NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia Barristers' Society v. Trinity Western University*, 2015 NSCA 113

Date: 20151218
Docket: CA 438894
Registry: Halifax

BETWEEN:

THE NOVA SCOTIA BARRISTERS' SOCIETY

Appellant

v.

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Respondents

and

ASSOCIATION FOR REFORM POLITICAL ACTION (ARPA) CANADA, CANADIAN COUNCIL OF CHRISTIAN CHARITIES, THE CATHOLIC CIVIL RIGHTS LEAGUE AND FAITH AND FREEDOM ALLIANCE, THE ATTORNEY GENERAL OF CANADA, THE EVANGELICAL FELLOWSHIP OF CANADA AND CHRISTIAN HIGHER EDUCATION CANADA, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, SCHULICH SCHOOL OF LAW OUTLAW SOCIETY, THE ADVOCATES' SOCIETY, CANADIAN BAR ASSOCIATION AND CHRISTIAN LEGAL FELLOWSHIP, THE CANADIAN SECULAR ALLIANCE

Intervenors

Judge:	Scanlan, J.A.
Motion Heard:	December 10, 2015, in Halifax, Nova Scotia in Chambers
Written Decision:	December 18, 2015
Held:	Motion for leave to extend time to intervene is dismissed.
Counsel:	Peter Rogers, Q.C., for the appellant Brian Casey, Q.C., for the respondents David Dalrymple, for the proposed intervenor Canadian Constitution Foundation

Decision:

[1] The Canadian Constitution Foundation ("CCF") applies for an extension to apply for intervention and, if granted, leave to intervene in the above-noted proceedings. The motion as filed requested additional items, such as direction as to length of briefs. The matters I have dealt with below, and the decision I have prepared make the other items in CCF's motion irrelevant. The motion was heard on December 10, 2015. At that time I indicated the motion was denied and reasons would follow. These are those reasons.

[2] The case on appeal is reported as *Trinity Western University v. Nova Scotiqa Barristers' Society*, 2015 NSSC 25. I will not repeat the facts as set out in that case. It is clear that the facts give rise to *Charter* issues and questions about the limitations of the Nova Scotia Barristers Society as it relates to students graduating from Trinity Western University.

[3] CCF asks this Court for leave to extend the time to apply for intervention in the above noted appeal and for the right to intervene. CCF's motion is made pursuant to *Civil Procedure Rules* 90.19 and 90.37(12)(h). In support of its motion CCF filed the affidavit of Marni Soupcoff, Executive Director of CCF, sworn on September 16, 2015. In her affidavit she asserts that CCF has been involved in approximately 20 cases in which it was an intervenor seeking to uphold the constitutional rights and freedoms for Canadians. She indicates that CCF is a national citizens-based organization dedicated to the promotion of constitutional freedoms. She says that CCF has been involved as an intervenor in the Supreme Court of Canada on six occasions in cases involving constitutional and human rights.

[4] Counsel for CCF argued that CCF is a national, non-secular, non-partisan charity dedicated to defending the constitutional rights and freedoms of Canadians. It suggests their position would be distinct from those of other parties or intervenors, saying that "… CCF promotes a purposive interpretation of the Constitution and quasi-constitutional statutes without regard to any special interest or the individual interests of any particular litigant.

[5] Counsel for the Nova Scotia Barristers' Society (NSBS) objects to the extension of time for CCF to intervene. They assert that, even if the court were to extend the time to file the motion, CCF should not be allowed to intervene as CCF has nothing unique to bring to the appeal.

Extension of time

[6] Rule 90.19 (4) states:

> (4) The notice of motion for leave to intervene must be filed no more than fifteen days after the day the notice of appeal is filed.

Rule 90.37(12)(h) states:

> A judge of the Court of Appeal hearing a motion, in addition to any other powers, may order any of the following:
>
> (h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereafter.

[7] The motion to intervene was not filed until November 30th 2015, and it stated:

> 3. The CCF was unaware of the deadline for applications for leave to intervene in this proceeding, and once learning of the state of these proceedings it moved quickly to file its Application Motion to Intervene."

[8] CCF seeks to intervene in an appeal in which the Notice of Appeal was date stamped May 5, 2015. The deadline for filing of leave to intervene expired 15 business days after May 5, 2015, that is, May 28, 2015.

[9] By July, 2015, there were 10 intervenors, seven of whom were said to be supportive of the respondents' position. After a hearing on August 27, 2015, this Court granted leave to another intervenor; Canadian Secular Alliance (CSA).

[10] On September 17, 2015, the appellant first became aware of CCF's request to intervene. By that date CCF was aware of the need to apply for extension of time and leave to intervene yet it took no immediate steps. CCF knew around that time that the appellant was not prepared to consent to CCF's intervention.

[11] I have already noted that on November 30, 2015, CCF formally applied to extend the time for filing a motion for leave to extend time and to intervene. They proposed a hearing of that motion on December 3, 2105. That would not have allowed sufficient notice under the Rules for the parties to respond to the motion. A new date of December 10, 2015 was set.

Analysis

[12] CCF is not a stranger to the rules of court and court processes. The appellant produced, as attachments to the affidavit filed in response to the CCF motion, excerpts from newspapers beginning in January, 2015. Those articles were authored by Ms. Soupcoff and she discussed therein the pleadings in the case under appeal.

[13] Ms. Soupcoff's own affidavit, filed on behalf of CCF, refers to the fact that she has a law degree from Stanford University and is a member of a Bar or Law Society. The fact that courts have time limitations should not come as any surprise to Ms. Soupcoff.

[14] CCF and Ms. Soupcoff have been involved in six cases before the Supreme Court of Canada where CCF had participated as an intervenor. The *Supreme Court of Canada Rules*, SOR/2002-156, contain deadlines of 30 days or four weeks for the intervention applications (see *Supreme Court Rules*, R. 56(a), (b) and (c), SOR/2006-203, s. 29; SOR/2013-175, s. 37(E)).

[15] The fact the rules exist, setting time limits and affording the court discretion as to whether or not to allow a party to intervene, suggest there is nothing in the nature of a rubber stamp approving requests to intervene nor extending the deadlines to apply for intervention. Contrary to what Ms. Soupcoff suggests in her affidavit, CCF did not act quickly once it learned of the expired deadline to apply as an intervenor.

[16] I am satisfied that an intervenor has an obligation to provide a reasonable excuse for the delay in applying to intervene. Even if CCF was not aware of the 15 business day deadline in the first instance, it was well aware of the deadline by late September. They did nothing for about two more months. This is a factor that weighs heavily against CCF. They failed to take reasonable steps to rectify any problem with missed deadlines once they became aware of the limitation. CCF has failed to offer a reasonable excuse for the delay in making the application to extend time. Once the CCF became aware of the deadline they should have moved quickly to rectify the situation.

[17] Meaningful intervention is relevant to both the request for extension of time and to the issue of whether leave to intervene should be granted. I ask, what is it that CCF can bring to this appeal that would justify this Court affording it the

privilege of intervening in an appeal to which they are not a party. *Civil Procedure Rule* 90.19 provides:

> **Intervention**
>
> 90.19 (1) A person may intervene in an appeal with leave of a judge of the Court of Appeal.
>
> (2) A judge of the Court of Appeal may make an order granting leave to intervene on terms and conditions the judge sets.
>
> …
>
> (5) A motion for leave must concisely describe all of the following:
>
> (a) the intervenor;
>
> (b) the intervenor's interest in the appeal;
>
> (c) the intervenor's position to be taken on the appeal;
>
> (d) the submissions to be advanced by the intervenor, their relevancy to the appeal, and the reasons for believing that the submissions will be useful to the Court of Appeal and will be different from those of the parties.

[18] There is nothing automatic about allowing non-parties to have a voice in an appeal. Each intervention is a drain on the resources of the parties and the Court. A party seeking to gain a seat at the table must be able to convince the court that it brings with it a relevant perspective, the existing parties or other intervenors will not supply.

[19] I have previously noted there are already 10 intervenors. CCF submits that what it brings to this appeal is unique in that it would bring a non-religious *Charter*-based perspective to the case. Even a cursory review of the decision under appeal makes it apparent that the respondents themselves have forcefully asserted non-religious C*harter*-based rights. That issue formed a substantial part of the trial judge's decision.

[20] I understand CCF to infer that the respondent TWU is a religious-based institution, and that somehow diminishes the non-religious assertion of *Charter* rights. For the sake of analysis, if I were to assume CCF was correct, I ask if there are other intervenors who can bring the same secular, non-religious based assertion of *Charter* rights that CCF says it can bring to the appeal. The answer is that there

are a number of other secular, non-religious intervenors who the appellant says have indicated support the respondents. There are a number of intervenors who, at least as they are named, are secular, non-religious intervenors. They include the Association for Reformed Political Action (ARPA), Schulich School of Law OUTlaw Society, The Advocate's Society, the Canadian Bar Association, all of whom one would expect would bring a secular perspective to the table, whether they support the appellant or respondent.

[21] Rule 90.19(1) is a successor to Rule 62.35(1). As noted by Fichaud, J.A. in *R. v. Chehill*, 2009 NSCA 85:

> [14] The authorities have described a flexible list of criteria to govern the judge's discretion whether to allow an intervention under what are now *Rules* 90.19 (1) and (2): *R. v. Regan* (1999), 174 NSR (2d) 1, at ¶29-53, per Cromwell, J.A.; *Arrow Construction Products Ltd. V. Nova Scotia (Attorney General)* (1996), 148 NSR (2d) 392, at ¶ 5, per Bateman, J.A. *Logan v. N.S. (Workers Compensation Appeals Tribunal)*, 2006 NSCA 11. …

[22] In *Logan v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2006 NSCA 11, the Chambers judge said:

> [8] … Generally, an intervention should (1) target the parties' existing *lis* and (2) accommodate the process of the existing appeal while (3) augmenting and not just duplicating the parties' submissions or perspectives to assist he court's consideration of the parties issues… In the circumstances of this application the key factor is whether the proposed intervention would bring a different or broader perspective that may assist the court to consider and determine the parties' issues on appeal.

Justice Fichaud repeated these principles in *Global Maxfin Investments Inc. v. Crowell*, 2015 NSCA 9 (see ¶24). He noted at ¶25 that in *A.B. v. Bragg Communications Inc.*, 2010 NSCA 70 (Chambers), ¶8. Justice Farrar adopted the passage from John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal*, 2nd ed., (Toronto: Butterworths Canada Ltd., 2000), pp. 255-56:

> A person who seeks leave to intervene in an appellate court is constrained by the same general considerations as is a person who seeks leave to intervene at trial. As at trial, intervention is discretionary and is based on the legislative criteria governing intervention in that jurisdiction. The proposed intervenor must convince the court that it brings something additional to the Appeal that the parties may not be able to supply. …

[23] In this case as in *Global,* the issue is whether the intervention "…brings something additional to the Appeal that the parties (or other intervenors) may not be able to supply". I see nothing in the materials or submissions by CCF to convince me that they bring something additional to the appeal, which the parties or other intervenors may not be able to supply.

Conclusion

[24] CCF has failed to convince me that they acted in a timely manner to extend the time to intervene once it missed the deadline. Second even if I had extended the time to apply for intervention, CCF has failed to convince me that they bring a new perspective to the appeal and their application for intervention would have been denied.

[25] The motion to extend the time to apply for leave is dismissed. The parties have not requested costs.

Scanlan, J.A.