding/reply affidavits in connection with both motions. The Defendant subsequently brought a motion to strike portions of the Plaintiffs' reply evidence, and to further adjourn the certification hearing to permit it to respond to other evidence included in the Plaintiff's reply record. The Court granted this relief, and adjourned the hearing of the motions to October 16-25, 2023.

[11] On August 8, 2023, the parties mutually requested a further adjournment of the hearing of the motions in order to complete cross-examinations. The motions are now to be heard jointly on a date to be set after May 3, 2024.

B. *The Supporting Affidavit and Cross-Examination*

[12] On July 17, 2023, the Secretary General of Amnesty Canada, Ketty Nivyabandi swore an affidavit in support of the proposed intervener's motion. The Defendant cross-examined Ms. Nivyabandi on October 13, 2023.

[13] During this cross-examination, Amnesty Canada's counsel confirmed that, if granted leave to intervene, Amnesty Canada's participation would be limited to making legal arguments regarding the Defendant's obligations under international law.

[14] Amnesty Canada did not seek leave to file any evidence. The Notice of Motion filed by Amnesty Canada does not request leave to file additional materials.

[15] However, in their Memorandum of Fact and Law, Amnesty Canada requests an order allowing them to introduce a record of secondary sources. Ms. Nivyabandi's affidavit and Amnesty Canada's motion materials describe the proposed legal submissions in detail, but they only provide vague details about the "findings", "comments" and "reports" they may file in support of their submissions.

III. Issues and Test for Intervention

[16] A first and main issue is whether the proposed intervener meets the test for intervention. As recently held by Stratas JA in *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 at para 7, the test for intervention requires consideration of three elements: (1) the usefulness of the intervener's participation to what the Court has to decide; (2) a genuine interest on the part of the intervener; and (3) a consideration of the interests of justice.

[17] A second issue, if leave is granted, is whether it is proper to take judicial notice of international law and secondary sources.

IV. Analysis

A. *Test for intervention*

(1) Step one: usefulness

[18] The test with respect to usefulness is whether the proposed intervener will make different and useful submissions and offer insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues (*Le-Vel Brands* at para 19). To determine usefulness, the Court must consider 4 questions:

i) What issues have the parties raised?

ii) What does the proposed intervener intend to submit concerning those issues?

iii) Are the proposed intervener's submissions doomed to fail?

iv) Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?

[19] Amnesty Canada argues their submissions do not duplicate the Plaintiffs' arguments. Amnesty Canada will offer interpretive tools not otherwise available to the Court. Amnesty Canada's expertise in international law will provide helpful assistance to the court with respect to interpreting the Charter issues at play.

[20] Amnesty Canada describes their proposed submissions in detail. In relation to whether the Plaintiffs' Charter claims raise common questions of law or fact, Amnesty Canada will present submissions regarding the right to non-discrimination and the obligation to address intersectional discrimination under international law.

[21] With respect to whether a class proceeding is a preferable procedure and the determination of the motion to strike, Amnesty Canada will provide submissions on the Defendant's obligation under international law to provide an effective remedy when rights are violated. Amnesty Canada is particularly interested in a potential violation of article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol 660, p 195.

[22] The Defendant reminds the Court that it is only once the usefulness of the proposed intervention has been established that the Court will consider the remaining two prongs of the test for intervention (*Le-Vel Brands* at para 19; *Parker v Canada (Attorney General)*, 2022 FC 1244 at paras 16-17). If a proposed intervener cannot persuade the Court that its participation is

useful to the actual debate before the Court, the Court is legally bound to dismiss the motion to intervene (*Le-Vel Brands* at para 15).

[23] The Defendant argues that Amnesty Canada overstates the role that international law plays in construing and enforcing domestic legal obligations. Amnesty Canada does not sufficiently explain how or why the international law principles and materials it refers to have any relevance. The Defendant argues that international law is irrelevant to whether the Plaintiffs' facts disclose a reasonable Charter claim, whether a class proceeding is a preferable procedure, and the jurisdiction issues raised by the Defendant's motion to strike.

[24] The Defendant specifically highlights three reasons why Amnesty Canada's proposed submissions are doomed to fail. First, the Defendant argues the proposed submissions on "commonality" are substantive and do not have any bearing on the procedural questions actually at issue on the motions. Second, there is no legal basis for the assertion that international law informs the interpretation or application of domestic law to issues of jurisdiction and preferable procedure. Third, the Defendant argues that the "importance" of the issues does not determine whether the Plaintiffs' claims and evidence satisfy the certification test.

[25] The following analysis goes through the four questions to be asked during the usefulness stage of the test.

(a) *What issues have the parties raised?*

[26] The central issues on the certification motion and the motion to strike the proposed intervener seeks to address include:

i) Whether the claims of the proposed class members related to section 15(1), 27 and 28 of the Charter disclose a reasonable cause of action;

ii) Whether the claims of the proposed class members related to section 15(1), 27 and 28 of the Charter raise common issues of law or fact in accordance with subrule 334.16(1);

iii) Whether the class action would be the preferable procedure for the just and efficient resolution of the common issues and whether the other means of resolving the claims are less practical or less efficient, in accordance with subrules 334.16(1)(d) and 33.16(2)(d); and,

iv) Whether the Court has jurisdiction to consider the claim, in connection with the motion to strike.

(b) *What does the proposed intervener intend to submit concerning those issues?*

[27] As articulated in their Notice of Motion, if granted leave to intervene, Amnesty Canada will make the following submissions:

i) With respect to the Court's determination of whether the claims related to sections 15, 27 and 28 of the Charter raise common questions of law or fact, Amnesty Canada will provide submissions on Canada's obligations regarding the right to non-discrimination under international law;

ii) With respect to the question of whether a class proceeding is the preferable procedure and the determination of the motion to strike, Amnesty Canada

will provide submissions on Canada's obligation under international law to provide an effective remedy when people are subjected to systemic discrimination;

iii) The gendered considerations this Court must take into account when considering whether this Action is the preferable procedure and the motion to strike, including barriers that Black women may face in accessing other remedies, as it relates to Canada's international obligation to ensure effective remedies;

iv) The exclusion of an important group of class members from seeking redress and availing themselves with remedies for damages suffered resulting from discrimination. Specifically, the existing grievance mechanisms would not capture and protect class members who have not been hired by the Federal government because of their race. Such exclusions could result in violations of article 6 of the United Nations General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol 660, p 195 ("ICERD");

v) Interpretation of the questions before the court in accordance with Canada's international legal obligations regarding the rights to non-discrimination and the right to an effective remedy, as they specifically relate to anti-Black racism; and,

vi) Judicial remedies and class actions in particular as the most effective means of redress in the context of systemic anti-Black discrimination.

(c) *Are the proposed intervener's submissions doomed to fail?*

[28] The Defendant has identified several weaknesses in Amnesty Canada's proposed submissions. However, "doomed to fail" is a high bar. As Stratas JA wrote in *Canada (Attorney General) v Kattenburg*, 2020 FCA 164 at para 9, "the Court should not venture too deeply into

the merits of issues". Submissions that are doomed to fail include submissions that are indisputably wrong in law or irrelevant to the live issues before the Court.

[29] While the Defendant has highlighted the weaknesses of Amnesty Canada's arguments, they have not demonstrated that they are indisputably wrong in law or completely irrelevant to the live issues before the Court. The Defendant highlights that there is well-developed domestic jurisprudence pertaining to Charter provisions and the certification criteria, such that there is no need to refer to international law. The existence of relevant domestic jurisprudence does not lead to the conclusion that international law is irrelevant.

(d) *Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?*

[30] Amnesty Canada proposes to submit Canada's international legal obligations for the Court to take into account when determining the issues on the motions. The certification test requires an analysis of whether the Charter claims are viable. International legal obligations are interpretive tools when analyzing Charter rights and Amnesty Canada has relevant expertise to assist with these interpretations.

[31] The certification test also requires the Court to assess whether the class members raise common issues of law. Amnesty Canada proposes to submit international legal questions that are distinctive from the Plaintiffs' submissions.

[32] Amnesty Canada argues that if this action is struck on procedural grounds, there is a risk that the Plaintiff class will be deprived of remedies. Amnesty Canada seeks to submit international legal norms that affect class members who were never hired by the federal government because of their race and therefore do not have access to statutory grievance procedures.

[33] While Amnesty Canada's proposed submissions may not be determinative of the issues, there is enough relevance that international legal obligations may assist the Court in its determination of these issues.

[34] Amnesty Canada's submissions ought not to duplicate the Plaintiffs' submissions. The proposed intervener's submissions on "judicial remedies and class actions in particular as the most effective means of redress in the context of systemic anti-Black discrimination" may overlap with the Plaintiffs' submissions. However, these submissions may be distinctive and useful if they are truly limited to whether Canada has an obligation under international law to provide an effective remedy for the alleged discrimination, which could inform this Court's analysis of "preferable procedure".

[35] I therefore conclude that Amnesty Canada has demonstrated that its participation in the motions will be useful to what the Court has to decide.

(2) Step two: genuine interest

[36] Amnesty Canada argues they have a genuine interest in the matters before this Court, which include human rights. Amnesty Canada cites various organizational objectives to support this, including core international principals relating to the human rights of Black people in Canada, which is a key priority in Amnesty International Canada's 2022-2030 Strategic Plan.

[37] Amnesty Canada also argues they have the necessary skills and resources required of an intervener. They describe the way in which they perform research and cite many cases in which Canadian courts have recognized the credibility of their research.

[38] In asserting a genuine interest, there must be a link between the "issue to be decided and the mandate and objectives of the party seeking to intervene" (*Gordillo v Canada (Attorney General)*, 2020 FCA 198 at para 12. This link may be established through the expertise and experience of a proposed intervener, including a historical record of engagement in different facets of the legal issues before the Court (*Gordillo*, at paras 12-13).

[39] The Defendant argues the issues to be decided are limited to procedural questions concerning where and how the class members' claims might be adjudicated. There is no reason why Amnesty Canada would have any interest in these matters.

[40] The Defendant states that the genuineness of a proposed intervener's interest may be informed by the timeliness of its motion for leave. Those who have a valuable perspective and

who are “[k]een for their important viewpoint to be heard” act quickly and “jump off the starting blocks when they hear the starter’s pistol” (*Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13 at para 21.

[41] First, I respectfully believe that the Defendant confuses the lack of timeliness of Amnesty Canada’s motion with a lack of genuine interest. Case law rather places timeliness of action under the consideration of the interests of justice prong of the test (*Canadian Council for Refugees* at para 19; *Le-Vel Brands* at para 26).

[42] In *Le-Vel Brands* at para 25, Justice Stratas found the proposed interveners had a genuine interest because “it is obvious that they are capable of offering articulate, well-informed submissions”. Amnesty Canada’s expertise in international law and human rights is undisputed, and they have intervened in many cases before Canadian courts. Amnesty Canada is clearly capable of offering articulate, well-informed submissions and considering its very mission in protecting human rights and advocating against any form of discrimination, it has a genuine interest in this litigation.

(3) Step three: consideration of the interests of justice

[43] The proposed intervener highlights that this prong of the test requires the intervener to show the intervention is consistent with Rule 3 of the *Federal Courts Rules*, SOR/98-106. Considerations in this analysis include whether the intervention will disrupt the proceedings, or whether the matter is of such public importance and complexity that the court needs to be

exposed to perspectives beyond those offered by the particular parties before the court (*Right to Life Association of Toronto and Area et al. v Canada*, 2022 FCA 67 at para 10).

[44] Amnesty Canada argues their intervention will not disrupt the proceedings. Amnesty Canada requests 30 minutes to make arguments and will not duplicate arguments or materials otherwise before the Court. They also highlight they are the only proposed intervener, offering a valuable perspective not otherwise available to this Court.

[45] A key consideration at this stage is whether the intervention is consistent with the imperative in Rule 3 that the proceeding be conducted "so as to secure the just, most expeditious and least expensive outcome" (*Canadian Council for Refugees*, at para 9).

[46] Considering the intervener's timeliness in bringing the motion, I am mindful that the proposed class action began in 2020, the certification motion was first filed in 2021, and the proposed interveners did not serve and file this motion until July of 2023.

[47] However, the Defendant's motion to strike was not brought until October of 2022. One key argument raised by Amnesty Canada is that the issues in the class action are so important and wide-ranging that they should not be dismissed on a procedural motion. It is likely that Amnesty Canada was not motivated to bring the motion to intervene until after the Defendant filed its motion to strike.

[48] Regardless, Amnesty Canada did not bring their motion until approximately 9 months after the filing of the motion to strike. While this delay is unexplained, it did not cause the adjournment of the October 2023 hearing dates. Rather, the delay was a result of the parties requiring additional time to complete cross-examinations.

[49] Allowing the intervention will not delay these proceedings any further. The proposed intervener is requesting 30 minutes of time for oral arguments and has agreed to abide by any filing deadlines set out by this Court.

[50] The Defendant points out that responding to Amnesty Canada's submissions will incur additional costs. These costs would be minimal, and the Defendant cannot say that on the one hand, the proposed submissions will rack up additional costs and, on the other hand, that the proposed submissions are irrelevant and not useful.

B. *Judicial notice of international law and admissibility of secondary sources*

[51] Amnesty Canada proposes to rely on treaties, customary international law and international instruments. These treaties are listed in Schedule "A" of their Memorandum of Fact and Law. Amnesty Canada states these materials have received judicial notice.

[52] Amnesty Canada also proposes to rely on "findings", "comments" and "reports" from various international institutions and committees. In their reply memorandum, Amnesty Canada simply states the "findings", "comments" and "reports" that Amnesty intends to rely upon have

received judicial notice and are sources of international law, without citing any authority or specifically identifying which secondary sources they intend to refer to.

[53] The Defendant agrees with the intervener that authoritative sources of international law are the proper subject of judicial notice, citing *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at paras 96-98.

[54] The Defendant argues that Amnesty Canada relies on materials that far exceed the bounds of authoritative international law. The Defendant categorizes these "findings", "decisions", "comments" and "reports" issued by various international committees, institutions, and panels of experts as factual findings which constitute matters of social science that generally do not fall within the categories of permissible judicial notice (*Ishaq v Canada (Citizenship and Immigration)*, 2015 FCA 151 at para 21.

[55] I agree with the parties that customary international law is the proper subject of judicial notice (*Nevsun*, 2020 SCC 5 at paras 96-98). However, customary international law is different from treaty law, both of which the proposed intervener proposes to rely on. The Federal Court of Appeal recently held that courts ought to take judicial notice of customary international law and of treaties that have been ratified and implemented in Canadian law: *International Air Transport Association v Canadian Transportation Agency*, 2022 FCA 211 at para 64. This decision is currently under appeal, the Supreme Court of Canada having granted leave on August 17, 2023.

[56] Central to the Federal Court of Appeal's reasoning that both customary international law and treaties are the proper subject of judicial notice is that both are incorporated into Canadian law and judges are expected to treat them as law, not as fact (*International Air* at para 64). It follows that Amnesty Canada ought to strictly limit secondary materials filed to authoritative sources of international law, rather than any factual findings or evidence.

[57] The international law instruments listed in Schedule "A" of Amnesty Canada's motion record are limited to international law treaties and conventions; they do not include any of the "findings", "decisions", "comments" and "reports" issued by various international committees, institutions, and panels of experts referenced in Nivyabandi's Affidavit.

V. Conclusion

[58] In *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, the Supreme Court of Canada held there is a "presumption that legislation is presumed to operate in conformity with Canada's international obligations and the values and principles of customary and conventional international law" (at para 72). Amnesty Canada's proposed submissions may be useful to the court in interpreting the certification test in a way that complies with Canada's international legal obligations.

[59] Permitting additional secondary materials which include factual findings would not be in the interests of justice, as the Defendants would request time to respond to this evidence which would further delay the proceedings. Amnesty Canada has not sufficiently described this

additional evidence nor shown how it is relevant to their proposed legal submissions and arguments pertaining to the Defendant's international legal obligations.

[60] For these reasons, Amnesty Canada is granted leave to intervene in these proceedings. It is permitted to file a twenty page factum, but it is not permitted to file additional evidence, nor to rely on any "findings", "decisions", "comments" and "reports" issued by various international committees, institutions, and panels of experts.

ORDER in T-1458-20

THIS COURT ORDERS that:

1. The motion for leave to intervene by Amnesty International Canadian Section (English Speaking) [Amnesty Canada] is granted;
2. Amnesty Canada shall be served with any documents filed by a party, either in hard copy or electronically at the discretion of the party;
3. Amnesty Canada is permitted to file a factum not to exceed 20 pages on or before April 12, 2024;
4. Amnesty Canada is permitted to file treaties, customary international law and international instruments that are authoritative sources of international law;
5. Amnesty Canada is not permitted to supplement the record with additional evidence;
6. The Defendant is permitted to file a factum not to exceed 20 pages in length responding to the intervener's submissions on or before April 26, 2024;
7. Amnesty Canada is permitted to present oral submissions at the hearing of the certification motion and motion to strike not exceeding 30 minutes;
8. No costs are granted on this motion.

"Jocelyne Gagné"

Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1458-20
STYLE OF CAUSE:	NICHOLAS MARCUS THOMPSON, JENNIFER PHILLIPS, MICHELLE HERBERT, KATHY SAMUEL, WAGNA CELIDON, DUANE GUY GUERRA, STUART PHILP, SHALANE ROONEY, DANIEL MALCOLM, ALAIN BABINEAU, BERNADETH BETCHI, CAROL SIP, MONICA AGARD, AND MARCIA BANFIELD SMITH v HIS MAJESTY THE KING

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 109 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	GAGNÉ A.C.J.
DATED:	FEBRUARY 8, 2024

WRITTEN SUBMISSIONS:

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