NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Fraser, 2010 NSCA 106

Date: 20101214
Docket: CAC 330167
Registry: Halifax

Between:

Antoine Fraser

Applicant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Motion Heard:	November 25, 2010, in Chambers
Held:	Motion to intervene granted
Counsel:	Joshua M. Arnold, Q.C. and Craig Garson, Q.C. (not present), for the appellant Mark Scott, for the respondent Michael J. Wood, Q.C. for the proposed intervenor

Decision: (Orally)

[1] On November 25, 2010 I heard two motions in Chambers. The first was by the appellant to amend his Notice of Appeal to expand his allegation of Crown failure to fulfill its disclosure obligation. The Crown consented to the proposed amendment and I granted that motion.

[2] The second motion was by the appellant's former counsel, Lawrence Scaravelli for leave to intervene in the appeal from conviction by Mr. Fraser. Counsel for the Crown and appellant did not oppose the motion. Both had endorsed their consent to a form of order that would grant standing to Mr. Scaravelli to intervene in the proceeding with the right "to file a factum and present oral argument with respect to the fresh evidence application and at the hearing on the merits of the appeal".

[3] Perhaps in recognition of the unusual nature of an order permitting intervention in a criminal appeal, Michael J. Wood, Q.C., counsel for Mr. Scaravelli, acknowledged that the motion must be addressed by the judge in Chambers and he would be prepared to speak to the Motion on November 25, 2010. I did invite submissions. At the conclusion of the hearing, I announced my bottom line decision that the Motion would be granted with reasons to follow with respect to the terms and conditions upon which intervention would be permitted. These are my reasons.

BACKGROUND

[4] The appellant, Antoine Fraser was convicted on December 15, 2009, following a trial by judge and jury, of touching a young person for a sexual purpose while he was in a position of trust or authority vis-à-vis that person, contrary to s. 153 (a) of the *Criminal Code*. He discharged his trial counsel, Lawrence Scaravelli and retained Joshua M. Arnold, Q.C. to represent him at his sentencing hearing scheduled for May12, 2010. The appellant was sentenced to nine months incarceration to be followed by 12 months probation. Correspondence was exchanged between Mr. Arnold and Mr. Scaravelli in which details of the suggested failings of trial counsel were put and responses solicited.

[5] The original Notice of Appeal set out two grounds of appeal: that the appellant did not receive effective assistance from his trial counsel; and the Crown

breached its obligation to make ongoing disclosure. Bail pending appeal was unopposed by the Crown. November 29, 2010 was the original date for the hearing of the appeal, including an intended motion to adduce fresh evidence. Notice was given that the appellant would be represented by both Mr. Arnold and Craig M. Garson, Q.C. and that one day would be insufficient to hear the fresh evidence motion and the appeal. The parties arranged for the case to come to Chambers on September 1, 2010. The dates for hearing of the appeal were then set for March 23 and 24, 2011 with new dates for the filings of the Appeal Book and the materials for the fresh evidence motion. The appellant was to file his estimated eight affidavits with respect the proposed fresh evidence by October 26, 2010 and the respondent to file reply affidavits by November 22, 2010. Mr. Wood advised that he may be seeking leave to intervene in the appeal on behalf of Mr. Scaravelli. Dates were also set for the filing of facta, including any on behalf of Mr. Scaravelli should he pursue and be granted standing as an intervenor.

[6] The appellant has filed a volume of affidavits on October 22, 2010 containing the affidavit of the appellant and seven others. On November 22, 2010 the respondent filed an affidavit from Alonzo Wright, Crown counsel at trial. On November 23, 2010, Mr. Wood filed an affidavit from Mr. Scaravelli responding to the suggested shortcomings of his preparation and conduct of the trial proceedings.

ANALYSIS

[7] I would venture it is trite to say that as a general principle in our adversarial system of justice only the actual parties to the litigation may make written or oral submissions or otherwise participate in legal proceedings before any court or tribunal. Where the proceeding is criminal, there is a heightened concern about the fairness of permitting intervention lest the accused end up, in effect, facing two prosecutors (See *R. v. Finta* (1990), 1 O.R. (3d) 183 (C.A.); *R. v. Neve* (1996), 108 C.C.C. (3d) 126 (Alta.C.A.); *R. v. B.P.*, 2010 ABQB 204).

[8] In Nova Scotia, the power to grant standing as an intervenor is governed by the *Nova Scotia Civil Procedural Rules*. *Civil Procedure Rule* 35 sets out the principles relevant to a motion to intervene in an action or application. *Civil Procedure Rule* 35.10 provides:

> **35.10** (1) A person who is not a party to an action or application and wishes to be joined may move for an order joining the person as an intervenor.

(2) A judge who is satisfied that the intervention will not unduly delay the proceeding, or cause other serious prejudice to a party, may grant the order in one of the following circumstances:

(a) the person has an interest in the subject of the proceeding;

(b) the person may be adversely affected by the outcome of the proceeding;

(c) the person ought to be bound by a finding on the determination of a question of law or fact in the proceedings;

(d) intervention by the person is in the public interest.

(3) Unless a judge orders otherwise, an intervenor must comply with all Rules applicable to a defendant, including the Rules in Part 5 - Disclosure and Discovery.

(4) Unless a judge orders otherwise, an intervenor is entitled to all of the procedural rights of a party.

(5) The judge may make an order restricting an intervenor's procedural duties and rights, and generally, regulating the intervenor's participation in an action or application.

[9] Rule 91is made pursuant to s. 482 of the *Criminal Code* and governs criminal appeals. It adopts by reference the *Civil Procedure Rules* as a whole, and in particular Rule 90 (civil appeals) with any necessary modifications and when not inconsistent with Rule 91. Rule 91 contains no specific reference to intervenors in a criminal appeal. However, Rule 90.19 empowers a judge of the Court of Appeal to permit intervention in an appeal on terms and conditions. It says:

90.19 (1) A person may intervene in an appeal with leave of a judge of the Court of Appeal.

(2) A judge of the Court of Appeal may make an order granting leave to intervene on terms and conditions the judge sets.

(3) A person who wishes to intervene in an appeal may make a motion to a judge of the Court of Appeal for leave to intervene by filing a notice of motion for leave.

(4) The notice of motion for leave to intervene must be filed no more than fifteen days after the day the notice of appeal is filed.

(5) A motion for leave must concisely describe all of the following:

(a) the intervenor;

(b) the intervenor's interest in the appeal;

(c) the intervenor's position to be taken on the appeal;

(d) the submissions to be advanced by the intervenor, their relevancy to the appeal, and the reasons for believing that the submissions will be useful to the Court of Appeal and will be different from those of the parties.

(6) An intervenor's factum must not exceed twenty-five pages, unless ordered otherwise by the Court of Appeal or a judge of the Court of Appeal.

(7) An intervenor is bound by the content of the appeal books and may not add to them, unless a judge of the Court of Appeal directs otherwise.

(8) An intervenor may present oral argument only if permitted by the Court of Appeal or a judge of the Court of Appeal.

[10] Interventions in criminal proceedings in the Court of Appeal have been permitted both before and subsequent to the introduction of the new *Rules*. In *R. v. K.A.R.* (1992), 116 N.S.R. (2d) 418 a complainant in a criminal case sought intervenor status, not on the appeal proper, but on an application by the appellant under s. 683 of the *Criminal Code* to compel production of the complainant's medical records held by her former psychiatrist. Chipman J.A. noted that the reluctance of courts to grant intervention in criminal proceedings arises from a concern with the fairness of the proceeding. This concern dictated an examination of the usefulness of the intervention, the prejudice to the accused and if delay in the proceedings would likely result. In allowing the complainant to intervene, he reasoned:

> [23] In this case, the applicant's interest in the appellant's motion is of a personal and unique character. It relates to her privacy interests. No other person or organization has the same interest in the subject matter of the motion as does she. Fairness and justice dictate that she be at least given the opportunity to be heard by the court before it decides that the contents of her personal file become evidence.
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> [24] The objection that to grant the motion would confront the accused with two prosecutors has little weight here. The applicant does not join the Crown in an attack upon the appellant. She comes to defend what she perceives to be her right of privacy. Depending on what unfolds at the hearing of the motion, her position could differ substantially from that of the Crown - a point which counsel for the Crown readily conceded here. Thus, the intervention is useful and in the public interest because it is the only opportunity the applicant could ever have to assert what she claims to be her right.
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> [25] I see no prejudice to the appellant but if any there be, it would be slight indeed when balanced against the applicant's interests. The appellant's motion will be opposed from one more perspective, but in exercising my discretion, this is outweighed I think by the considerations favouring the applicant. The applicant's presence is with respect to one point in the appeal only, and no undue delay as a result can reasonably be foreseen.

[11] Leave to intervene was considered by Bateman J.A. in *R. v. Murdock* 1996 NSCA 6. The appellants had been convicted of conspiracy to defraud the government of revenue alleged to be due and collectible under the provincial *Tobacco Tax Act and Regulations*. The Union of Nova Scotia Indians sought intervenor status on the appeal to advance additional arguments challenging the constitutional validity of the legislation that purported to impose a liability to impose and collect the tax. The appellant no longer had counsel. Bateman J.A. granted intervenor status to the Union as she was satisfied it would not unduly delay or prolong the hearing of the appeal and the Union had a sufficient interest in the outcome. In sum, the appeal process would be advanced by the intervention. But intervention was limited to grounds already advanced concerning the constitutional validity of the *Tobacco Tax Act*.

[12] A useful summary of the relevant considerations is set out by John Sopinka & Mark A. Gelowitz in *The Conduct of an Appeal*, 2nd ed. (Canada: Butterworths, 2000) at pp. 258-59:

> In considering an application to intervene, appellate courts will consider: (1) whether the intervention will unduly delay the proceedings; (2) possible prejudice to the parties if intervention is granted; (3) whether the intervention will widen the *lis* between the parties; (4) the extent to which the position of the intervenor is already represented and protected by one of the parties; and (5) whether the intervention will transform the court into a political arena. As it is a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the *lis*.
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> As this is the case at trial, consent of the parties to the intervention is not dispositive. The appellate court retains its discretion even in the face of such consent, although consent of the parties tends to diminish concerns about prejudice or undue delay caused by the intervention.

[13] In the present appeal, conduct of trial counsel will be in issue. In *R. v. McCullough* (1995), 24 O.R. (3d) 239, [1995] O.J. No. 1603, leave was granted for trial counsel to intervene where trial counsel's conduct in taking steps to have the judge recuse himself (which led to a personal order of costs against counsel) would be central to the appellant's case. Dubin C.J.O, in Chambers wrote:

> **14** Intervention in a criminal appeal is provided by Rule 23(1) of the Criminal Appeal Rules, which reads:
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> > 23(1) Any person interested in an appeal between other parties may by leave of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario, intervene in the appeal upon such terms and conditions and with such rights and privileges as the court, the Chief Justice or the Associate Chief Justice determines.
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> **15** Notwithstanding the breadth of the Rule, absent a constitutional issue, leave to intervene is seldom granted in criminal appeals. **What is normally required is material which discloses that the proposed intervenor would be able to make a useful contribution beyond that which would be offered by the parties and without causing an injustice to the immediate parties**.
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> **16** In this case, there will be no injustice to the appellant McCullough if leave to intervene were granted, and no unfairness where the liberty of the subject is at stake.

> **17** On the appeal, the conduct of Mr. Bennett and the order made against him by the trial judge will be matters specifically raised, and obviously Mr. Bennett is a person interested in those issues.
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> **18** I would grant him leave to intervene in the appeal on those two issues. [Emphasis added]

[14] In *McCullough* the interests of the appellant and trial counsel were obviously not at odds. Both sought to challenge the propriety of the trial judge failing to recuse himself on the basis of a reasonable apprehension of bias.

[15] However, even where the interests of trial counsel may be opposed to the position sought to be advanced by the appellant, intervention has been granted. In *R. v. West*, 2009 NSCA 63, Saunders J.A., was the case management judge. The appellant, who was self represented at trial and on appeal advanced a claim that the conduct of his former lawyer, who had withdrawn approximately 16 months before trial, was responsible for or contributed to his conviction. The appellant had a motion pending in the appeal to adduce fresh evidence. Some of the materials he had filed included several hundred pages of documentation from Crown disclosure and correspondence, including letters passed between he and his former lawyer. Neither the Crown nor the appellant opposed trial counsel's motion for leave to intervene. Saunders J.A. recognized that intervention should only be granted in exceptional circumstances in criminal matters. A number of features were highlighted by the motions judge. They were:

- trial counsel had a direct interest in the appeal with respect to the ground of appeal alleging incompetence. Concern was raised by both the Crown and by Mr. Wood, for trial counsel, that absent intervention, trial counsel may have to turn over his entire file to the Crown in order to permit a meaningful response by the Crown. Those file materials may well contain materials with respect to trial strategy matters that could prejudice the appellant in his future defence to the charges should there be a new trial.

- there would be no delay if leave to intervene was granted

- trial counsel's involvement may assist the Court in clarifying or streamlining some of the issues.

- trial counsel's participation would not result in the appellant facing two prosecutors as his submissions would be limited to his interactions and communications with the appellant

[16] Saunders J.A. concluded that fairness, justice and the public interest justified trial counsel being granted formal intervenor status with the right to file a factum, present oral argument on the fresh evidence application and appeal on the merits. Details as to the length of his factum, and oral argument, would be up to the panel assigned to hear the case.

[17] Not all of these considerations apply on this motion. No concern has been raised over the impact of waiver of solicitor-client privilege and the potential prejudice to the appellant if the allegations necessitated trial counsel's file being turned over the Crown. On the other hand, Mr. Scaravelli does have an interest arising out of the pointed allegations regarding his conduct, from the inception of his retainer to the conclusion of the jury trial. Although Rule 90.19(4) stipulates that the motion for leave to intervene must be filed within fifteen days after the Notice of Appeal, the delay here has not caused any prejudice to the orderly conduct of the appeal proceedings, and is quite understandable since the details of the appellant's complaint were not known until long past that time period.

[18] The decision to permit intervention is a discretionary one. This requires the Court to consider the relevant factors. There will be no delay occasioned by trial counsel's intervention on the appeal. Filing and hearing dates have been set and counsel for the proposed intervenor assures the Court of compliance with these directions. While I am not convinced that the submissions of the intervenor will much different, if at all, from the respondent, I fully expect that the submissions by Mr. Wood on behalf of Mr. Scaravelli may well be useful to the Court. Yet, I am concerned that the position he will be advancing on behalf Mr. Scaravelli is the same position the Crown will be advancing. This raises the spectre of repetition of argument and potential prejudice to the appellant facing two prosecutors. Concern over prejudice is ameliorated by the fact that the appellant is represented by two senior counsel, who have given their consent to the motion to intervene.

[19] Balancing these factors, I allow the motion to intervene, but on conditions. The intervenor is limited to a factum not to exceed twenty-five pages (Rule 90.19(6)) and to oral argument on the complaint of conduct by Mr. Scaravelli in his

representation of the appellant, but not with respect to any aspect of the merits of the appeal. Mr. Wood, at the time of the motion to intervene, did not have instructions on whether he would be seeking to cross-examine any of the affiants. It will therefore be up to the panel assigned to hear the case to determine if permission will be granted for Mr. Wood to cross-examine should he request to do so.

Beveridge, J.A.