NOVA SCOTIA COURT OF APPEAL
Citation: ***A.B. v. Bragg Communications Inc.***, 2010 NSCA 70

Date: 20100830
Docket: CA 330605
Registry: Halifax

Between:

A.B., by her litigation guardian, C.D.

Appellant

v.

Bragg Communications Incorporated, a body corporate,
The Halifax Herald Limited, a body corporate,
and Global Television

Respondents

Restriction on publication: Pursuant to the decision of Oland, J.A. (2010 NSCA 57)

Judge: The Honourable Justice David P. S. Farrar

Motion Heard: August 12, 2010, in Chambers

Written Decision: August 30, 2010

Held: Motion for Intervenor status dismissed

Counsel: Christopher Robinson, Q.C., for the appellant
Nancy G. Rubin and Jackie Porter, Articled Clerk, for the respondent Halifax Herald Limited
Alan V. Parish, Q.C. for the respondent Global Television
Jonathan Rosenthal and Stanley MacDonald, Q.C. for Beyond Borders

Decision:

[1] This is a motion by Beyond Borders for leave to have standing in this appeal as an intervenor. Beyond Borders is a non political/non religious volunteer organization that advances rights of children to be free from abuse and exploitation without regard to race, religion, gender or sexual orientation.

[2] This appeal arises as a result of a written decision of Nova Scotia Supreme Court Justice Arthur J. LeBlanc (reported as 2010 NSSC 215) dismissing a motion by the appellants to allow them to proceed in the Supreme Court of Nova Scotia by way of initials and a publication ban on material which they allege is defamatory.

[3] The appellant on the appeal raises the following issues:

- Whether the trial judge failed to exercise his *parens patriae* jurisdiction and take into account the distinctive vulnerability of children in dismissing the motion.

- Whether the trial judge erred in failing to consider that the publication of defamatory statements made about the minor applicant was evidence of a serious risk of harm.

[4] At the time of hearing I dismissed Beyond Borders' motion without costs with reasons to follow. Here are my reasons.

DECISION

[5] Nova Scotia **Civil Procedure Rule** 90.19 (formerly **Rule** 62.35) prescribes a procedure to be followed by persons seeking to intervene in appeals. It reads:

> 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 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.

[6] Therefore, the proposed intervenor must **identify itself** , **its interest** in the appeal, the **position** it will take on the appeal, and the **submissions** it will advance. The submissions must be demonstrably **relevant** to the appeal, **useful** to the court, and **different** from those of the parties.

[7] I will address each of these factors after first considering the granting of intervenor status generally.

INTERVENTION - GENERALLY

[8] As noted by the authors, John Sopinka and Mark A. Gelowitz in *The Conduct of an Appeal*, 2nd ed., (Toronto: Butterworths Canada Ltd., 2000) at pp. 255-6:

> A person who seeks leave to intervene in an appellate court is constrained by the same general considerations as is a person who seeks to leave to intervene at trial. As at trial, intervention is discretionary and is based on the legislative criteria governing intervention in that jurisdiction. The proposed intervenor must convince the court that it brings something additional to the Appeal that the parties may not be able to supply. ...

[9] And later at pp. 258-259:

> 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 intervener 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*. (footnotes omitted).

[10] Fichaud, J.A. recently considered a 90.19 motion in **R. v. Chehil**, 2009 NSCA 85, although, in the criminal context, the decision offers helpful guidance, he held:

> [11] ... The critical factor for a proposed intervention is whether the intervenor would bring a submission or perspective on the parties' issues that reasonably may be expected to assist the Court.
>
> . . .
>
> [14] The authorities have described a flexible list of criteria to govern the judge's discretion whether to allow an intervention under what are now *Rules* 90.19(1) and (2): *R. v. Regan* (1999), 174 NSR (2d) 1, at ¶ 29-53, per Cromwell, J.A.; *R. v. Murdock* (1996) 148 NSR 2(d) 183, at ¶ 10, per Bateman, J.A.; *Arrow Construction Products Ltd. v. Nova Scotia (Attorney General)* (1996), 148 NSR (2d) 392, at ¶ 5, per Bateman, J.A. *Logan v. N.S. (Workers Compensation Appeals Tribunal)*, 2006 NSCA 11, ¶ 8, says:
>
> > [8] ... Generally, an intervention should (1) target the parties' existing lis and (2) accommodate the process of the existing appeal while (3) augmenting and not just duplicating the parties'

> submissions or perspectives to assist the court's consideration of the parties' issues...In the circumstances of this application the key factor is whether the proposed intervention would bring a different or broader perspective that may assist the court to consider and determine the parties' issues on the appeal.

[11] I now turn to the factors prescribed by **Rule** 90.19.

(a) The Intervenor's Identity

[12] As is evident from the affidavit of Ms. Rosalind Prober, Beyond Borders is a registered charitable organization incorporated in the Province of Manitoba. It is the Canadian affiliate of ECPAT International (End Child Prostitution Child Pornography and Trafficking of Children for Sexual Purposes)

[13] Its goal is the elimination of all forms of "commercial" sexual exploitation of children. The focus and the mission of Beyond Borders (and ECPAT) is on various initiatives to protect children from prostitution, pornography and trafficking for sexual purposes.

[14] Beyond Borders says it has an understanding of the debates and the trends in regards to the privacy interests of children and young persons involved in various aspects of the legal system. It adds that it will present to the court "a unique perspective of the special privacy interests of children and young persons".

(b) The Intervenor's Interest

[15] An interest in the proceeding may be demonstrated where the outcome would directly affect an intervenor's existing legal or commercial rights.

[16] Here, Beyond Borders does not have a direct interest but seeks to intervene on the basis of a broader "public interest".

[17] The case of **R. v. LePage**, [1994]) O.J. No. 1305 (Q.L.)(Ont. Ct., Gen. Div.) is a good example of such a public interest intervention. In the context of applications brought by defence counsel in a criminal sentencing, the proposed intervenors sought to make submissions limited to constitutional issues. Howden, J. observed:

> 23. It is clear to me that for constitutional issues such as these to receive proper consideration, different perspectives and argument are certainly required. And at the trial level, useful evidentiary contributions beyond what may be available to the existing parties may be most valuable not only for a sound result at trial but, if required, to form the kind of record for appellate review which may contribute to the interests of justice and the social good. ...

[18] Likewise, in the **Reference re Workers' Compensation Act, 1983 (Nfld.)**, [1989] 2 S.C.R. 335, the issue was the constitutionality of certain sections of the **Workers' Compensation Act** which limited certain rights of compensation. The intended intervenor in that **Reference** case was an injured person who had brought a challenge to similar British Columbia provisions and whose action had been stayed pending the outcome of the appeal. Her rights and appeal were directly contingent on the outcome of the Newfoundland **Reference** case.

[19] However, these cases are distinguishable. Unlike **Lepage, supra**, here, we are dealing with civil litigation and not a constitutional issue in a criminal setting which requires different perspectives. **Reference Re WCA, supra**, is also distinguishable in that Beyond Borders has no outstanding actions hinging on the outcome; it has no direct interest. At most, it has an indirect interest in privacy interests of youths, in general, who appear in court. This indirect interest, without more, makes it difficult to justify its intervention on this appeal.

(c) The Intervener's Position to be Taken on Appeal

[20] Beyond Borders states in the affidavit of Ms. Prober that its position will be:

> children and young persons have a special privacy interest that must carefully guarded [sic]
>
> The failure to do so will deter children and young persons from seeking remedies from Courts
>
> the test for an anonymity order needs to be modified such that it is presumptive that such an order be granted even in the absence of evidence of specific prejudice.

(d) Are the submissions relevant, useful to the court, and different from the parties?

[21] Before answering these questions it would be helpful to first consider the test and review the Chambers judge's decision.

[22] The "test for an anonymity order" referenced by Beyond Borders is as set out in **Rule** 85.04 which governs order for confidentiality. The **Rule** states, in part:

> **85.04**(1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with the law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.
>
> (2) An order that provides for any of the following is an example of an order for confidentiality:
>
> (a) sealing a court document or an exhibit in a proceeding;
>
> (b) requiring the prothonotary to block access to a recording of all or part of a proceeding;
>
> (c) banning publication of part or all of the proceeding;
>
> (d) permitting a party, or a person who is referred to in a court document, but is not a party, to be identified by a pseudonym, including in a heading.

[23] Here, the Chambers judge recited the above **Rule** at ¶ 23 of his decision and then the relevant principles as laid down by the Supreme Court of Canada at ¶ 25:

> [25] Although this is a civil proceeding, I am satisfied that the principles laid down by the Supreme Court of Canada in *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835, *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 [sic]. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, Iacobucci, J. set out the analysis for a publication ban as developed by the Court in *Dagenais* and *Mentuck*:
>
> > 45 […] At para. 32 [of *Mentuck*], the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
>
> 46 The Court emphasized that after the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

[24] After reciting the relevant **Rule** and the applicable law, the learned Chambers judge concluded:

> [37] I am not convinced that *B.G.* [*B.G. v. British Columbia*, 2004 BCCA 345] provides an adequate basis upon which to grant a confidentiality order without an evidentiary basis of harm to one of the parties (or, as in the case of *Osif*, to patients and witnesses). I repeat that there is no evidence before the court of the harm that counsel for the applicant says will occur. While counsel suggests that no evidence of potential harm is necessary, I cannot agree. This conclusion does not depend entirely on a lack of evidence respecting future harm. The Facebook profile was published in March and this application was heard in late May, yet there was no evidence offered respecting any effects that the publication had in the interim. I appreciate the contention by the applicant's counsel that if she were proceed with a defamation suit and succeeded, she would be entitled to a presumption of damages that would follow from the finding of defamation. However, it is my view that this is not sufficient to establish the harm, actual or potential, required to grant for this type of order. I, therefore, deny the application for a publication ban and the use of pseudonyms.

[25] It was argued before the Chambers judge that there must be an evidentiary basis for any assertion of irreparable harm to justify a publication ban by reason of the importance of the public interest at stake. A publication ban includes an anonymization order. Reference was made to authorities which provide that as a general rule the names of the parties, the nature of the case, the issues on appeal and the positions of the parties are all part of the public domain. As stated:

> In general terms, the open court principle implies that justice must be done in public. Accordingly, legal proceedings are generally open to the public. The hearing rooms where the parties present their arguments to the court must be open to the public, which must have access to pleadings, evidence and court decisions. Furthermore, as a rule, no one appears in court, whether as a party or as a witness, under a pseudonym. (**Named person v. Vancouver Sun**, 2007 SCC 43 at para. 81.

[26] There was no dispute among counsel before the Court as to the appropriate legal test. Counsel for A.B. stated as follows in her written submissions:

> I have reviewed the brief submitted on behalf of the Halifax Herald. It refers to first principles dealing with the need for open courts to ensure independence, impartiality and public confidence in the justice system. The Applicant is not challenging the propriety of those policies in our society, nor could she. But the law is clear that the open courts principles are not absolute. The real question for Your Lordship is whether the partial restrictions sought by the Applicant are appropriate in this case.

[27] The thrust of the parties' arguments was the evidentiary basis for the assertion of harm to justify a publication ban. The issue before the Chambers judge was not who bore the evidentiary burden but rather whether it had been met. The applicant submitted:

> The evidence of the defamatory publication is the only evidence that Your Lordship needs for purposes of considering this application…
>
> Your Lordship is the person who has to decide if the words in that fake profile are *prima facie* defamatory. If they are, the evidentiary hurdle that my friends are speaking of, that they say I haven't met, is met. It's met by the legal presumption. ...

[28] Finally, the applicant, in Chambers, conceded, consistent with the Supreme Court of Canada jurisprudence, that the burden lay upon her, stating:

> So in summary, as I say, it's the applicant's submission that the burden on her has been met in this circumstance, and we would ask that the order be granted.

[29] The grounds of appeal are two-fold:

(a) The learned trial judge failed to exercise his *parens patriae* jurisdiction and take into account the distinctive vulnerability of children; and

(b) The learned trial judge failed to find that the publication of defamatory statements about the minor Applicant in these circumstances is evidence of a serious risk of harm.

[30] As is evident from the submissions of counsel and the grounds of appeal, there was no argument, nor was it ever contended that anonymization should be presumed and the burden lie upon the media participants to prove the contrary.

CONCLUSION

[31] The Intervenor's intended submissions are simply not relevant to the subject-matter of the appeal. The subject-matter of the appeal is the question of the sufficiency of evidence to warrant intrusion upon the open court principles.

[32] With respect, Beyond Borders has overstated the impact of this appeal. It suggests that:

> The outcome of this appeal will likely determine in what circumstances will an anonymity order be granted to young persons engaged in civil litigation. ...

[33] The circumstances when an anonymity order will be granted have been well-established. Whether an anonymity order was granted in respect of A.B. depended on the sufficiency of evidence before the Chambers judge; whether an anonymity order is granted in respect of any other individual who comes before a Chambers judge will also depend upon the sufficiency of the evidence in that case.

[34] As noted in **TAS Communications Systems Ltd. v. Nfld. Telephone Co. Ltd.**, 1981 CarswellNfld 18 (T.D.) at para.7:

> There are few, if any, actions which do not, to some degree, affect the public interest. A wish to further that interest does not justify an intervention in an action between others.

[35] Beyond Borders acknowledges that the individual's interests will be ably represented by her own counsel, but wishes to appear "for the broader public interest". I fail to see the “broader public interest” that is in issue on the grounds of appeal in this case. The appeal is based on the facts and law as established and presented to the Chambers judge. It is very narrow in scope, and, as set out above, will not affect anyone else seeking a similar order.

[36] Furthermore, in the court below, all counsel focused its arguments on the two-part *Dagenais*/*Mentuck* test and the sufficiency of evidence demonstrating the need for a confidentiality order. Counsel and the Chambers judge were very much attuned to the fact that the Applicant was a minor and of her emotional well-being. As stated in the written submission of counsel for A.B.:

> The Applicant is a minor. Her reputation is an important interest. It has already been harmed by publication of the Fake Profile and the Applicant wishes to avoid further harm to that reputation to the extent possible.

[37] Beyond Borders seeks to change the state of the law. It argues that failing to recognize the "special privacy interests" of children and young persons will deter them from "seeking remedies from Courts". This is an argument made in a vacuum. There was absolutely no evidence before the Chambers judge of any specific or general deterrence beyond the speculation of counsel, nor was any evidence presented on the intervention motion in support of this assertion.

[38] Finally, although the **Rule** requires that an intervenor present useful and "different" submissions, it is inappropriate for an intervenor to widen the *lis* between parties. As noted by Sopinka and Gelowitz, *The Conduct of an Appeal, supra* at p. 264:

> Although the Court requires a different perspective on the part of an intervenor, this does not allow the intervenor to raise new arguments on appeal. While some

> latitude is given to interveners on this issue, intervenors cannot hijack an appeal or reference for their own purposes.

[39] This statement applies to the issues on this appeal. The appellant would not be entitled to raise a new ground on appeal not argued in Chambers - to shift the burden of proof – and the intervenor should not be permitted to do so. Granting leave to intervene to Beyond Borders on the basis sought goes beyond the evidence and arguments advanced by the appellant before the Chambers judge.

[40] In the final analysis, I am not satisfied that Beyond Borders has a sufficient interest in the appeal to warrant being granted intervenor status. Nor would its proposed submissions bring a different or broader perspective that would assist the Court in its considerations. Finally, the position that it intends to take on appeal, widens the *lis* between the parties that was not contemplated by the evidence and arguments before the Chambers judge nor in the grounds of appeal to this Court. The motion is dismissed however, under the circumstances, without costs.

Farrar, J.A.