Federal Court of Appeal | Cour d'appel fédérale

Date: 20220421

Docket: A-325-21

Citation: 2022 FCA 67

Present: **STRATAS J.A.**

BETWEEN:

RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA, BLAISE ALLEYNE and MATTHEW BATTISTA

Appellants

and

CANADA (MINISTER OF EMPLOYMENT, WORKFORCE, AND LABOUR)

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 21, 2022.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Three parties move for leave to intervene in this appeal: the Association for Reformed Political Action (ARPA) Canada, Action Canada for Sexual Health and Rights, and the Evangelical Fellowship of Canada. For the reasons that follow, the motions will be dismissed.

A. The issue in this appeal

[2] In 2018, the Minister of Employment, Workforce, and Labour required that applicants for funding under the Canada Summer Jobs Program attest to several statements. One of these statements is that the applicant respects individual human rights, Charter rights, and reproductive rights. The appellant, the Right to Life Association of Toronto and Area did not so attest. Thus, the Minister did not consider its application for funding.

[3] In the Federal Court, the appellants brought an application for judicial review seeking quash the refusal on the grounds of improper purpose, irrelevant considerations, lack of authorization under the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, bad faith, and the existence of a closed mind. The appellants also alleged that the Minister failed to appropriately balance freedom of religion, freedom of expression, and government objectives in accordance with *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395. The constitutional challenge was framed and asserted under the rubric of *Doré* and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, with reasonableness as the standard of review. The challenge was not framed and asserted on the basis that the order itself was state action that violated the Charter, with correctness as the standard of review: see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 and *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416.

[4] The Federal Court (*per* Kane J.) dismissed the application for judicial review: 2021 FC 1125.

B. The test for intervention

[5] The most recent authority from a full panel of this Court on interventions is *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3. But, as we shall see, *Sport Maska* requires us to look to other authorities on intervention.

[6] The respondent submits that *Sport Maska* adopted the test in the older case of *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.) and so *Rothmans* remains the governing authority. Inexplicably and quite disappointingly, the respondent ignores the other jurisprudence of this Court, much of which ignores or downplays *Rothmans*.

[7] *Sport Maska* itself tells us that articulations and refinements of the test in other cases are also usable, indeed in some respects preferable. In particular, *Sport Maska* approved the discussion in *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, [2015] 2 F.C.R. 253 on what makes an intervention in "the interests of justice", a discussion adopted in many other cases. It is not right to suggest, as the respondent does, that *Rothmans* remains the governing authority.

[8] Indeed, *Sport Maska* did not address certain critical issues and so we are driven to look at other authorities:

- *Rule 109*. Rule 109 is paramount. This is the governing legislation. Legislation prevails over all court decisions: *Canada (Attorney General) v. Utah*, 2020 FCA 224, 455 D.L.R. (4th) 714 at para. 28; *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131, 424 D.L.R. (4th) 366 at para. 54; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 82. As other cases cited below suggest, the assessment whether an intervener should be allowed into the proceedings must start with the requirements of Rule 109.

- *Criticisms of Rothmans*. *Rothmans* makes no sense in certain respects: *Pictou Landing* at paras. 6-9. For example, it injects a "direct interest" standard—one sufficient for standing as a party—into the test for intervention. But party status and intervener status are two entirely different things.

- *The "interests of justice" criterion for intervention*. *Sport Maska* left this undefined. Thus, it left it in the eyes of the beholder, *i.e.*, the undefined, unstated, impossible-to-articulate impressions of individual judges. This is unacceptable, as we are governed by objective law and legal doctrine, not subjective inclinations and feelings: see *Zaric v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 36 at para. 11; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13, 481 C.R.R. (2d) 234 at paras. 8-9.

[9] Since *Pictou Landing*, this Court has refined the test for intervention by working in and elaborating on the criterion of usefulness that is central to Rule 109: *Canada (Attorney General)*

v. Kattenburg, 2020 FCA 164 and *Canadian Council for Refugees*. The most recent case, *Canadian Council for Refugees*, collects all the various strands in our jurisprudence—including those adopted by and left unaddressed in *Sport Maska*—and offers a compendious test. Quite appropriately, the three moving parties adopt *Canadian Council for Refugees* at paras. 6 and 9 as the test we should apply here.

[10] The test is as follows:

I. Will the proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues? To determine usefulness, four questions need to be asked:

- What issues have the parties raised?

- What does the proposed intervener intend to submit concerning those issues?

- Are the proposed intervener's submissions doomed to fail?

- Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?

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. Is it in the interests of justice that intervention be permitted? The list of considerations is not closed but includes the following questions:

- Is the intervention consistent with the imperatives in Rule 3? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?

- 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 first-instance court in this matter admitted the party as an intervener?

- Will the addition of multiple interveners create the reality or an appearance of an “inequality of arms” or imbalance on one side?

[11] Often applications to intervene run afoul of the first part of this test—the usefulness of the intervener's submissions. In some cases, the issues, viewed in light of the standard of review, are such that an intervener will have little room to be useful; in others, such as those involving broad and uncertain issues of law for which the standard of review is correctness, an intervener may have more room to be useful. The best applications to intervene concentrate on usefulness. They "hone into the true nature of the case, locating the particular itch in the case that needs to be scratched, and telling us specifically how they will go about scratching it" and "investigate the evidentiary record and the specific issues in the case, enabling them to offer much detail and particularity on how they will assist the Court": *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686 at para. 10.

[12] As well, an intervener's submissions must contribute to what we actually do as a court of law. As a court of law, we ascertain, interpret, and apply legal doctrine to the facts as found by a first-instance court. In interpreting legislation, we regard legislative purpose as "the authentic aim of the legislation passed by the legislators, not what international authorities, judges, parties and interveners think is 'best for Canadians' or what they consider to be 'just', 'right' or 'fair'": *Kattenburg* at para. 26; *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174; *Atlas Tube Canada ULC v. Canada (National Revenue)*, 2019 FCA 120, 2019 D.T.C. 5062 at paras. 5-9. We draw on international law only where it properly arises before us and we reject those who cite it as if it is "a series of tasty plates on a buffet table from which we can take whatever we like and eat whatever we please": *Kattenburg* at para. 26; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020

FCA 100 at paras. 76-92. We do not draw upon policies at large, especially those untethered to proven facts and settled doctrine. Still less do we enshrine grand policies into law as if we are legislators or constitutional framers. Nor are we a running an open-line radio show or a roving commission of inquiry. We are running a court of law. See *Ishaq* at paras. 9 and 26-27 and *Kattenburg* at paras. 41 and 44.

[13] We deplore interveners who try to slip fresh evidence into the record through crafty, unprofessional means, such as smuggling into their books of authorities materials that contain facts and social science opinions not in evidence or sliding fresh evidence into their oral submissions: *Public School Boards' Association of Alberta v. Alberta (Attorney General)*, [1999] 3 S.C.R. 845, 180 D.L.R. (4th) 670; *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108, 174 C.P.R. (4th) 85; *Zaric* at para. 14; *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167 at para. 19. Here, experience is our teacher. We have seen falsehoods advanced by interveners seep uncritically into reasons for judgment, with damaging, real-life consequences: see the examples provided in *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130, [2021] 1 F.C.R. 53 at paras. 156-159, citing *Teksavvy Solutions* at para. 22, both referring to *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409 and *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467. If at any time interveners or their lawyers have tried these sorts of things in this or in any other Court or if we sense from their submissions that they might, we will keep them out.

[14] As well, sometimes those applying to intervene seem to think that the superiority, rightness, and importance of their causes allows them to insert their issues—new issues—into a

case that existing parties have prosecuted and defended often at great stress and expense for years. Some go so far as to transform the parties' case, to turn it into something more than it is, or into something it is not. This we forbid. In our Court, interveners are nothing more than secondary participants in cases that already have parties. Thus, interveners must take the parties' issues as they find them. This Court once put it this way:

> [I]nterveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.
>
> To allow them to do more is to alter the proceedings that those directly affected—the applicants and the respondents—have cast and litigated under for months, with every potential for procedural and substantive unfairness.

(*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373 at paras. 55-56.) If interveners want to do more, if they want to advance their own issues, they must bring their own cases as parties with all that that entails, including legal expense and potential costs liability.

[15] Finally, for us, the fairness of our proceedings and our impartiality, both actual and apparent, is paramount, especially in the controversial cases that often attract many applications to intervene. But fairness and impartiality are damaged, sometimes severely, when the Court admits too many interveners on only one side of the debate, all pushing for the same outcome. If the Court ultimately adopts that outcome, fair-minded lay observers might well believe that the imbalance of voices on one side of the courtroom and their amplification through frequent repetition—all set up by the Court's decisions on intervention—may have carried the day.

[16] Thus, in considering applications to intervene, we are careful to avoid the appearance of a court-sanctioned stacking in favour of one side or a court-sanctioned gang-up against the other side. The outcomes we reach must be seen to be the product of fair and impartial judicial thinking, nothing else. See *Canadian Council for Refugees* at para. 15; *Teksavvy* at para. 11; *Gitxaala Nation v. Canada*, 2015 FCA 73 at para. 23.

[17] In offering the foregoing comments about interventions, the Court draws comfort from recent changes the Supreme Court has made to its policies on intervention: "November 2021 – Interventions" (15 November 2021), online: *Supreme Court of Canada* <www.scc-csc.ca/ar-lr/notices-avis/21-11-eng.aspx>. Although not binding on this Court, the Supreme Court's *Notice* underscores the importance and appropriateness of three fundamental policies of this Court evident from the above discussion: (1) intervention in another's case is a privilege, not a right; (2) the focus is on what the intervener can usefully do to help the Court determine the issues already before it, not other issues; and (3) the proceeding must be scrupulously fair, both in reality and appearance.

C. Application of these principles

[18] The three moving parties do not meet the test for intervention. They have not met the all-important, first branch of the test set out at paragraph 10, above.

[19] The Court is not persuaded that the arguments the moving parties intend to advance are different from the arguments that the appellants will put before the Court. In many respects, the

arguments are identical or have a modestly different, inconsequential spin from those already before the Court. They echo the arguments of the appellants. But this does not meet the necessary threshold of usefulness: *Li v. Canada (Citizenship and Immigration)*, 2004 FCA 267, 327 N.R. 253 at para. 9; *Canada (Attorney General) v. Shakov*, 2016 FCA 208 at para. 9; *Zaric* at para. 17.

[20] For example, the Association for Reformed Political Action (ARPA) Canada proposes to argue that "a private organization is incapable of disrespecting *Charter* rights or values" and that the expression rights at issue are "at the core of section 2(b)'s guarantee of freedom of expression". The appellants already argues that its activities are lawful and that the attestation requirement "strikes at the core of *Charter* s. 2(a) and (b) protection". The Association's proposed submissions provide little more than an inconsequential spin on what is already before the Court.

[21] The Evangelical Fellowship of Canada proposes two new issues that are not currently in play in this appeal: section 27 of the Charter and the requirement under section 1 of the Charter that the limit be "prescribed by law". Section 27 of the Charter may have interpretive significance and can be considered by the existing parties or by the Court itself; assistance is neither necessary nor useful. The section 1 requirement that the limit be "prescribed by law" is a feature relevant to the test under *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, a test that applies where state action, such as legislation or an administrative decision, are alleged to violate a Charter right or freedom. As mentioned at paragraph 3 above, the appellants do not

make that allegation here. The appellants have instead chosen to argue under the line of jurisprudence exemplified by *Doré* and *Loyola*.

[22] The rest of the arguments advanced by the Evangelical Fellowship of Canada are ultimately unhelpful to the Court's task. For example, it argues that the Minister's attestation requirement "*undermine*[*s*] rather than advance[s] the statutory objectives of an inclusive labour market and of improving social well-being and quality of life for all" and that "the government should not concern itself with preventing youth from working for law-abiding organizations with pro-life views". These sorts of freestanding policy opinions are unrelated to the *Doré*/*Loyola* legal test before us and should be rejected: *Zaric* at para. 12.

[23] Action Canada for Sexual Health and Rights intends to argue that the activities of anti-abortion organizations are inconsistent with Charter values and international human rights obligations. Action Canada for Sexual Health and Rights proposes to discuss the current state of abortion laws. These issues have nothing to do with the legal issues before this Court in this particular appeal. They concern wider policy issues surrounding abortion. This resembles what some of the moving parties for intervention in *Kattenburg* tried to do: to transform a legal case on the reasonableness of an administrative decision on the acceptability of a particular wine label into a policy discussion about Canadian foreign policy, human rights in the Middle East, and the status of the West Bank.

[24] All three moving parties are interested in the development of the law in this case because they, like hundreds of other organizations, might be affected by this Court's decision. But this

sort of purely jurisprudential interest, without more, is insufficient: *Canadian Doctors for Refugee Care* at para. 30; *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, 2000 FCA 233, [2010] 1 F.C.R. 226 at paras. 10-11.

[25] The Evangelical Fellowship of Canada is the only moving party that discusses how the Minister's actions tangibly affect it. It is concerned that the impugned attestation requirement will prevent it from applying for the federal government's Summer Jobs Program. But notwithstanding the impugned attestation requirement, the Evangelical Fellowship of Canada has applied for and has received funding in years after the rejection of funding in this case. On this basis, the Federal Court rejected the Evangelical Fellowship of Canada's motion to intervene. This Court substantially agrees with this rejection, for the reasons the Federal Court gave.

[26] The Association for Reformed Political Action (ARPA) Canada and the Evangelical Fellowship of Canada submit that they can offer important religious perspectives. But this Court does not lack religious perspectives in this case: see the presence in the record of an affidavit from a professor of moral theology, arguments placed before the Federal Court, and the Federal Court's reasons (at paras. 29-30, 118-119, 121, 144-146, 159 and 161). As well, these moving parties have not persuaded this Court that the religious perspectives offered by these moving parties are different from those already before it. And even if the perspectives are different, they are likely factual in nature. But they do not appear in the factual record before this Court.

D. Disposition

[27] Therefore, for the foregoing reasons, I will dismiss the motions.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-325-21
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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	APRIL 21, 2022

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