Federal Court of Appeal  Cour d'appel fédérale

Date: 20120118

Docket: A-358-11

Citation: 2012 FCA 14

CORAM: BLAIS C.J.

BETWEEN:

AIR CANADA

Appellant

and

MICHEL THIBODEAU
and
LYNDA THIBODEAU

Respondents

and

THE COMMISSIONER OF OFFICIAL LANGUAGES

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 18, 2012.

REASONS FOR ORDER BY: BLAIS C.J.

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REASONS FOR ORDER

BLAIS C.J.

INTRODUCTION

[1] This is a motion by the Commissioner of Official Languages for leave to be added as a party to the appeal in *Thibodeau v. Air Canada*.

[2] In the alternative, the Commissioner asks that the Court grant him intervener status, allow him to participate fully in the appeal by filing a memorandum and making written and oral representations on all the issues, and grant him the right to appeal against this Court's decisions.

[3] For the reasons that follow, the Commissioner's principal motion will be denied, and the alternative motion, with Air Canada's consent, will be granted.

[4] I will not revisit the factual background of this case since it is well-known to the parties and does not appear to have been the subject of dispute.

INTERVENTION OF THE COMMISSIONER AT TRIAL

[5] By order dated June 11, 2010, Prothonotary Tabib granted the Commissioner full intervener status, including leave to take part in cross-examinations, make written and oral representations and appeal against any decision of the Court, just as a party to the proceedings may do.

[6] It appears that, in Federal Court, the Commissioner made oral representations on all of the issues while focusing especially on the issue of the relationship between the *Convention for the Unification of Certain Rules relating to International Carriage by Air* (Montréal Convention) and the *Official Languages Act* (OLA). He was also given the right to reply at that time.

INTERVENTION OF THE COMMISSIONER ON APPEAL

[7] In preparation for the hearing on March 28, 2011, the Commissioner filed a memorandum of fact and law covering the entire file. In the memorandum, he submits, among other things, that

a. the OLA takes precedence over the Montréal Convention;
b. the complainants are entitled under section 79 of the OLA to file as evidence complaints of the same nature concerning Air Canada; and
c. Federal Courts have the authority to grant any relief that is appropriate and just, having regard to the circumstances, including damages.

[8] The Commissioner now submits that it is in the interests of justice to grant him co-respondent status on appeal.

ISSUE RAISED BY THIS MOTION

[9] To ensure a full and thorough consideration of the issues, does the Commissioner of Official Languages need to be granted leave to act as a party to the proceedings?

ANALYSIS

[10] An order to add an applicant as a party to proceedings under Rule 104(1)(*b*) of the *Federal Courts Rules*, SOR/98-106, is discretionary (*Stevens v. Canada (Commissioner, Commission of Inquiry*) [1998] 4 F.C. 125 at paragraph 10 (F.C.A.) [*Stevens*]). This principle also applies to the mechanism provided for in paragraph 78(1)(*c*) of the OLA, which states that

the Commissioner may, "with leave of the Court, appear as a party to any proceedings" [emphasis added].

[11] The judge's discretion is guided by one test alone: necessity. In *Stevens*, above, Justice Stone referred to English case law to explain the requirements of the necessity test:

> Although the present appeal is concerned with a claimed misjoinder of party, it is instructive to have some regard to the decided cases which have dealt with joinder of a party under similar rules of practice. In *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357, the Court was asked to add a defendant to the action pursuant to Order XVI, Rule 11 of the English rules of practice. By that Rule the Court was authorized to join any person "whose presence before the court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter". I would note that Order XVI, Rule 11 of the English rules corresponds to paragraph 1716(2)(*b*) of the Rules of this Court. It seems to me that the meaning which the courts have given to the word "necessary" in that paragraph is of assistance in understanding the intent of the words "unnecessarily made a party" in paragraph 1716(2)(*a*). In concurring with his colleagues that the presence of the proposed new defendant was not "necessary", Devlin J. (as he then was) stated, at page 380:
>
> > The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the construction of a clause in a common form contract many parties would claim to be heard, and if there were power to admit any, there is no principle of discretion by which some could be admitted and others refused. The court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it is necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be

> a question in the action which cannot be effectually and completely settled unless he is a party.
>
> (*ibid.* at paragraph 20 [emphasis added])

[12] In other words, is it necessary to grant the Commissioner status as a party to completely adjudicate and settle the issues raised in these proceedings?

[13] The Commissioner notes that his mandate extends to appearing as a party to proceedings. Under subsection 56(1) of the OLA, "[i]t is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit . . . of this Act".

[14] The Commissioner argues that he must be granted status as a party because of the importance of the issue to all members of the travelling public and because of the potential repercussions on a number of OLA provisions. He further argues that the fact that the respondents are not represented by counsel underscores the importance of adding him as a party. Otherwise, the highly complex nature of the arguments made by Air Canada would put the respondents at a serious disadvantage.

[15] Finally, the Commissioner submits that he has a special interest in the case since

a. as ombudsman responsible for enforcing the OLA, he wants to ensure that Air Canada complies with its duties;

b. the Court's decision could have an impact on the Commissioner's investigations into other institutions; and

c. the Court's decision will affect the interpretation of a number of provisions of the OLA.

[16] Meanwhile, Air Canada objects to the Commissioner's motion. It argues that the complexity of the issues does not justify the Commissioner's motion. It notes that at trial, the Commission was allowed to file a complex and well-documented memorandum and to make oral representations on all of the issues.

[17] Air Canada submits that the Commissioner does not meet the criteria for being added as a party. It notes that the fear that the parties to the proceedings will not present their arguments adequately is not enough. Moreover, the Commissioner has not shown that he would be directly affected by the judgment to be rendered by this Court (*Warner-Lambert Canada Inc. v. Canada (Minister of Health)*, 2001 FCA 116 at paragraph 5).

[18] Air Canada also submits that in the absence of a cause of action raised against the Commissioner, he cannot be added as a party. On this point, the appellant relies on the judgment of this Court in *Shubenacadie Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 509, 299 N.R. 241, in which Justice Evans wrote as follows at paragraphs 6 and 7:

> The second issue is whether the UNSI and the CMM were properly joined as defendants pursuant to Rule 104, regardless of the fact that they had been respondents in the application for judicial review. In our view, they were not. The plaintiffs' statement of claim states no cause of action against them, seeks no

> relief against them, and makes no allegations against them. Moreover, it is not clear that the Federal Court would have jurisdiction over UNSI and CMM as defendants to the action.
>
> It may well be that the UNSI and CMM will be able to adduce evidence relevant to the plaintiffs' statement of claim, and that their members may be adversely affected by the outcome of the litigation. However, neither is sufficient to enable the UNSI and CMM to be joined as necessary defendants to the action.
>
> [emphasis added]

[19] Finally, Air Canada fears that adding the Commissioner as a party to the appeal will change the nature of the case on appeal, since the proceeding would cease to be one brought solely by a private party. Air Canada argues that it would be seriously prejudiced. First off, I note that Air Canada's fear is baseless. As the Commissioner observes in his reply at paragraph 9, an order of this Court would not have retroactive effect. In other words, the issues in this appeal would be unaffected, like the factual background that led to the trial judge's decision.

[20] I am of the opinion that the Commissioner's motion must be denied. True, this appeal is complex. The conflict between the OLA and the Montréal Convention, the appropriateness of a general order to comply with the Act, the appropriateness of a structural order and the introduction of similar complaints and previous reports of the Commissioner by the respondents Thibodeau, to name a few of the legal issues, are indeed subtle questions. However, the complexity of these issues is not the factor on which the exercise of my discretion should be based.

[21] At trial, the Commissioner chose to seek intervener status from the Federal Court. A few days later, on June 11, 2010, the Court allowed its application and granted the Commissioner intervener status.

[22] As Air Canada rightly points out, the Commissioner chose not to be a party to the proceedings at trial, suggesting that [TRANSLATION] "it was more appropriate for the applicants [Michel Thibodeau and Lynda Thibodeau] to institute proceedings against the respondent [Air Canada] in order to raise the breaches to which they personally were subjected as well as the systemic breaches".

[23] As the saying goes, the Commissioner has made his bed and now must lie in it. It was at that moment that he made his choice; in my view, it is a bit late to reverse his position.

[24] All in all, the Commissioner has not shown why leave to act as a party on appeal was necessary to completely and adequately settle all of the issues. Intervener status is amply sufficient.

CONCLUSION

[25] I would dismiss the principal motion of the Commissioner of Official Languages.

[26] Considering Air Canada's consent to the Commissioner's alternative application, I would grant the Commissioner the right to intervene on appeal. This right would include the right to file a memorandum, make representations at the appeal hearing and appeal against the decisions of this Court.

"Pierre Blais"
Chief Justice

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-358-11
STYLE OF CAUSE:	Air Canada v. Michel Thibodeau and Lynda Thibodeau and The Commissioner of Official Languages

DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	BLAIS C.J.
DATE:	January 18, 2012

WRITTEN REPRESENTATIONS BY:

Kevin Shaar Pascale Giguère	FOR THE INTERVENER
Louise-Hélène Sénécal David Rheault	FOR THE APPELLANT
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