Federal Court of Appeal  Cour d'appel fédérale

Date: 20141210

Docket: A-218-14

Citation: 2014 FCA 292

Present: STRATAS J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 10, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20141210

Docket: A-218-14

Citation: 2014 FCA 292

Present: **STRATAS J.A.**

Docket:A-218-14

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

STRATAS J.A.

A. Introduction

[1] These reasons concern two motions:

- The Privacy Commissioner of Canada moves to intervene in this application under Rule 109 of the *Federal Courts Rules*, SOR/98-106.

- The applicant moves for dismissal of the Privacy Commissioner's motion to intervene because of his conduct during the cross-examination of the Privacy Commissioner's affiant.

[2] In its November 14, 2014 Order, this Court advised the parties that it would determine the applicant's motion first, and then it would determine the Privacy Commissioner's motion to intervene.

[3] All materials have been filed for the motions. Both are ready to be determined. I have considered the motions in the sequence mandated by the November 14, 2014 Order, though, as will be seen, there reasons shall deal with them in reverse sequence. As will be seen, my reasoning concerning the Privacy Commissioner's motion to intervene affects my determination of the applicant's motion.

[4] For the reasons given below, I allow the Privacy Commissioner's motion to intervene on terms. I dismiss the applicant's motion to dismiss and for other relief.

B. The motion to intervene in this application

(1) The nature of the application and the *Privacy Act* issues in it

[5] In this application, the applicant challenges the decision of the Canadian Transportation Agency not to disclose certain documents to the applicant during the course of a proceeding. In its reasons, the Agency relied in part upon the *Privacy Act*, R.S.C. 1985, c. P-21.

[6] The applicant contests the Agency's refusal to disclose, submitting, among other things, that the *Privacy Act* does not trump the open court principle.

[7] In this motion, the Privacy Commissioner says he will be able to assist the Court in its analysis of the *Privacy Act* and how it applies to the issues in this application. In particular, the Privacy Commissioner says that he can make a valuable contribution in the application by addressing the Court on three issues concerning the *Privacy Act*.

- Is personal information provided to the Agency in the course of adjudicative proceedings "publicly available information" within the meaning of subsection 69(2) of the *Privacy Act* and, therefore, not subject to the limitations on disclosure set out in section 8 of the *Privacy Act*?

- Can the Agency disclose, without consent, personal information provided to it in the course of adjudicative proceedings, in accordance with one or more of the

exceptions to the requirement of consent set out in paragraphs 8(2)(*a*), 8(2)(*b*), or 8(2)(*m*) of the *Privacy Act*?

- In light of the open court principle, are the limitations on disclosure imposed by the *Privacy Act* contrary to subsection 2(*b*) of the Charter and not justified under section 1?

(2) The test for intervention under Rule 109

[8] The Privacy Commissioner submits that in determining its motion for leave to intervene, the Court should follow the test for intervention that was first set out in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90 (C.A.).

[9] As the applicant notes, recently I suggested that this test is outmoded, does not meet the exigencies of modern litigation, and is, in some respects, illogical: *Pictou Landing Band Council v. Canada (Attorney General)*, 2014 FCA 21, 456 N.R. 365 at paragraph 11. In *Pictou*, I reformulated the test to better implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address and to meet modern litigation challenges in the Federal Courts.

[10] In *Pictou*, I held that the test to be applied is as follows (at paragraph 11):

> I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener

status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

II. Does the proposed intervener 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. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, 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?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

(3) Applying the test for intervention

[11] In my view, all of these factors are met in this case.

[12] The Privacy Commissioner has complied with the Rules and this Court is fully empowered on this record to decide this motion.

[13] I am satisfied that the Privacy Commissioner has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court.

[14] I am also satisfied that the Privacy Commissioner will advance different and valuable insights and perspectives that will actually further the Court's determination of the matter.

[15] The Privacy Commissioner can make a valuable contribution to this Court's consideration of the issues set out in paragraph 7, above.

[16] In this case, the need for the Privacy Commissioner's contribution is heightened by the fact at present there is only one party completely free to speak on the *Privacy Act* issues before the Court, namely the applicant.

[17] The only other party in the application, the Agency, is also present. But the Agency is in an awkward position, not entirely free to speak to the matter. In its reasons for decision, the Agency expressed its views on the interpretation and application of the *Privacy Act*. On those things, it is now *functus officio*. In this Court, where its decision is under review, the Agency must be careful not to illegitimately bootstrap its reasons by augmenting the *Privacy Act* analysis: *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 39 Admin. L.R. (3d) 1 at paragraphs 26 and 33. While a decision-maker can potentially appear in a judicial review of its own decision (typically as an intervener), it can face restrictions on the submissions it can make: *Canada (Attorney General) v. Quadrini*, 2010 FCA 246.

[18] In my view, the issues before the Court concerning the *Privacy Act*, summarized above, are complex and deserve a full, unrestricted airing by opposing parties. This strongly favours allowing the Privacy Commissioner into this application as an intervener.

[19] The next consideration is the public interest dimension. I have nothing before me to suggest that this application has assumed a significant public interest dimension. Further, the Privacy Commissioner was not involved in the matter before the Agency. However, I note that the public interest in decisions of this Court being respected will be furthered by the involvement of the Privacy Commissioner. Determinations of technical issues of interpretation of the *Privacy Act* should be grounded on the best insights available and the Privacy Commissioner is a party with much insight in this area. The Privacy Commissioner has repeatedly demonstrated this in many high profile interventions in appellate courts, including the Supreme Court of Canada.

[20] The final consideration is whether the proposed intervention is inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits." In this case, while the Privacy Commissioner could have moved earlier, he is not unduly disrupting the progress of this matter. Further, the Privacy Commissioner is prepared to be bound by the evidentiary record before this Court.

[21] Overall, then, I will grant the Privacy Commissioner's motion.

[22] Under Rule 109(3), I am empowered to give directions concerning the intervention. Under Rule 53, I may make an order on terms.

[23] The Privacy Commissioner may file a memorandum of fact and law on the issues of interpretation and application of the *Privacy Act*, bearing in mind that this is a judicial review of the Agency's decision. The memorandum of fact and law may be no more than fifteen pages and shall be filed no later than twenty days following the date of the Order granting it leave to intervene.

[24] As a term of granting the Privacy Commissioner the right to intervene and file a memorandum, I shall allow the applicant to file a memorandum of no more than fifteen pages only in response to the intervener's submissions. This memorandum shall be filed within twenty days of the service of the Privacy Commissioner's memorandum.

[25] The Privacy Commissioner shall not add to the evidentiary record. The Privacy Commissioner shall not seek costs or be awarded costs.

[26] The Privacy Commissioner shall have the right to make oral submissions at the hearing of the application of no more than twenty minutes. The panel hearing the application, of course, may amend this as it sees fit.

C. The applicant's motion to dismiss the intervention motion

[27] I now address the applicant's motion seeking the dismissal of the Privacy Commissioner's motion to intervene or seeking other lesser relief. The applicant bases his motion on Rule 97(*d*) (dismissal of a motion for failure to answer a proper question on cross-

examination). He submits that the Privacy Commissioner improperly refused to permit its affiant to answer questions on cross-examination.

[28] The applicant asked questions aimed at finding out the particular submissions the Commissioner was going to make at the hearing of the application, including the extent to which, with particularity, those submissions would be different from those of the Agency. In my view, while the questions were directed at a relevant issue, they sought information that was not material to the motion. The Court simply does not need the level of particularity sought by the applicant in his questions.

[29] Suppose for a moment that the Privacy Commissioner's affiant answered the applicant's questions by saying that it had not yet worked out with particularity its submissions. Would that affect my analysis? Not at all. The factors overwhelmingly point to granting the Privacy Commissioner the right to intervene.

[30] Other questions posed by the applicant, such as when and how the Privacy Commissioner became aware of this matter, are irrelevant to the legal test I have applied.

D. Miscellaneous issues

[31] The Registry seeks direction on whether the respondent's record in the application can be filed. The applicant objects on the basis that it is late. In the circumstances proven in the record

before me, the lateness is fully explained and I exercise my discretion in favour of granting an extension of time and permitting the record to be filed.

E. Disposition of the motions

[32] Therefore, I grant the Privacy Commissioner's motion to intervene on terms and I dismiss the applicant's motion. There shall be no costs awarded on these motions.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-218-14
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	DECEMBER 10, 2014

WRITTEN REPRESENTATIONS BY:

Dr. Gábor Lukacs	ON HIS OWN BEHALF
Odette Lalumière	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Legal Services Branch Canadian Transportation Agency	FOR THE RESPONDENT