Federal Court of Appeal | Cour d'appel fédérale

Date: 20250213

Docket: A-197-24

Citation: 2025 FCA 37

Present: **STRATAS J.A.**

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

DAC INVESTMENT HOLDINGS INC.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 13, 2025.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] QPQ Marketing Limited moves for an order under Rule 109 of the *Federal Courts Rules*, S.O.R./98-106 permitting it to intervene in this appeal. For the reasons that follow, its motion will be dismissed.

[2] The principles underlying Rule 109 have been set out in many cases. It is useful to review them again. Many applying to intervene still seem to be unaware of them.

A. Rule 109 and intervention: the need to demonstrate usefulness

[3] Rule 109 governs interventions. Rule 109 is a provision of a set of Rules passed under the authority of section 46 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The Rules are akin to Regulations passed under a statute. The Rules are mandatory law, not a policy statement, still less informal guidance.

[4] Rule 109 governs the Federal Courts system: for a recent, full explanation of the test under Rule 109, see *Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)*, 2022 FCA 67 at paras. 5-10, and for the precise questions to be examined on a motion to intervene, see para. 10 therein; see also *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 at paras. 8-9 and *Pictou Landing First Nation v. Canada (Attorney General)*, 2014 FCA 21, [2015] 2 F.C.R. 253 at para. 11.

[5] Other courts have other provisions in their procedural rules. It's up to them whether they choose to enforce the limits in rules and practice directions. It's up to them whether they want to admit so many interveners that their hearings take on the appearance of a roving commission of inquiry. It's up to them whether they want to admit many on only one side of the courtroom and create the appearance of a court-sanctioned gang-up against the other side. The approaches of other courts to intervention, no matter how senior they may be in the judicial hierarchy, are irrelevant to this Court. We have to follow Rule 109.

[6] Rule 109 says that intervention can be granted if the proposed intervener's submissions "will assist the determination of a factual or legal issue related to the proceeding". This means that the proposed intervener's submissions must be useful. And not just useful in an abstract sense. They must be useful to "the determination of a factual or legal issue related to the proceeding". See generally *Right to Life Association* at para. 9; *Macciacchera (Smoothstreams.tv) v. Bell Media Inc.*, 2023 FCA 180 at para. 20. To determine this, the Court must gain a realistic appreciation of the "essential character" and "real essence" of both the issues in the proceeding and the issues the proposed intervener intends to raise: *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13 at para. 32.

[7] "Useful" must be seen from the perspective of the Court: what does the Court need to determine the factual and legal issues before it in the proceeding? To answer that, the proposed intervener must appreciate two things: (1) the factual and the legal issues in the proceeding the intervener wishes to join and (2) how the Court determines factual and legal issues.

B. The factual and legal issues in the proceeding

[8] The originating document before the Court—either the notice of appeal or notice of application—defines the factual and legal issues in the proceeding. The parties' memoranda of fact and law can shed more light on these. See *Canadian Council for Refugees* at paras. 26-28; *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34 at para. 19.

[9] Thus, when interveners apply to join the proceeding, the legal and factual issues have already been defined. For this reason, interveners have to take the issues as they find them and cannot raise new issues: *Zaric v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 36 at para. 14; *Right to Life Association* at para. 14; *Canadian Doctors for Refugee Care* at paras. 19-20.

[10] Interveners must remember that they are secondary participants in a legal proceeding that belongs to others. 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 at paras. 55-56.)

[11] Nor can interveners add new evidence, especially on appeal: *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108 at para. 22.

[12] An intervener's cause may be noble and praiseworthy. But that does not give it a licence to raise new issues or offer new evidence in others' proceedings—proceedings prosecuted and defended with much worry, great effort and significant cost over many months. Rather than commandeering others' proceedings, interveners should bring their own proceedings, taking on

all the legal expense and potential costs liability primary litigants normally bear: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 102 at paras. 42-43.

C. How the Court determines factual and legal issues

[13] In an appeal court, such as this Court, the factual issues have usually been settled by the first-instance court or administrative decision-maker: *Ishaq v. Canada (Citizenship and Immigration)*, 2015 FCA 151, [2016] 1 F.C.R. 686 at paras. 15-16. Thus, there is often little scope for intervention on factual issues in this Court.

[14] Legal issues are live in an appeal court, such as this Court. But they must be the actual legal issues in the proceeding before the Court. And given that the parties before the Court are already addressing the legal issues, the proposed intervener must thread the needle so to speak: it must find an argument on a legal issue necessary for the determination of the proceeding that the parties have not addressed or will not address: *Le-Vel Brands, LLC v. Canada (Attorney General)*, 2023 FCA 66 at para. 19.

[15] Often intervention on a point of law is a realistic possibility where the established legal precedents do not go far enough to determine the legal issues in the case. Instances of legal uncertainty where the Court may need assistance can be found in *Ishaq* at para. 12.

[16] But the inadequacy of established legal precedents does not mean interveners have a blank slate on which they can draw anything they want. It is a court of law governed by law and

doctrine. Even where the Court must decide an open legal question, it is never a policy forum or a parliamentary committee that considers the public good, largely writ. Rather, courts of law proceed in a more limited way:

> When courts consider a novel claim, they must keep in mind a line. On one side of the line is a claim founded upon a responsible, incremental extension of legal doctrine achieved through accepted pathways of legal reasoning. On the other is a claim divorced from doctrine, spun from settled preconceptions, ideological visions or freestanding opinions about what is just, appropriate and right. The former is the stuff of legal contestation and the courts; the latter is the stuff of public debate and the politicians we elect.

(*Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, [2016] 1 F.C.R. 446 at para. 117.

[17] Statutory interpretation issues frequently arise in this Court and sometimes interveners can be helpful. On these issues, the Court will sometimes examine the likely effects of rival interpretations to see which interpretation best accords with the statutory purpose: *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174, at para. 52. But there are limits to that. Unelected judges do not try to make statutory provisions accord with their own preferences and policies, nor do they amend statutory provisions passed by our elected representatives: *Williams* at para. 52; *Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328 at para. 74; *Hillier v. Canada (Attorney General)*, 2019 FCA 44 at para. 25. The purpose behind a statutory provision is tied down to the terms of the statute and is not just any old purpose that an intervener would like to further: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para. 24; M. Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022), 59 *Alta. L. Rev.* 919.

D. The centrality of Rule 3

[18] Rule 3 provides, among other things, that the *Federal Courts Rules*, such as Rule 109 on intervention, will be "interpreted and applied" so as "to secure the just, most expeditious and least expensive outcome of every proceeding".

[19] This means that the Court will assess every motion to intervene to see whether intervention will be consistent with the objectives of Rule 3. For example, those who apply late to intervene, with potential disruption to the orderly progress of a proceeding, are unlikely to be allowed into the proceedings: *Le-Vel Brands* at paras. 26-29. On the other hand, those who are "[k]een for their important [and useful] viewpoint to be heard" tend to "jump off the starting blocks when they hear the starter's pistol" and are often welcomed into the proceedings: *Canadian Doctors for Refugee Care* at para. 28.

E. Application of these principles to this case

[20] This is an appeal from the Tax Court. The Tax Court concluded that the general anti-avoidance rule in subsection 245(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended, did not apply to a series of avoidance transactions undertaken by DAC Investment Holdings Inc. to avoid the refundable tax under section 123.3 of the Act and to benefit from the general rate reduction under section 123.4 of the Act.

[21] The only issues in this appeal are narrow: whether the avoidance transactions resulted in an abuse of the provisions of the Act and, if so, whether the reassessment was statute-barred.

[22] On appeal, the Crown raises whether the Tax Court erred in its analysis of the rationale of the relevant provisions of the Act and in finding that the avoidance transactions did not result in a misuse of abuse of those provisions. The Crown adds that the reassessment was issued in time.

[23] Here, QPQ Marketing Limited seeks to intervene on the issue whether the Minister's act of designating a corporation that is not a Canadian-controlled private corporation under subsection 125(7) of the Act as a Canadian-controlled private corporation for the purpose of implementing an assessment, overrides the legislative criteria imposed by the Act for determining Canadian-controlled private corporation status. To set up this issue, QPQ Marketing Limited relies on its own notice of reassessment.

[24] The parties to this appeal did not put in issue the Minister's designation of DAC Investment Holdings Inc. as a Canadian-controlled private corporation in its notice of reassessment and no evidence was led on the issue, as QPQ Marketing Limited acknowledges at paragraph 3 of its proposed memorandum of fact and law. QPQ Marketing Limited also appears to be introducing its own notice of reassessment as new evidence in this appeal.

[25] The issue raised by QPQ Marketing Limited is new. It seeks to reinvent the theory of the case. The new issue does not assist the Court's determination of the "essential character" and "real essence" of the issues in this appeal. It appears to be introducing new evidence.

[26] This is a classic case of a proposed intervention that, if allowed, will commandeer the parties' case.

[27] As well, this proposed intervention is too late and, thus, is against the objectives of Rule 3. The requisition for hearing for this appeal has already been filed and the appeal is about to be scheduled for hearing. Permitting intervention at this late stage will cause the existing parties to file further responding memoranda of fact and law. The result? Needless delay.

F. Proposed disposition

[28] Therefore, the motion to intervene will be dismissed. The Crown does not ask for costs and so none shall be awarded.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-197-24
STYLE OF CAUSE:	HIS MAJESTY THE KING v. DAC INVESTMENT HOLDINGS INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	FEBRUARY 13, 2025

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