Date: 20090212

Docket: T-1621-08

Citation: 2009 FC 156

Ottawa, Ontario, February 12, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

SAPUTO INC.
KRAFT CANADA INC.
PARMALAT CANADA INC.

Applicants

and

THE ATTORNEY GENERAL
OF CANADA

Respondent

and

ST. ALBERT CHEESE COOPERATIVE INC. AND
INTERNATIONAL CHEESE COMPANY LTD.

Interveners

REASONS FOR ORDER

[1] By application filed 20 October 2008, Saputo, Kraft and Parmalat, large cheese producers all, challenged the validity of the *Regulations Amending the Food and Drug Regulations and the Dairy Products Regulations* S.O.R./2007-302 scheduled to come into force on 14 December 2008.

[2] St-Albert Cheese Cooperative Inc. and International Cheese Company Ltd. sought to intervene. Although they side with the Attorney General, they represented that they had a somewhat different perspective to offer. By order issued 5 January 2009, Prothonotary Tabib granted them intervener status, limited to the filing of certain affidavits. They were denied the right to file a record or to make written or oral submissions as to the merits of the application.

[3] St-Albert and International Cheese have appealed that decision. I dismissed their appeal from the Bench earlier today, adding that I would issue written reasons.

[4] The thrust of the new Regulations is to regulate the make-up of certain cheeses. These Regulations will have a considerable adverse effect on the applicants. They submit, among many other things, that some of the requirements of the Regulations are impossible in fact to fulfil.

[5] The *Regulatory Impact Analysis Statement* indicates that these Regulations are a compromise between the interest of large producers who may tend to use powder in their cheese products and other producers who do not. International Cheese uses no powder, while only 5% of St-Albert's business would be affected. The perspective they offer to the Court includes the practical point of view that there is no reason why the Regulations could not be observed.

[6] When the motion to intervene was heard on 18 December 2008, Chief Justice Lutfy had already appointed Prothonotary Tabib as Case Manager and dates for the hearing on the merits, 31st March and 1st April 2009, were already set notwithstanding that records had not been filed.

[7] In her speaking order (9 pages), Prothonotary Tabib concluded that: 1) the proposed interveners were not "directly affected" as that factor is generally understood for the purposes of motions for leave to intervene; 2) all that the interveners could bring to the application, that might not otherwise be made available, is the evidence of Réjean Ouimet, Yvan Wathier and Dominique Salvadore. She was of the view that that evidence was, for the most part, relevant and would be useful to the Court in determining the issues on the merits; and 3) while it was possible that, given time and if it did not already have equivalent evidence, the Attorney General could arrive at some understanding with St-Albert and International Cheese to file their proposed evidence as its own, "Time is one commodity that the parties can ill-afford to waste." Indeed, this is not far from Rule 313 which permits the Court to augment the records on the application with other material.

[8] The standard of review in an appeal of a discretionary order of a Prothonotary has been well settled. If the order was vital to the case, the judge on appeal must exercise discretion *de novo*. That is not the situation here. Therefore, the order should only be set aside and reviewed *de novo* on appeal if clearly wrong in the sense that the exercise of discretion was based upon a wrong principle or upon a misapprehension of the facts (*Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459).

[9] St-Albert and International Cheese argue that the very purpose of intervention is to permit the intervener to address the Court. Certainly, at higher levels there is not even a question of allowing a proposed intervener to file evidence. It is unprecedented to grant intervener status for the

purposes of filing evidence and then denying the interveners the right to address the Court on the merits of the case.

[10] Prothonotary Tabib recognized that the interveners did have a perspective somewhat different from the Attorney General, but that that perspective derived from what the affiants had to say, not from legal argument. This different perspective may be a relevant factor. I suggested that if I had heard this matter in first instance, I might well have granted the interveners the right to a greater participation in the proceedings (*Canadian Generic Pharmaceutical Assn. v. Canada (Governor in Council)*, 2007 FC 154, aff'd 2007 FCA 375, 371 N.R. 46). However, before I could so do, I would have to be satisfied that the order was clearly wrong as per the *Merck* decision. In my opinion it is not clearly wrong. Rule 109 of the *Federal Courts Rules* gives the Court discretion to grant leave to any person to intervene and to give directions as to the role of the intervener.

[11] Although in most cases it logically follows that an intervener should be able to address the Court on the merits of the matter, i.e. the validity of the impugned Regulations, Prothonotary Tabib was satisfied that the Attorney General did not need any help.

[12] The Attorney General supports the appeal, pointing out that its own evidence was shaped to a considerable extent by the fact that the affidavit evidence of the interveners, who have now been cross-examined, is currently in the record. On the other hand, the Attorney General does not intend to rely upon, and may even dislike, some of that evidence, so that there will be no one to assist the

Court in making representations as to the legal significance of parts of the evidence in the record. Obviously the Prothonotary did not consider a legal gloss on this evidence to be necessary.

[13] Although unusual, given the timeline Prothonotary Tabib had before her, I do not consider that she misdirected herself in general or with respect to Rule 109 in particular. It does not automatically follow that the right of audience is inherent in an order granting intervention. To so order would be a victory of form over substance. Although spoken in a different context, I think the following words of Lord Denning and Lord Atkin are a source of comfort. In *Letang v. Cooper*, [1964] 2 All E.R. 929 at page 932 Lord Denning said:

> I must decline, therefore, to go back to the old forms of action in order to construe this statute. I know that in the last century MAITLAND said "the forms of action we have buried but they still rule us from their graves." But we have in this Century shaken off their trammels. These forms of action have served their day. They did at one time form a guide to substantive rights; but they do so no longer. Lord Atkin told us what to do about them:
>
> > "When these ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them undeterred"
>
> see *United Australia, Ltd.* v. *Barclays Bank, Ltd.* [1940] 4 All E.R. 20 at p. 37.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lev Alexeev	FOR THE APPLICANT SAPUTO INC.
Timothy M. Lowman	FOR THE APPLICANTS KRAFT CANADA INC. AND PARMALAT CANADA INC.
Alexander Gay	FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA
David K. Wilson	FOR THE INTERVENERS ST. ALBERT CHEESE COOPERATIVE INC. AND INTERNATIONAL CHEESE COMPANY LTD.

SOLICITORS OF RECORD:

Stikeman Elliott LLP Barristers & Solicitors Montréal, Québec	FOR THE APPLICANT SAPUTO INC.
Sim, Lowman, Ashton & McKay LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANTS KRAFT CANADA INC. AND PARMALAT CANADA INC.
Gowling Lafleur Henderson LLP Barristers & Solicitors Ottawa, Ontario	FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA
Fasken Martineau LLP Barristers & Solicitors Ottawa, Ontario	FOR THE INTERVENERS ST. ALBERT CHEESE COOPERATIVE INC. AND INTERNATIONAL CHEESE COMPANY