Federal Court of Appeal | Cour d'appel fédérale

Date: 20160420

Docket: A-435-15

Citation: 2016 FCA 120

Present: STRATAS J.A.

BETWEEN:

PROPHET RIVER FIRST NATION AND WEST MOBERLY FIRST NATIONS

Appellants

and

ATTORNEY GENERAL OF CANADA, MINISTER OF THE ENVIRONMENT, MINISTER OF FISHERIES AND OCEANS, MINISTER OF TRANSPORT, AND BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 20, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Amnesty International and Te'mexw Treaty Association move for leave to intervene in this appeal. For the reasons set out below, I dismiss the motions.

A. The test for intervention

[2] The factors to be considered on an intervention motion are set out in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, 103 N.R. 391 (C.A.), recently reaffirmed in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44.

[3] Prior to *Sport Maska*, *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, [2015] 2 F.C.R. 253 tweaked and reformulated the *Rothmans, Benson & Hedges* factors. One of the reasons for that was to provide greater guidance concerning the "interests of justice" factor in *Rothmans, Benson & Hedges*. The danger of a broad "interests of justice" factor is that it can be taken to mean "whatever the judge assigned to the motion thinks."

[4] In the end, the Court in *Sport Maska* found there was not enough of a difference between *Rothmans, Benson & Hedges* and *Pictou Landing* to warrant a departure from the former: para. 41. Instead, the panel held that a number of the *Pictou Landing* factors are the sorts of factors that the Court may consider within the flexible "interests of justice" factor: *Sport Maska,* para. 42. That is how I shall proceed with these motions.

B. Applying the test for intervention

(1) Considerations common to both intervention motions

[5] Four of six of the factors in *Rothmans, Benson & Hedges* can be dismissed as irrelevant right at the outset:

- *Is the proposed intervener directly affected by the outcome?* No. It may be that both are very interested in the outcome. But they are not directly affected. "Directly affected" is a requirement for full party status in an application for judicial review – *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236. Neither moving party says that it should have been an applicant or respondent in this case.

- *Does there exist a justiciable issue and a veritable public interest?* There is a justiciable issue. If there were not, the application for judicial review would have been struck out: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250. Yes, there seems to be public interest in the case, but that does not necessarily mean that the moving parties should succeed.

- *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. The question is before the Court and it will be decided whether or not the moving parties are before the Court.

- *Can the Court hear and decide the case on its merits without the proposed intervener?* Yes. The absence of the interveners will not stop the Court from deciding this appeal.

[6] This leaves only two *Rothmans, Benson & Hedges* factors to be considered on these motions:

- *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.

- *Are the interests of justice better served by the intervention of the proposed third party?* In my view, this factor includes all of the factors discussed in *Pictou Landing First Nation* plus any others that might arise on the facts of particular cases:

- whether the intervention is compliant with the objectives set out in Rule 3 and the mandatory requirements in Rule 109 (provisions binding on us);

- whether the moving party has a genuine interest in the matter 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;

- whether the matter has 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;

- whether the moving party has been involved in earlier proceedings in the matter;

- whether terms should be attached to the intervention that would advance the objectives set out in Rule 3 and afford procedural justice to existing parties to the proceeding.

[7] I have carefully considered these factors. In the interests of brevity I need only offer brief reasons on the factors most salient to my decision.

(2) Amnesty International's motion

[8] Amnesty International offers us submissions on a variety of international law issues. However, I am not persuaded that these issues are sufficiently relevant and material to the issues in this appeal.

[9] In particular, I am not persuaded that Amnesty International will assist the Court on the central issue in this appeal, namely the jurisdiction or statutory mandate of the Governor-in-Council under ss. 52(4) of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19.

[10] The matter before us is an appeal from the dismissal of an application for judicial review. Amnesty International has not explained with particularity exactly how international law will bear upon the precise administrative law issues in this case. We are told that "[i]nternational law requires high standards of substantive and procedural protection for Indigenous peoples' rights" and that "domestic legal standards…must be informed by and accord with Canada's international obligations," but precisely why and how that is so in the precise facts, circumstances and legislative provisions in this case is left unmentioned.

[11] The Supreme Court of Canada has done much to define the law that we must follow. We do not have licence to modify that law. The scope for more general submissions based on international law concepts is narrower for our Court than the Supreme Court.

[12] In *Gitxaala Nation v. Canada*, 2015 FCA 73—a case in which Amnesty International was one of the moving parties—this Court outlined the rather limited (but sometimes important) ways in which international law can come to bear in proceedings such as this. In this case, it was open to Amnesty International to take issue with the Court's observations in that case, but it did not. Amnesty International has not demonstrated, with particularity and with reference to *Gitxaala*, how the international law matters it wishes to raise will be relevant to our determination of the precise issues in this appeal. For example, it has not pointed to any particular ambiguity in any relevant legislative provision, nor has it outlined in any precise way how international law standards might affect the Court's interpretation of any relevant provision.

[13] I have not been convinced by Amnesty International's submissions that the Court would receive anything more from Amnesty International than a general presentation on international law provisions and concepts as they pertain to the law of indigenous peoples, suggesting overall that this law is of prime importance—something that is already very front-of-mind for this Court.

[14] The Court would welcome precise submissions on specific international law matters that might affect our decision on the precise issues in this case. But I have not been persuaded that that is on offer.

[15] Finally, I note several months delay in the bringing of this application. In the circumstances of this case, this is a significant consideration: *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34; 470 N.R. 167 at paras. 28 and 39; *ViiV Healthcare ULC v. Teva Canada Limited*, 2015 FCA 33, 474 N.R. 199 at para. 11. Amnesty

International was granted leave on a limited basis in the Federal Court to intervene, so it was well-aware of this appeal. But inexplicably, it delayed.

[16] Before this Court is a motion by the appellants to set an early hearing date for this appeal. If Amnesty International were permitted to intervene, responding submissions would be required, resulting in further delay and potentially exposing the appellants to more of the sort of harm they allege in their motion.

[17] Thus, I shall dismiss Amnesty International's motion to intervene. In doing so, I cast no aspersions upon it and the exemplary work it has done in some legal matters and other broader matters.

(3) Te'mexw Treaty Association's motion

[18] I have not been persuaded that the Association will offer a different perspective on the issues in this appeal. Instead, it seems to propose submissions that will substantially duplicate those of the appellants.

[19] The Association submits that its unique perspective arises from its involvement in the modern treaty process but the legal arguments it wishes to advance are unconnected to its participation in that process.

[20] I accept that this Court's determination of this appeal may affect the interests of the Association. However, that sort of interest—a jurisprudential interest—has been repeatedly held not to be sufficient: *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, 2000 FCA 233, [2010] 1 F.C.R. 226; *Anderson v. Canada Customs and Revenue Agency*, 2003 FCA 352, 311 N.R. 184; *The Queen v. Bolton*, [1976] 1 F.C. 252 (C.A.); *Tioxide Canada Inc. v. Canada* (1994), 174 N.R. 212, 94 D.T.C. 6366 (F.C.A.).

[21] Among other things, the Association intends in this appeal to submit that the decision below will dissuade First Nations from entering into modern treaties. A respondent would likely respond that a modern treaty would be expected to contain detailed and specific provisions that would render the kind of dispute in this case unnecessary. Whether the Association or the respondent is correct turns on a factual matter on which no evidence has been adduced. Evidence cannot normally be adduced on appeal: *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, 474 N.R. 268 at paras. 14-27.

[22] At the centre of this appeal is the statutory scheme, the authority of the administrative decision-maker, and the decision at issue. The Association offers general submissions but has failed to persuade me that those submissions will affect this Court's consideration of those central matters.

[23] Like Amnesty International, the Association has delayed in moving to intervene. In the circumstances of this case, this is another significant factor in the Court's exercise of discretion against granting the Association's motion.

C. Disposition

[24] Therefore, I shall dismiss the motions to intervene. Concurrently with the release of these reasons and order, the parties will receive a direction from the Court concerning the appellants' motion for an early hearing date.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-435-15
STYLE OF CAUSE:	PROPHET RIVER FIRST NATION AND WEST MOBERLY FIRST NATIONS v. ATTORNEY GENERAL OF CANADA,, MINISTER OF THE ENVIRONMENT,, MINISTER OF FISHERIES AND OCEANS,, MINISTER OF TRANSPORT, AND, BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	APRIL 20, 2016

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