Federal Court of Appeal Cour d'appel fédérale

Date: 20150202

Docket: A-407-14

Citation: 2015 FCA 34

Present: STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA and
MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

and

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI and JUSTICE FOR CHILDREN AND YOUTH

Respondents

and

REGISTERED NURSES' ASSOCIATION OF ONTARIO and
CANADIAN ASSOCIATION OF COMMUNITY HEALTH CENTRES

Interveners

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 2, 2015.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The Women's Legal Education and Action Fund Inc. ("LEAF") seeks leave to intervene in this appeal.

[2] The appeal is from the Federal Court's judgment (2014 FC 651) that, among other things, declared Orders in Council P.C. 2012-433 and P.C. 2012-945 inconsistent with section 12 of the Charter (the right against cruel and unusual treatment or punishment) and section 15 of the Charter (the right to equality). The two Orders in Council enacted the Interim Federal Health Program for refugees.

[3] LEAF submits that if it is allowed to intervene, it will make useful, necessary, and valuable submissions on the section 15 issues.

A. The nature of this appeal and LEAF's intended contribution to it

[4] When faced with a request for intervener status, the Court must first determine what is truly in issue in this appeal and examine how the intervention relates to those issues.

[5] On the section 15 issue, the appellant's notice of appeal simply states that the Federal Court erred. However, the reasons of the Federal Court and the memorandum of fact and law filed by the appellant in this Court give us a clearer picture of the section 15 issues.

[6] In the Federal Court, the Canadian Doctors for Refugee Care, *et al.* attacked the Orders in Council under section 15 on the ground that they draw a distinction between classes of refugee claimants based upon their country of origin. They said that the Orders in Council provide a lower level of health insurance coverage to individuals coming from certain countries than to those coming from others. As well, they said that the Orders in Council treat individuals who are lawfully in Canada for the purpose of seeking protection differently from other legal residents in Canada who are provided with health insurance benefits by the government. The Attorney General and the Minister of Citizenship and Immigration disagreed. The Federal Court found substantially in favour of the Canadian Doctors For Refugee Care, *et al.* The Attorney General and the Minister of Citizenship and Immigration now appeal.

[7] LEAF alleges that this appeal raises important substantive equality questions under section 15 of the Charter including "the gendered impacts of the 2012 changes to the Interim Federal Health Program, which creates a unique discriminatory effect for refugee women."

[8] More generally, LEAF suggests that this appeal raises general questions about how "laws and policies that create a distinction among [certain] groups may [also] have a particularly adverse impact on people such as refugee women." Refugee women may "experience greater and distinctive effects of inequality."

[9] LEAF adds that it is well-placed to assist on these issues because it has "particular expertise regarding how women's experiences of inequality are shaped by the intersection of multiple prohibited grounds." It can contribute on "the impact of any approach to s. 15 analysis

on refugee women who may not share all the characteristics of the individual respondents in this case." And, for good measure, "[t]his is a critical perspective given that none of the applicants in this case were women, but 51% of the refugee claimants in Canada are women." Finally, allowing LEAF to make submissions on the "gendered dimensions of this appeal" will further "access to justice for refugee women."

[10] More generally, LEAF submits that "[t]he way courts approach these issues affects how they evaluate Charter claims and this in turn affects the protection of equality rights more broadly." As a result, LEAF "has an interest in this appeal and the Charter issues it raises."

B. The test for intervention

[11] The traditional test is set out in cases such as *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.). 74 and *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [2010] 1 F.C.R. 226. However, some branches of that test pose conceptual problems and leave out certain relevant considerations: *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, 456 N.R. 365 at paragraphs 6-10.

[12] The appellants exclusively invoke *Pictou*, while LEAF exclusively invokes the *Rothmans, Benson & Hedges* and *Canadian Airlines* line of cases.

[13] *Pictou* sets out a test that is phrased differently from the former test, but both tests essentially capture the same basic idea – that the decision whether a party should be allowed to intervene is a discretionary one based on the criteria in Rule 109 and the general principles in Rule 3 of the *Federal Courts Rules*, SOR/98-106, the particular evidence on the motion, and the nature of the proceeding before the Court.

[14] In this particular case, I do not believe that the rival tests would achieve a different outcome. For the reasons I expressed in *Pictou*, I do prefer the modification of the older *Rothmans, Benson & Hedges* and *Canadian Airlines* tests. Therefore, I shall apply the test in *Pictou*.

[15] The test is as follows:

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?

(*Pictou*, *supra* at paragraph 11.)

C. Applying the test for intervention

[16] I acknowledge LEAF's helpful interventions in many cases, particularly in those concerning gender discrimination.

[17] I also acknowledge that the reasons and judgment below have received public attention and that often in such cases, "the matter [has] 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": *Pictou*, *supra* at paragraph 11.

[18] But the new perspectives offered by a proposed intervener must be tied to an issue in the proceeding. Specifically Rule 109(2)(*b*) requires the proposed intervener to show how it will assist in the determination of a factual or legal issue related to the proceeding.

[19] Notices of application and notices of appeal serve to define the issues in a proceeding. Existing parties build their evidence and submissions around those carefully defined issues. An outsider seeking admission to the proceedings as an intervener has to take those issues as it finds them, not transform them or add to them. Thus, under Rule 109(2)(*b*) a proposed intervener must show its potential contribution to the advancement of the issues on the table, not how it will change the issues on the table.

[20] This, of course, is consistent with the approach of appellate courts to new issues. A party cannot raise a new issue in circumstances where the factual record is not adequate to support it or

where the factual record might have been different had the issue been raised below: *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.

[21] This is of special concern in Charter cases: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873 at paragraph 28. The judgments and reasons of courts in Charter cases can have the effect of removing or limiting areas of legislative and executive power. It is most important, then, that those judgments and reasons be based on the issues defined in the originating document. Those are the issues on which the parties have filed evidence and have tested. Those are the issues the parties have researched and have written up in their memoranda of fact and law. In this Court, those are the issues the court and/or administrative decision-maker below has decided in carefully considered reasons.

[22] LEAF has not persuaded me that its proposed submissions are related to the defined issues in this proceeding. Nor has it persuaded me that its submissions will assist this Court in determining the defined issues.

[23] LEAF wishes to raise issues of gender. But issues of gender are not present in this proceeding as framed.

[24] LEAF suggests that the Orders in Council have a “gendered impact.” But that is a conclusion of fact that cannot be assumed but rather must be based on evidence: *Métis National*

Council of Women v. Canada (Attorney General), 2005 FC 230, [2005] 4 F.C.R. 272, aff'd 2006 FCA 77, 348 N.R. 83. And this Court, in an appeal, cannot normally make conclusions of fact.

[25] I do understand the issue of intersectionality that LEAF would like to raise – the fact that in some section 15 cases the intersection of multiple prohibited grounds can play an important role in the analysis. But intersectionality is a legal element dependent on evidence. An appeal court cannot go into that issue unless there is a factual basis for it and unless the parties had notice of the issue in the court below and had a full opportunity to adduce evidence relevant to it.

[26] If intersectionality had been a live issue below, the parties might have adduced evidence on it. While there is some evidence in the record pertaining to female refugees, more evidence might have been called in the Federal Court if intersectionality were front and centre there.

[27] Aside from the foregoing, I note that LEAF's motion for intervention is late.

[28] In my experience, those 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.

[29] In this case, the appellants have filed their memorandum and the respondents' memoranda are imminent. The judgment and reasons of the Federal Court, released seven months ago, attracted great attention, but only now does LEAF apply to intervene. LEAF has not explained the delay. Here, LEAF's admission to the appeal and its filing of a memorandum

would mean that the parties would have to respond in extra memoranda – an avoidable consequence if LEAF had proceeded faster.

[30] Finally, LEAF's interest in this case is purely jurisprudential, nothing more. At points in its written submissions, it stressed that cases that do not involve gender equality can affect the gender equality jurisprudence. I accept that. But that sort of interest – merely a jurisprudential interest – is insufficient to intervene. It would be like admitting a pharmaceutical company into a case involving patents simply because it has patents and is very interested in the development of the jurisprudence. That we do not do: *Canadian Airlines, supra at* paragraph 11.

[31] I dismiss the motion to intervene.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-407-14
STYLE OF CAUSE:	**ATTORNEY GENERAL OF CANADA and MINISTER OF CITIZENSHIP AND IMMIGRATION v. CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES, HANIF AYUBI and JUSTICE FOR CHILDREN AND YOUTH and REGISTERED NURSES' ASSOCIATION OF ONTARIO and CANADIAN ASSOCIATION OF COMMUNITY HEALTH CENTRES**

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	FEBRUARY 2, 2015

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