Federal Court of Appeal | Cour d'appel fédérale

**Date: 20220718**

**Docket: A-242-21**

**Citation: 2022 FCA 131**

**Present:** **RENNIE J.A.**

**BETWEEN:**

**ALLIANCE FOR EQUALITY OF BLIND CANADIANS**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**and**

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA**

**Intervener**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 18, 2022.

REASONS FOR ORDER BY: RENNIE J.A.

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## REASONS FOR ORDER

**RENNIE J.A.**

[1] The First Nations Child and Family Caring Society of Canada [Caring Society] seeks an order under Rule 109 of the *Federal Courts Rules*, S.O.R./98-106 granting it leave to intervene in the hearing of this appeal.

[2] At issue is a decision of the Canadian Human Rights Commission [Commission] that it did not have jurisdiction to hear a complaint by the appellant Alliance for Equality of Blind Canadians [AEBC] as the alleged discrimination was against AEBC, as a corporate entity, and not against individuals as required by the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [CHRA].

[3] It is unnecessary and inadvisable to delve deeply into the decisions of either the Commission or the Federal Court. It is sufficient to note that the AEBC appealed the Federal Court decision on the basis that, by according "too much deference" to the Commission, it erred in its application of the reasonableness standard. It also appealed on the basis that the Commission and the Federal Court failed to consider that blind Canadians who would have benefited from the federal government funding that was withheld from AEBC and is said to constitute the discriminatory act were "individual[s]" under subsections 5(a) and 40(1) of the CHRA.

[4] The Caring Society proposes to make submissions to the effect that the Commission erred in failing to properly consider the Charter value of equality or to apply the framework set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*]. In light of this, the Commission decision cannot be reasonable.

[5] The Attorney General's objection is to the scope of the proposed intervention. He contends that in advancing this argument, the Caring Society is introducing a new issue, beyond the scope of the appeal.

[6] The criteria governing whether or not leave to intervene should be granted have been considered in a number of decisions of a full panel of this Court (*Métis National Council and Manitoba Metis Federation Inc. v. Varley*, 2022 FCA 110; *Gordillo v. Canada (Attorney General)* 2022 FCA 23 [*Gordillo* 2022]; *Whapmagoostui First Nation v. McLean*, 2019 FCA 187; and *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3 [*Sport Maska*]).

[7] There are also numerous orders of single judges of this Court arising from motions for leave to intervene (*Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)*, 2022 FCA 67; *Canada (Environment and Climate Change) v. Ermineskin Cree Nation*, 2022 FCA 36 [*Ermineskin Cree Nation*]; *Air Passenger Rights v. Canada (Attorney General)*, 2021 FCA 201; *Canada (Citizenship and Immigration) v. Camayo*, 2021 FCA 20; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13 [*Canadian Council for Refugees*]; *Gordillo v. Canada (Attorney General)*, 2020 FCA 198 [*Gordillo* 2020]; *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164).

[8] All of these cases take, as their point of departure, the decision of this Court in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, 103 N.R. 391 [*Rothmans*].

[9] *Rothmans* identified a number of considerations to be taken into account, including, amongst others, whether the intervener is directly affected by the outcome, whether the intervener's position is adequately advanced by one of the parties and whether the interests of

justice are better served by the intervention. In *Sport Maska* this Court observed that none of the factors to be considered in *Rothmans* are, in and of themselves, determinative of the question. As Nadon J.A. said at paragraph 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.

[10] The *Rothmans* factors may, at times, need to be supplemented; at times they may also be of no relevance. Other considerations may come to the forefront. For example, whether an intervener has the knowledge and expertise necessary to support the argument it wishes to make is a pertinent consideration, one not identified in *Rothmans*, but one which is frequently advanced in argument. There is good reason for this; it is doubtful whether the utility requirement of Rule 109 can be met if the intervener does not have the background, experience or expertise to address the issue. Similarly, the *Rothmans* criteria which ask whether the appeal can proceed without the presence of interveners is arguably of little relevance. As noted in *Gordillo* 2020, if the appeal cannot proceed without the interveners, more fundamental problems are in play. So too is the requirement of a "justiciable or veritable issue"; if there is none, then that surely is an issue for the parties, and not an intervener, to identify.

[11] The fact that different factors or considerations play a greater role in one intervention motion than another does not mean that the test or criteria are ephemeral or that the law is not

normative; rather it simply reflects judges doing what judges are required to do – exercising their discretion according to legally relevant criteria. Whether to grant leave to intervene is a discretionary decision, made in a unique legal, factual and procedural matrix. A grocery list approach to intervention criteria is to be avoided.

[12] One criteria is, however, invariable. It is required that the intervention be useful, in the sense that it will, in the language of Rule 109, "… assist the determination of a factual or legal issue." The requirement that submissions be useful requires, in turn, a judge to consider the nature of the issue on appeal, what the intervener proposes to say about those issues, and whether those submissions assist in determining issues in the proceeding.

[13] This raises the question of perspective. From whose perspective is the question of utility considered? The starting point is the notice of appeal, and from there, the parties' memoranda. These materials define what is in issue. As discussed in *Gordillo* 2022 at paragraph 99, an intervener must take the issues as framed by the parties, and not shape the case in a way that they prefer it to have been argued.

[14] I do not suggest that a motion for leave to intervene necessarily include a draft memorandum of fact and law of the arguments the intervener would make. While possibly helpful, to require a draft memorandum could impose a significant financial cost on a presumptive intervener and is inconsistent with the guiding principles that the rules and procedures should extend access to justice, not impede it (Rule 3). However, the Court must have

some indication of the substance of the intervener's position, otherwise there is no background against which the utility requirement can be assessed.

[15] A court must be satisfied that an intervention also furthers the interests of justice. This criteria broadens the scope of relevant considerations. In *Canadian Council for Refugees* at paragraph 14, Stratas J.A. identified a number of considerations which may arise under the broader question of whether the intervention is in the interests of justice. The timeliness of the intervention, whether the intervention will create an imbalance in the presentation of argument, and whether the intervener is prepared to accept the existing record and issues as framed by the parties are all considerations that may affect the exercise of discretion. I would add to these the question of prematurity: whether the intervention addresses the merits of the case when it is still at an interlocutory stage.

[16] These considerations are neither mandatory nor are they a definitive re-statement of the law on intervention. To treat them as such is inconsistent with diverse factual and legal matrices that characterize motions for intervention, and indeed with what Rule 109(2) requires. The criteria for determining whether or not to grant leave to intervene remain broad, and different cases will highlight different criteria based on their unique circumstances.

[17] It is suggested in argument that there is a divergence in the jurisprudence of this Court, best reflected in recent articulation of what is argued to be a new criteria, namely whether the intervention is "doomed to fail". While I disagree that there is a divergence, I agree that the

proposed criteria, depending on how it is understood, could be problematic. I say this for several reasons.

[18] First, it presupposes a view on the ultimate merits of the issues on appeal before the parties have even presented their case to the panel. As motions for leave to intervene are most frequently addressed by single judges sitting alone, judges are careful to avoid making comments on the merits of an appeal. Further, as this Court does not require an extensive elaboration of the proposed arguments, it is impossible to say that the intervener's argument is destined to fail. I note as well that most interventions before this Court, given the public and national dimension of its jurisdiction, are interest based. The purpose of the intervention is to advise the Court of the implication of the choices before it and how a decision may affect the intervener's interests. It is impossible to assess, let alone conclude, that an intervention of this nature is destined to fail.

[19] In light of these considerations, I believe that that language simply captures interventions which are frivolous and vexatious, take a position on the merits of a proceeding while it is in an interlocutory stage, or comprises overt political or policy arguments. In other words, the intervention cannot be useful or assist and therefore cannot meet the requirement of Rule 109. In sum, it is preferable to focus on the question whether the intervention may assist the Court, and not import concepts and tests associated with motions to strike under Rule 221.

[20] The focus is on the controlling test and whether the intervention may "assist" the Court in determining a legal or factual issue. An intervention need not be conclusive or determinative of the issue and it need not address all the issues before the Court. A motions judge must also keep

in mind that different members of the panel assigned to hear the appeal may have different views on the helpfulness of an intervention, which suggests a certain degree of latitude is appropriate in assessing a motion for leave to intervene.

[21] The purpose of an intervention is to advance the intervener's own perspective on a legal issue and not simply to duplicate the argument or support the result desired by one of the parties. This Court has consistently required proposed interveners to show that their submissions are different from the parties' (*Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120 [*Prophet River*]; *Ermineskin Cree Nation*; *Gordillo* 2020).

[22] At no point has AEBC raised the Charter value of equality and the application of the *Doré/Loyola* (*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 [*Loyola*]) framework as a distinct issue before the Commission or as ground of review before the application judge. In this Court, AEBC's grounds of appeal allege that the application judge afforded "too much deference" to the Commission and that the Commission mischaracterized, misunderstood, or ignored the allegations. Neither the notice of appeal nor the appellant's factum mention Charter values or the *Doré/Loyola* framework.

[23] Interveners do not have a right to make the case into something that it is not. They must take the record, and the issues, as they find them.

[24] The Caring Society says, in response, that the Attorney General would not be prejudiced by the argument, that he has time to respond to the admittedly new issue.

[25] Two points may be said about this. First, the issue of prejudice is only tangentially relevant. This appeal arises in the context of judicial review. Whether the Attorney General has the time to respond to an argument, while a concern, is not predominant. Of greater concern is the fact that the Court would be denied the benefit of the Commission's and Federal Court's analysis of the *Doré* issue. There are two types of prejudice in play; any prejudice to a party can be addressed by extensions of time; but there is no remedial order that can substitute or replace the decisions of the lower tribunal and courts.

[26] While a Court has discretion to hear a constitutional question raised for the first time on appeal, it is to be exercised sparingly (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3). The rules which limit the extent to which a party may raise a new issue on appeal evolved in the case of parties; they apply with greater force when it is an intervener who seeks to raise the issues.

[27] In *Gordillo* 2022, this Court declined to consider the interveners' arguments about Charter values on an appeal from the decision of the Federal Court on judicial review. It did so on the basis that the arguments had not first been considered by the decision-maker. While the Court acknowledged *Doré* and that the Charter values may inform administrative decision-making, it determined it should not consider the merits of the arguments:

> …leaving aside any assessment of the merits of these interveners' submissions, there is a problem with our considering them in this appeal. They were not put to the Commissioner. Nor were they put to the Federal Court on judicial review.
>
> […]
>
> The reasonableness of an administrative decision cannot normally be impugned on the basis of an issue not put to the decision maker. Rather, to

> respect legislative choice as to where primary decision-making authority lies, issues like those raised before us by the interveners should be decided at first instance by those in whom Parliament has vested responsibility to decide the merits – in this case, the Commissioner – not by a reviewing court or a court sitting on appeal from a reviewing court, whose roles are more limited. If the decision is then judicially reviewed, the reviewing court will have the benefit, in assessing reasonableness, of the decision maker's reasons, experience and expertise. And if the matter then goes to appeal, the appellate court will have the further benefit (even if it is to decide on reasonableness de novo) of the reasons of the reviewing court [citations omitted].

[28] I would therefore grant the motion for intervention on a limited basis, on the terms set out in my order of this date.

"Donald J. Rennie"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-242-21 |
| **STYLE OF CAUSE:** | ALLIANCE FOR EQUALITY OF BLIND CANADIANS v. ATTORNEY GENERAL OF CANADA AND FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA |

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

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| **REASONS FOR ORDER BY:** | RENNIE J.A. |
| **DATED:** | JULY 18, 2022 |

**WRITTEN REPRESENTATIONS BY:**

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|---|---|
| Anne Levesque | FOR THE APPELLANT |
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