Federal Court of Appeal  Cour d'appel fédérale

Date: 20180420

Docket: A-259-17

Citation: 2018 FCA 81

Present: **WEBB J.A.**

BETWEEN:

YORK UNIVERSITY

Appellant

and

THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT")

Respondent

and

UNIVERSITIES CANADA, CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS AND CANADIAN FEDERATION OF STUDENTS

Interveners

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 20, 2018.

REASONS FOR ORDER BY: WEBB J.A.

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Interveners

REASONS FOR ORDER

WEBB J.A.

[1] There are three motions that have been brought for leave to intervene in this appeal. The first motion dated February 2, 2018 is brought by Universities Canada, an association representing 96 universities from across Canada. The second motion dated March 8, 2018 is brought by the Canadian Association of University Teachers (CAUT) and the Canadian Federation of Students (CFS). CAUT is an organization that represents 70,000 teachers, librarians, researchers and other academic professionals and staff. CFS is an organization representing in excess of 650,000 members in 75 students' unions in all 10 provinces. The third motion is brought by the Canadian Association of Research Libraries (CARL) which is an organization that represents 31 research libraries at universities and federal government institutions.

[2] Rule 109 of the *Federal Courts Rules*, SOR/98-106 (Rules) provides that:

109(1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109(1)** La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Notice of a motion under subsection (1) shall	**(2)** L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir:
(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	*a*) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the	*b*) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise

determination of a factual or legal issue related to the proceeding.	d'une décision sur toute question de fait et de droit se rapportant à l'instance.
(3) In granting a motion under subsection (1), the Court shall give directions regarding	**(3)** La Cour assortit l'autorisation d'intervenir de directives concernant :
(*a*) the service of documents; and	*a*) la signification de documents;
(*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	*b*) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[3] All of the proposed interveners and the respondent agree that the appropriate criteria to be met to permit a person to intervene in a proceeding are as set out by Justice Rouleau in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 74, at 79 and 80 (and affirmed on appeal ([1990] 1 F.C. 90, at 92)):

> (1) Is the proposed intervenor directly affected by the outcome?
>
> (2) Does there exist a justiciable issue and a veritable public interest?
>
> (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
>
> (4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
>
> (5) Are the interests of justice better served by the intervention of the proposed third party?
>
> (6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

[4] This Court in *Sports Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, confirmed that these criteria will continue to apply in determining whether a person should be permitted to intervene in a proceeding. In particular this Court noted that:

> **42** The criteria for allowing or not allowing an intervention must remain flexible because every intervention application is different, i.e. different facts, different legal issues and different contexts. In other words, flexibility is the operative word in dealing with motions to intervene. In the end, we must decide if, in a given case, the interests of justice require that we grant or refuse intervention. Nothing is gained by adding factors to respond to every novel situation which motions to intervene bring forward. In my view, the *Rothmans, Benson & Hedges* factors are well tailored for the task at hand. More particularly, the fifth factor, i.e. "[a]re the interests of justice better served by the intervention of the proposed third party?" is such that it allows the Court to address the particular facts and circumstances of the case in respect of which intervention is sought. In my view, the *Pictou Landing [Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, [2015] 2 F.C.R. 253] factors are simply an example of the flexibility which the Rothmans, Benson & Hedges factors give to a judge in determining whether or not, in a given case, a proposed intervention should be allowed.

[5] In my view, in each of the three motions the critical factors are whether the position of the proposed intervener will be adequately represented by one of the parties and whether it will be in the interests of justice to allow the organization to intervene. As part of this determination, it is important to review the issues that have been raised by York University (York) in the notice of appeal. The organizations that are seeking to intervene will, if leave is granted, be interveners and not parties to the appeal. The issues that they can raise will be restricted to the issues that were raised by York in its notice of appeal.

[6] The grounds of appeal as identified by York that are relevant to these motions are as follows:

I. Introduction

1. Generally stated, this appeal relates to the following independent issues:

(a) The scope of fair dealing for the purposes of education - a user's right under the *Copyright Act*. In particular, whether copies of extracts of published works (e.g. a chapter from a book) made for students' education are fair dealing, and therefore not infringing copies, or whether compensation must be paid to rights holders for such copies.

(b) Whether an interim tariff granted by the Copyright Board of Canada under its interim decision making power is an approved tariff, and mandatory and enforceable on an institution that does not consent to be bound by its terms.

II. Fair Dealing

2. The Trial Judge erred in concluding that reproductions falling within York's Fair Dealing Guidelines do not constitute fair dealing pursuant to sections 29, 29.1 and/or 29.2 of the *Copyright Act*. Specifically, he misconstrued the second part of the test for fair dealing (i.e., whether the dealing was fair) and/or altered that legal test in the course of its application. These errors included the following:

(a) failing to recognize that fair dealing is a user's right of students enrolled at York; and

(b) conflating the fairness factors enumerated by the Supreme Court of Canada and relying on the same considerations to support conclusions under multiple factors.

III. Interim Tariff

3. The trial judge erred in holding that:

(a) the Interim Tariff is mandatory and enforceable against York;

(b) an approved tariff is mandatory and binding on any person to whom it pertains; and

(c) the defence that the Interim Tariff is not mandatory and enforceable was a collateral attack on the Copyright Board's Interim Tariff decision.

[7] In *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2015 FCA 34, Justice Stratas noted that:

> **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.

[8] Universities Canada has, in my view, satisfied the requirement to show that its position in relation to the issues of fair dealing and the Interim Tariff that are raised in the notice of appeal would not be adequately defended by York and that it is in the interests of justice that Universities Canada be added as an intervener. However, in relation to the Interim Tariff, Universities Canada has also indicated that it would be addressing issues that do not appear to have been raised in the notice of appeal. In its reply submissions Universities Canada has indicated that:

> [its] arguments on the Interim Tariff will go beyond those made by York, including to:
>
> - the importance of the Board completing its work in the ongoing proceeding and issuing a final tariff;
> - the availability of judicial review of the final tariff once the boards proceeding concludes, which is important because no judicial review of the Interim Tariff was ever possible. This is shown by this Court dismissing as premature Universities Canada's attempt to judicially review the Interim Tariff, because 'This is manifestly a case with the Copyright Board should be permitted to complete its work before the Court is called upon to consider administrative law remedies'; and
> - the range of options available to the rights holders represented by Access Copyright to enforce their rights without the need to rely on the Interim Tariff.

[9] As noted above an intervener is restricted to the issues as raised in the notice of appeal. It is difficult to link the arguments that relate to the final tariff (which is not before this Court) or alternative remedies available to non-parties, to the issues as raised by York in its notice of appeal.

[10] I am also satisfied that CAUT and CFS have jointly satisfied the requirements that their position will not be adequately defended by York and that it is in the interest of justice that they be permitted to intervene in these proceedings.

[11] With respect to the submissions of CARL, I am not satisfied that the issues that it raises are issues that are within the scope of issues as raised in the notice of appeal. In its written submissions CARL submits that:

> **32**. Consistent with recent case law from this Court, the affidavit of Ms. Owen demonstrates in great detail that:
>
> …
>
> **b.** It is compliant with the object as set out in Rule 3 regarding "the just, most expeditious and least expensive determination of every proceeding on its merits", and the mandatory requirements in Rule 109, including an *explanation* of how the intervener will assist the Court in the issue before it.
>
> (Emphasis in original)

[12] In Ms. Owen's affidavit she states that:

> **58.** Moreover, York's Notice of Appeal and its Statement of Issues in its Memorandum both focus explicitly on whether the interim tariff is mandatory and not whether approved tariffs are mandatory. Even if York has succeeded on its narrow argument about the interim tariff or should do so in this Court on such a narrow basis, it would ring hollow for the university community because the final approved tariff from the Copyright Board, would still be mandatory. …

> **59.** Thus, it is still not clear that York will fully, forcefully and adequately address the overall threshold issue of whether tariffs approved by the Copyright Board are mandatory or merely whether the interim tariff is not mandatory. Moreover, York's submissions on the mandatory tariff issue comprise only about five of the 30 pages in the York Memorandum.

[13] By acknowledging that York only addresses the interim tariff issue in its notice of appeal, CARL is acknowledging that this is the only issue that will be before this Court. Any arguments that CARL would wish to make in relation to any final approved tariff are outside the issues that are before this Court and do not justify granting CARL leave to intervene.

[14] In its written submissions CARL also submitted that it is proposing to make arguments that Access Copyright "cannot ask the court to make findings on any alleged infringement by institutions such as York". However this issue has not been raised in the notice of appeal and therefore cannot justify granting CARL leave to intervene in this proceeding.

[15] CARL also indicated that, in the alternative, it would be proposing to make submissions on aggregate copying and monitoring and supervision. However, the only submission on this issue is in one paragraph (paragraph 25) of the 160 paragraphs that CARL submitted in its written submissions in support of its motion (including 72 paragraphs in its reply submissions). The only statement in paragraph 25 is that the trial decision was "incorrect with respect to its conclusions on 'aggregate' copying; and … incorrect with respect to its conclusions on monitoring and supervision". There is no indication of how its arguments on these issues would be any different from those of York. This brief allegation that the trial decision was incorrect does not warrant granting CARL leave to intervene.

[16] As a result the motion by Universities Canada and the motion by CAUT and CFS to intervene in this proceeding are each allowed and the motion by CARL is dismissed.

[17] Universities Canada shall have the right to serve and file, on or before May 22, 2018, a memorandum of fact and law that:

(a) does not exceed 15 pages in length

(b) does not repeat any of the submissions made by York;

(c) only relies on evidence that is part of the record in this proceeding;

(d) only addresses issues raised by the notice of appeal; and

(e) complies with Rule 65.

[18] Access Copyright shall have the right to serve and file, on or before June 21, 2018, a reply to the memorandum of Universities Canada that:

(a) does not exceed 15 pages in length

(b) only addresses issues raised by Universities Canada in its memorandum; and

(c) complies with Rule 65.

[19] CAUT and CFS shall jointly have the right to serve and file, on or before May 22, 2018, a memorandum of fact and law that:

(a) does not exceed 15 pages in length

(b) does not repeat any of the submissions made by York;

(c) only relies on evidence that is part of the record in this proceeding;

(d) only addresses issues raised by the notice of appeal; and

(e) complies with Rule 65.

[20] Access Copyright shall have the right to serve and file, on or before June 21, 2018, a reply to the memorandum of CAUT and CFS that:

(a) does not exceed 15 pages in length

(b) only addresses issues raised by CAUT and CFS in their memorandum; and

(c) complies with Rule 65.

[21] The right of the interveners to make oral submissions at the hearing will be determined by the panel hearing the appeal. The style of cause shall be amended to reflect Universities Canada, CAUT, and CFS as interveners.

[22] No costs shall be awarded to or against any of the interveners.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-259-17
STYLE OF CAUSE:	YORK UNIVERSITY v. THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT" AND UNIVERSITIES CANADA et al.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	APRIL 20, 2018

WRITTEN REPRESENTATIONS BY:

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