Federal Court of Appeal

Cour d'appel fédérale

Date: 2022-08-18

Dockets: A-238-21 (lead)
A-87-21
A-198-20

Citation: 2022 FCA 146

Present: GLEASON J.A.

BETWEEN:

SUSAN HUME SMITH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 18, 2022.

REASONS FOR ORDER BY: GLEASON J.A.

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REASONS FOR ORDER

GLEASON J.A.

[1] The Canadian Foundation for Children, Youth and the Law, which operates under the name Justice for Children and Youth (JFCY), has brought a motion seeking intervener status in these applications.

[2] JFCY is an independent non-profit organization, established over 40 years ago, to promote the rights and legal interests of children and young people and their recognition as individuals under the law. It receives its core funding to operate a legal aid clinic from Legal Aid, Ontario. JFCY has represented thousands of children and youth in multifaceted complex legal contexts, including claims under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11 (the Charter). It has frequently been granted intervener status, or participated as a public interest litigant or *amicus curiae*, in cases affecting the interests of children and youth, including cases before this Court and the Federal Court (see, *i.e.*, *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 F.C.R. 229; *Poshteh v. Canada (Citizenship and Immigration)*, 2005 FCA 85, [2005] F.C.R. 487; *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, 222 D.L.R. (4th) 265; *Abdi v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 733, 294 A.C.W.S. (3d) 818). JFCY also provides education and training—including professional development training for lawyers and judges—on a wide range of legal issues relevant to children and youth, and its lawyers have made presentations to committees of the Ontario Legislature. It has also developed numerous public legal education publications on a wide variety of legal topics relevant to children and youth.

[3] Based on the uncontested evidence filed by JFCY, it is clear that it has significant expertise and experience regarding the legal and human rights of children and a long history of legal representation and advocacy on behalf of children and young people.

[4] The applications in the present case seek to set aside three decisions rendered by the Appeal Division of the Social Security Tribunal (the AD), dismissing a Charter challenge brought on behalf of the applicant's three children to the provisions in the *Canada Pension Plan* R.S.C., 1985, c. C-8 that limit the recoverability of retroactive benefit payments for disabled contributors' children. While adults may receive unlimited retroactive amounts of disability benefits if they establish that they were incapable of making an application for disability benefits, the retroactive amount of benefits payable to a disabled contributor's children is capped at 11 months (*Canada Pension Plan*, s. 74(2)(a)).

[5] Before the AD, the applicant argued that this distinction violated section 15 of the Charter. She also sought to raise an argument based on section 7 of the Charter, but was precluded from doing so because the argument had not been advanced before the General Division of the Social Security Tribunal (the GD), where the applicant represented herself. JFCY was granted intervener status before the AD.

[6] In her memorandum of fact and law before this Court, the applicant raises the following issues:

1. What is the appropriate standard of review?

2. Was the AD correct when it held that there were errors made by the GD that warranted the AD's intervention? And if so, what is the appropriate remedy?

3. Was the AD unreasonable when it decided to make the decision that the GD ought to have made? And, if so, what is the appropriate remedy?

4. Was the AD unreasonable in dismissing the applicant's request to argue a violation of s. 7 of the Charter?

[7] As part of her second issue, the applicant raises the following three sub-issues: did the AD inappropriately re-weigh evidence that was before the GD; did it exceed its jurisdiction in answering a question of mixed fact and law; and did the AD err in its evaluation of the alleged violation of section 15 of the Charter? On these points, the applicant makes arguments involving the AD's analysis of substantive equality under section 15 of the Charter, its treatment of the evidence concerning the pre-existing disadvantage and disproportionate impact of the 11-month cap on children and children of parents with a disability, the appropriate use of social facts and judicial notice and the appropriate remedy.

[8] JFCY seeks to bring its perspective to the foregoing issues, which it describes as drawn from its "long-standing experience as an advocate for children and participant in public discourse and litigation concerning children's rights". It does not seek to raise new issues, but, rather, to bring this perspective to the foregoing issues raised by the applicant. Subject to review of the parties' memoranda of fact and law to ensure the points it makes are not duplicative, JFCY more specifically proposes to make the following arguments:

> a. Children and young people are recognized as being particularly and inherently vulnerable under Canadian and international law as a result of their relative

immaturity and lack of sophistication, and dependence on adults. These vulnerabilities are exacerbated where they intersect with other grounds of social disadvantage experienced by the young person or by their caregivers, including, *inter alia*, poverty, health status, gender, and disability.

b. Children and young people are entitled to special legal protections that recognize and correspond to their particular vulnerabilities to ensure that they are able to realize their legal entitlements. These exist in a variety of legal contexts and ought to inform the analysis of substantive equality under the *Canada Pension Plan*.

c. Achieving substantive equality for children and young people requires an approach that appropriately accounts for their unique circumstances and inherent and pre-existing disadvantage, rather than a formal comparator group approach. An approach that adequately captures the historical and ongoing disadvantage experienced by children and the specific implications in the context required. Children and children of parents with disabilities face pre-existing disadvantage and are disproportionately impacted by the application of the retroactive cap under the *Canada Pension Plan*.

d. These considerations must be central to the interpretation, application, and adjudication of the rights of children under the *Charter*—specifically sections 15 and 7, which are at issue in the case at bar—and the analysis must be informed by the rights of children under the *United Nations Convention on the Rights of the Child*.

e. It is not only appropriate, but essential, that courts and tribunals take judicial notice of the pre-existing disadvantage of children generally and children of parents with disabilities. Courts and tribunals can properly take notice of social fact evidence that establishes the barriers experienced by vulnerable and equity-seeking groups. Claimants may properly rely on their own evidence and experience, as well as everyday experience, common sense, and social science research, which provides necessary context and has important explanatory value; requiring expert evidence or direct evidence introduces additional barriers to the achievement of substance equality.

f. Courts and tribunals should take a flexible approach to the consideration of new *Charter* arguments raised on appeal, particularly where they are raised on behalf of a vulnerable group such as children and children of parents with disabilities, and where the evidence nonetheless supports the *Charter* argument, despite it not having been specifically raised at first instance. Particularly in social benefits cases, sections 7 and 15 of the *Charter* are closely intertwined and insisting on a formalistic approach may be detrimental to the ability of vulnerable groups, like children, to establish their claims.

> g. The appropriate standard of review with respect to the Appeal Division's *Charter* analysis, and its review of the General Division's findings of fact, is correctness.

[9] This Court has considered the test for determining whether to grant leave to intervene under Rule 109 of the *Federal Courts Rules*, S.O.R./98-106 in numerous cases, including, for example, by full panels of the Court in *Métis National Council and Manitoba Metis Federation Inc. v. Varley*, 2022 FCA 110, 2022 CarswellNat 1943 (WL Can); *Gordillo v. Canada (Attorney General)*, 2022 FCA 23, 466 D.L.R. (4th) 350; *Whapmagoostui First Nation v. McLean*, 2019 FCA 187, 306 A.C.W.S. (3d) 500; and *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3; and by single judges in *Alliance for Equality of Blind Canadians v. Canada (Attorney General)*, 2022 FCA 131, 2022 CarswellNat 2708 (WL Can) [*Alliance for Equality of Blind Canadians*]; *Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)*, 2022 FCA 67, 2022 CarswellNat 1052 (WL Can); *Canada (Environment and Climate Change) v. Ermineskin Cree Nation*, 2022 FCA 36, 2022 A.C.W.S. 286; *Air Passenger Rights v. Canada (Attorney General)*, 2021 FCA 201, 2021 CarswellNat 4867 (WL Can); *Canada (Citizenship and Immigration) v. Camayo*, 2021 FCA 20, 338 A.C.W.S. (3d) 85; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13, 329 A.C.W.S. (3d) 518 [*Canadian Council for Refugees*]; *Gordillo v. Canada (Attorney General)*, 2020 FCA 198, 329 A.C.W.S. (3d) 233; and *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164, [2020] F.C.J. No. 965.

[10] As noted by Rennie, J.A., recently in paragraph 8 of *Alliance for Equality of Blind Canadians*, all the forgoing take as their point of departure the decision of this Court in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, 1989 Can LII

9432 (FCA) [*Rothmans*]. *Rothmans* set out a number of factors relevant to determining a motion for leave to intervene, namely: (a) whether the proposed intervener is directly affected; (b) whether there is a justiciable issue and veritable public interest; (c) whether there is an apparent lack of other reasonable or efficient means to submit the question to the Court; (d) whether the position of the intervener is adequately defended by one of the parties; (e) whether the interests of justice are better served by the intervention of the proposed party; and (f) whether the court can decide the case without the proposed intervention (at para. 92).

[11] The case law cited above establishes that the foregoing criteria are to be applied flexibly, and that not every criterion will be relevant in every case. Some cases cast doubt on the continued relevance of some of the criteria, including, notably, the final one. I need not decide in this case whether this criterion remains relevant as the case law also establishes that, of the remaining criteria, those of greatest importance assess the ability of the proposed intervener to make useful submissions that will further the Court's determination of the issues raised by the parties such that the interests of justice favour granting leave to intervene. Stratas, J.A., recently usefully framed these principles in *Canadian Council for Refugees*, at paragraph 6, as follows:

> … [T]he 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?

[12] Here, the forgoing criteria weigh heavily in favour of granting JFCY's proposed intervention. JFCY will not add to the issues raised by the applicant and that were before the AD, but instead intends to make additional arguments in respect of them, premised on its expertise and experience. The arguments it proposes making are not frivolous. JFCY has a genuine interest in the application, which falls squarely within its mandate and experience. Additionally, the AD granted JFCY leave to intervene; and, in its decision, the AD considered the arguments advanced by JFCY. Both points highlight JFCY's interest in these applications. Most importantly, JFCY's intervention will be useful to the Court. Cases involving section 15 of the Charter, like the present one, raise complex issues. The perspective and expertise of JFCY will be of assistance to the Court in its consideration of these issues; nor will the proposed intervention unduly delay the perfection of this appeal. The interests of justice therefore favour granting the intervention.

[13] I will accordingly grant the motion, without costs, and grant JFCY leave to intervene and file a memorandum of fact and law of no more than 30 pages, discussing the issues outlined at paragraph 8, above. I will leave to the panel hearing the application the issue of how much time, if any, should be allotted to JFCY for oral argument, which will depend on the nature of the arguments made in the memoranda and the amount of time allotted for the hearing. In the Order

accompanying these Reasons, I set out a revised timetable for the perfection of these applications.

[14] The style of cause is amended and should appear on all subsequent documents in this appeal to read as follows:

BETWEEN:

SUSAN HUME SMITH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

JUSTICE FOR CHILDREN AND YOUTH

Intervener

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-238-21 (lead) A-87-21 A-198-20
STYLE OF CAUSE:	SUSAN HUME SMITH v. ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES.

REASONS FOR ORDER BY:	GLEASON J.A.
DATED:	AUGUST 18, 2022

WRITTEN REPRESENTATIONS BY:

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