Federal Court of Appeal | Cour d'appel fédérale

Date: 20210127

Docket: A-204-20

Citation: 2021 FCA 13

Present: **STRATAS J.A.**

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellants

and

THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE CANADIAN COUNCIL OF CHURCHES, ABC, DE [BY HER LITIGATION GUARDIAN ABC], AND FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI, REDA YASSIN AL NAHASS and NEDIRA JEMAL MUSTEFA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 27, 2021.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] On the eve of the hearing of this appeal, thirteen parties have brought six sets of motions to intervene:

- British Columbia Civil Liberties Association;

- Canadian Lawyers for International Human Rights and the Canadian Centre for Victims of Torture;

- David Asper Centre for Constitutional Rights, Women's Legal Education and Action Fund Inc. and West Coast Legal Education and Action Fund;

- HIV & AIDS Legal Clinic Ontario, HIV Legal Network, the Committee for Accessible AIDS Treatment and Health Justice Program (together, the Health Coalition);

- National Council of Canadian Muslims; and

- Rainbow Refugee Society and Rainbow Railroad.

For the reasons that follow, I dismiss the motions.

A. The test for intervention

[2] Rule 109 of the *Federal Courts Rules*, S.O.R./98-106 governs interventions in the Federal Court system. Two cases offered a test to determine intervention motions under Rule 109: *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 90, 103

N.R. 391 and *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, [2015] 2 F.C.R. 253.

[3] This Court discussed the interaction of these two cases and the test in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3. It observed that *Pictou Landing* and *Rothmans, Benson & Hedges* express the test for intervention differently. But, in its view, they are not different in substance.

[4] That finding binds the Court. However, it has been difficult for some parties to implement because the phrasing of the test is different in each. So how should parties express the test?

[5] In responding to the intervention motions in this case, the appellants have attempted to come up with the right wording. They distill the combination of the wording of Rule 109, *Pictou Landing* and *Rothmans, Benson & Hedges* to three requirements. They have done quite well. All that is missing is the concept in Rule 109(2)(*b*) of the usefulness of the proposed intervention. It must be remembered that the legislative provision here, Rule 109, governs and any judge-made test in this area is just an explanation of the meaning of that rule: *Canada (Attorney General) v. Utah*, 2020 FCA 224 at paras. 26-28. Further, the test needs to incorporate this Court's holding that usefulness under Rule 109 resolves itself into four questions: *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164.

[6] Thus, the current test for intervention under Rule 109 is as follows:

I. The proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues. To determine usefulness, four questions need to be asked:

(a) What issues have the parties raised?

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

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

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

II. The proposed intervener must have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court;

III. It is in the interests of justice that intervention be permitted.

[7] According to *Sport Maska*, this test must be applied in a "flexible" way. I take this to mean that the relative weight to be accorded to these requirements and the rigor with which they are to be applied can vary from case to case. *Sport Maska*'s mention of "flexibility" is not a licence for an anything-goes approach. A judge acting judicially is constrained by the legislative text of Rule 109 and the elements of the tests in *Pictou Landing* and *Rothmans, Benson & Hedges*, as combined in *Sport Maska*.

[8] *Sport Maska* does not say or even imply that a judge can rely on solely a subjective view of what is "in the interests of justice"—something that varies from judge to judge. Consistent with the rule of law, intervention motions must be determined by applying a reasonably stable, uniform legal standard, logically and rationally. Further, it must be remembered that many interveners are dedicated to advance causes—many political and some controversial. A judge that applies subjective views rather than law can create an apprehension of sympathy for the intervener's cause or a preference for a result in the case, undermining the appearance of impartiality essential to the maintenance of public confidence in the judiciary.

[9] Far from being a subjective, impressionistic concept, "the interests of justice" have been tied down in the case law by interpreting Rule 109 and its text, context and purpose. In doing this, the Court has developed a number of considerations that shed light on the meaning of "the interests of justice":

- Is the intervention consistent with the imperatives in Rule 3? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?

- Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?

- Has the proposed intervener been involved in earlier proceedings in the matter? For example, if the Federal Court acceptably rules that a particular party should be admitted as an intervener, that ruling will be persuasive in this Court.

- Will the addition of multiple interveners create the reality or an appearance of an "inequality of arms" or imbalance on one side?

The list of considerations is not closed.

[10] In substance, this test or close variants of it have been applied for some time now. Experience has shown that it, like the Rule it interprets, is balanced: although the test inquires into many things, some meet it, indeed sometimes quite easily.

[11] For example, recently by way of speaking order, I admitted a number of environmental advocacy groups into a case on statutory interpretation. Their proposed intervention was focused, respectful of the Court's schedule, relevant to the statutory interpretation issues already before the Court, pursued the proper way to interpret statutory provisions, and added a different, useful dimension to the Court's statutory interpretation task.

B. Applying the test for intervention

[12] None of the six intervention motions before the Court meet the test. A number of considerations drawn from the test, alone or in combination, lead the Court to dismiss them.

(1) Equality of arms and fairness

[13] This is one recognized consideration under the rubric of "the interests of justice".

[14] The six proposed interveners' submissions, if allowed, will support the respondents, three of which are powerful and experienced public interest litigants. Admitting all six into this appeal would create an imbalance: seven separately represented groups on one side and only one on the other. This cannot be countenanced: in deciding these intervention motions, the Court has to ensure that the appeal is fair and is seen to be fair.

[15] Intensifying the concern about fairness is the fact that the Court decides who intervenes. If the Court allows piles of interveners on one side of the debate, it creates the appearance that it wants a gang-up against one side: *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108 at para. 11. And the concern is beyond just appearance. If "one side…[is] so numerous or dominant that its voices drown out the other side and prevent it from expressing itself adequately", fairness is called into question: *Gitxaala Nation v. Canada*, 2015 FCA 73 at para. 23.

[16] Thus, “equality of arms” before the Court matters when considering the interests of justice requirement: *Gitxaala Nation* at paras. 21-24; *Atlas Tube Canada ULC v. Canada (National Revenue)*, 2019 FCA 120, 2019 D.T.C. 5062 at para. 12; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373.

[17] This Court put it this way in *Zaric v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 36 at para. 12:

> For example, in *Gitxaala Nation v. Canada*, 2015 FCA 73 at paragraphs 21-24, under the rubric of fairness (or what is “just” within the meaning of Rule 3), this Court paid attention to the principle of “equality of arms”. It noted that the appearance of fairness can be harmed by allowing too many interveners on one side of the case. A court that allows several interveners supporting one side of the case—especially those that have partisan leanings and advocate political positions—with none or very few on the other side, gives the appearance of a court-sanctioned gang-up against one side, an appearance that can be enhanced by the ultimate result and reasoning in the case. This is especially harmful in public law cases that should be decided on the basis of doctrine, not subjective impressions, aspirations, personal preconceptions, ideological visions, or freestanding policy opinions: *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 at paragraphs 25-26.

[18] In this case, even if all six proposed interveners meet the test for intervention, the Court would have to pick and choose among the six and only allow a couple at most. Were it necessary to do so, it would base this on who best meets the test for intervention and, overall, who is most likely to assist the Court in its determination of the appeal. Another option might have been to require the proposed interveners to combine into a small number of groups and collaborate: *Teksavvy* at para. 18.

(2) Timeliness

[19] This is another recognized consideration under the rubric of "the interests of justice". The appellants raised it.

[20] All of the intervention motions were filed between December 3, 2020 and December 18, 2020. No one sought to expedite them. The last one was perfected January 12, 2020. The Registry has worked at a breakneck pace to prepare them for the Court's consideration. Just now, they have come before the Court. The hearing of the appeal has been set for February 23-24, 2021 and it will not be adjourned, especially since this appeal has been expedited and the Federal Court's judgment has been stayed: *UHA Research Society v. Canada (Attorney General)*, 2014 FCA 134. Between now and then, any interveners admitted into this appeal would have to file their memoranda of fact and law, the appellants would need to file a response, and the Court would be severely challenged to complete its already daunting preparations.

[21] Late interventions can disrupt the orderly progress of a matter: *ViiV Healthcare ULC v. Teva Canada Limited*, 2015 FCA 33, 474 N.R. 199 at para. 11. They can also cause prejudice: *Pictou Landing* at paras. 10, 32. As a result, intervention motions should be brought early: *Zaric* at para. 23; *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167 at paras. 27-29; *Ignace v. Canada (Attorney General)*, 2019 FCA 266 at para. 8. Bringing a motion early also shows that the proposed intervener monitors the area closely, has a keen interest in the area and is dedicated to it. In *Canadian Doctors*, the Court put it this way (at para. 28):

> [T]hose who have a valuable perspective to offer to an appeal court jump off the starting blocks when they hear the starter's pistol. Keen for their important viewpoint to be heard, soon after the notice of appeal is filed, they move quickly.

To the same effect, this Court has observed that "[t]hose really concerned about a proceeding, who have much to say about it, and who are concerned that no one else will say it, proceed quickly": *ViiV Healthcare ULC* at para. 11.

[22] Intervention is a privilege bestowed to the skilled and committed who will truly assist the determination of a real-life, concrete proceeding that is up and running. Interveners have no right to disrupt the interests of those with a direct stake in the proceeding who have lived it from the beginning, often at great cost. No intervener is so grand and important that the Court will admit it late into the proceedings, whatever may be the prejudice to others or to itself.

[23] There is no reason why these intervention motions could not have been brought earlier. The issues in this case have swirled about for many years: *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136. Ordinary members of the public—let alone dedicated observers of this area of law—became aware of the proceedings in the Federal Court long ago. The Federal Court's judgment (2020 FC 770, 448 D.L.R. (4th) 132) received enormous publicity, as did the appellants' intention to appeal. Anyone could have obtained the appellants' grounds of appeal in August 2020 and the respondents' grounds of cross-appeal in September 2020, would have noticed the order expediting the appeal in September 2020, and would have known the arguments on the merits of the appeal and the cross-appeal from the earlier submissions before the Federal Court and from the submissions on the stay motion in this Court.

In October 2020, this Court stayed the judgment of the Federal Court partly on the basis that prejudice would be minimized by expediting the appeal: 2020 FCA 181. All issues were known and on the table. Strangers seeking admission to these fast-moving proceedings could have acted quickly—and, given the impending hearing date, had to act quickly.

[24] In these circumstances, it is baffling why the proposed interveners did not move until December 2020, indeed in some cases well into that month. Yet, all of them fail to explain their lateness. In fact, some deny any lateness at all. Others just ignore the issue altogether.

[25] Where an intervention motion is late—and valid reasons sometimes exist—proposed interveners should candidly fess up, explain themselves, emphasize the importance of and critical need for their participation, and propose measures to minimize any prejudice: *Tsleil-Waututh Nation* at paras. 15 and 32. Here, however, owing to the degree of lateness, the Court doubts it would have accepted any explanation.

(3) Usefulness

[26] A proposed intervention must be useful. One critical element of usefulness is the addressing of the real, actual issues in the case, not new issues. Many of these proposed interveners intend to address new issues.

[27] At first instance, the issues in a proceeding are set by the originating document such as a statement of claim or notice of application, as explained by the arguments in the parties'

memoranda of fact and law: *Kattenburg* at para. 9. A proposed intervener, has no standing to amend that originating document, add new issues or reinvent the theory of the case. It is the parties' case, the case has been defined by them, and their case cannot be commandeered by others: *Kattenburg* at para. 34. Still less should it become a reference case on general issues of law not pleaded by the parties.

[28] The issues before an appellate court are found primarily in the notice of appeal, as explained by the arguments in the parties' memoranda of fact and law. A proposed intervener has no standing to amend the notice of appeal and add new issues.

[29] Some guidance as to the issues in play in the appellate court can also be found in the originating document that defined the issues in the first-instance court. After all, the appellate court might have to grant judgment in the action or application that was brought in the first-instance court. And whether a party actually pursued an issue that was pleaded in the first-instance court is also relevant to the assessment whether the issue is in play in the appellate court.

[30] Normally, parties cannot raise new issues in the appellate court: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. The same is true for interveners: *Canadian Doctors* at para. 19; *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686 at para. 17; *Teksavvy Solutions* at para. 11; *Kattenburg* at para. 9. As strangers to a proceeding they

have not brought, they have no right to change it. If they wish, they can seek to bring their own proceeding as a public interest litigant to prosecute the issues they want.

[31] This Court has spoken about proposed interveners who seek to add new issues in this way:

> In this Court, interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.
>
> To allow them to do more is to alter the proceedings that those directly affected—the applicants and the respondents—have cast and litigated under for months, with every potential for procedural and substantive unfairness.

(*Tsleil-Waututh Nation* at paras. 55-56; see also *Reference re subsection 18.3(1) of the Federal Courts Act, R.S.C. 1985, c. F-7*, 2019 FC 261, 437 C.R.R. (2d) 85 at para. 50.)

[32] In this area, the Court must be alert. Earnest and driven by their passion for their cause, some moving to intervene try to add new issues to a proceeding, sometimes deliberately, sometimes not. Thus, in considering a motion to intervene, the Court must gain a "realistic appreciation" of the "essential character" and "real essence" of both the issues in the proceeding and the issues the proposed intervener intends to raise: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50.

[33] In this case, the claim based on section 7 of the Charter in the notice of application in the Federal Court and the notice of appeal in this Court is precise and clear. Before the Court is a strong team of experienced and skilled counsel representing the respondents on the section 7

issues. The Court is satisfied that the respondents have truly covered the field, raising in a high-quality way all the relevant matters, with thorough and admirable reference to this evidentiary record. Were it otherwise or had the interveners moved to intervene before the Court was sure the issues were well-handled by both sides, this would be a factor in favour of allowing the interventions: *Zaric* at para. 18; *Ishaq* at para. 37. Therefore, further section 7 submissions, to the extent they are proper, are neither useful nor necessary to the Court.

[34] Four intervener groups raise section 15 of the Charter: David Asper Centre for Constitutional Rights, Women's Legal Education and Action Fund Inc. and West Coast Legal Education and Action Fund; the Health Coalition; National Council of Canadian Muslims; Rainbow Refugee Society and Rainbow Railroad.

[35] Here, once again, the Court is satisfied that the respondents have truly covered the field with thorough and admirable reference to the evidentiary record. The proposed interveners' submissions on these issues would be duplicative. They do not add insights or added dimensions to the existing issues.

[36] To some extent, the proposed interveners raise new section 7 arguments. For example, the British Columbia Civil Liberties Association submits that the principles of fundamental justice in section 7 must be interpreted in a way that incorporates various non-binding international instruments or incorporates the language of other sections of the *Charter*. These are new issues that were not raised at the Federal Court or in the originating documents before this Court. The submission fails to cite the lead authority on the interpretation of *Charter* provisions

and on the relevance of non-binding international instruments to that issue and, thus, it is not sufficiently useful: *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32.

[37] The section 15 claim made in the Federal Court was based only on discrimination against women and children, not other groups. Some of the proposed interveners raise other grounds of discrimination not previously argued, such as religion, disability and sexual orientation. These are new issues. While one can find some evidence relevant to the treatment of these groups in the record, the issue of discrimination against these groups was not briefed or argued at the Federal Court, has not been argued by any of the parties, and, for practical purposes, would be a new issue in this Court. It is open to these moving parties to seek standing as public interest litigants to bring their own proceeding on these bases.

[38] Some of the proposed interveners, aware of the jurisprudence prohibiting the introduction of new issues, have tried to clothe their section 15 arguments as section 7 arguments, using the concept of intersectionality and phrases such as “viewing the section 7 issues through a section 15 lens”, approaches to Charter interpretation and application not raised by the parties to the case. Here, the essential character and real essence of what they are doing is to introduce section 15 grounds into the case that are new.

[39] David Asper Centre for Constitutional Rights, Women’s Legal Education and Action Fund Inc. and West Coast Legal Education and Action Fund do not address the actual section 15 claim raised in this case, as they admit at paragraph 11 of their reply. They propose to submit that courts of first instance must always decide section 15 matters when they are raised before

them. This goes beyond the respondents' submission that the Federal Court had a discretion to decide the section 15 issue but should have exercised it. Thus, it is new. Also their interest in this issue is solely jurisprudential and thus, on some authorities, is insufficient to justify intervention: *Amnesty International Canada v. Canada (Minister of National Defence*), 2008 FCA 257, 383 N.R. 275 at paras. 6-7; *C.U.P.E. v. Canadian Airlines International Ltd.*, 2000 FCA 233, [2010] 1 F.C.R. 226 at paras. 11-12.

[40] As well, this submission is doomed to fail and cannot be entertained: *Kattenburg* at para. 9. Implicit in it is that issues under section 15 of the Charter stand above all other issues and so, unlike other issues, when raised, the Court must deal with them. The Supreme Court has unanimously rejected this: *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238. Section 15 does not enjoy "superior status in a 'hierarchy' of rights": *Gosselin* at para. 26. As well, this submission runs counter to the well-established proposition that courts have a discretion whether or not to deal with issues unnecessary to the outcome of the case: see, *e.g.*, *Steel v. Canada (Attorney General)*, 2011 FCA 153, [2013] 1 F.C.R. 143 at paras. 65-66 and 68; *Defence Construction Canada v. Ucanu Manufacturing Corp.*, 2017 FCA 133, [2018] 2 F.C.R. 269 at paras. 47-52.

C. Conclusion and disposition

[41] The proposed interveners are high quality organizations. Their causes are important and worthy of attention and consideration. In the right case with the right kind of intervention, they can contribute much.

[42] However, the Court is not persuaded that they can enter this appeal at this late stage and that their participation would be useful to the Court's determination of the real issues genuinely in play.

[43] Intervention is not the only way groups such as these can participate. They are dedicated to their causes and remain free to offer their views and insights and other assistance to counsel for the respondents.

[44] Therefore, I will dismiss the motions.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-204-20
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION *ET AL*. v. THE CANADIAN COUNCIL FOR REFUGEES *ET AL*.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	JANUARY 27, 2021

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