Federal Court of Appeal

Cour d'appel fédérale

Date: 20201106

Docket: A-290-19

Citation: 2020 FCA 198

Present: RENNIE J.A.

BETWEEN:

MIRNA MONTEJO GORDILLO, JOSÉ LUIS ABARCA MONTEJO, JOSÉ MARIANO ABARCA MONTEJO, DORA MABELY ABARCA MONTEJO, BERTHA JOHANA ABARCA MONTEJO, FUNDACIÓN AMBIENTAL MARIANO ABARCA (MARIANO ABARCA ENVIRONMENTAL FOUNDATION OR FAMA), OTROS MUNDOS, A.C., CHIAPAS, EL CENTRO DE DERECHO HUMANOS DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD AUTÓNOMA DE CHIAPAS (THE HUMAN RIGHTS CENTRE OF THE FACULTY OF LAW AT THE AUTONOMOUS UNIVERSITY OF CHIAPAS), LA RED MEXICANA DE AFECTADOS POR LA MINERÍA (MEXICAN NETWORK OF MINING AFFECTED PEOPLE OR REMA) and MININGWATCH CANADA

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

and

AMNESTY INTERNATIONAL CANADA and CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS AND THE INTERNATIONAL JUSTICE AND HUMAN RIGHTS CLINIC and the CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY

Interveners

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 16, 2020.

REASONS FOR ORDER BY: RENNIE J.A.

Cour d'appel fédérale

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Citation: 2020 FCA 198

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BETWEEN:

MIRNA MONTEJO GORDILLO, JOSÉ LUIS ABARCA MONTEJO, JOSÉ MARIANO ABARCA MONTEJO, DORA MABELY ABARCA MONTEJO, BERTHA JOHANA ABARCA MONTEJO, FUNDACIÓN AMBIENTAL MARIANO ABARCA (MARIANO ABARCA ENVIRONMENTAL FOUNDATION OR FAMA), OTROS MUNDOS, A.C., CHIAPAS, EL CENTRO DE DERECHO HUMANOS DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD AUTÓNOMA DE CHIAPAS (THE HUMAN RIGHTS CENTRE OF THE FACULTY OF LAW AT THE AUTONOMOUS UNIVERSITY OF CHIAPAS), LA RED MEXICANA DE AFECTADOS POR LA MINERÍA (MEXICAN NETWORK OF MINING AFFECTED PEOPLE OR REMA) and MININGWATCH CANADA

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Interveners

REASONS FOR ORDER

RENNIE J.A.

[1] The Canadian Lawyers for International Human Rights and The International Justice and Human Rights Clinic (CLIHR/IJHRC), Amnesty International Canada, and the Centre for Free Expression at Ryerson University (CFE) seek leave to intervene in an appeal to this Court from a decision of the Federal Court (2019 FC 950, *per* Boswell J.). In that decision, the Federal Court dismissed a judicial review application of the refusal of the Public Sector Integrity Commissioner to investigate allegations that officials in the Canadian Embassy in Mexico City failed to follow Government of Canada policies applicable to the protection of human rights advocates and failed to report an act of corruption in a timely manner. The Commissioner found that these were not "wrongdoings" under subsection 33(1) and paragraphs 8(*d*) and (*e*) of the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (Disclosure Act.)

[2] By way of context, in 2007, a Canadian mining company, Blackfire Exploration Ltd. (Blackfire), opened a barite mine in Chiapas, Mexico. The mine met with local opposition, manifesting in demonstrations in front of the Canadian Embassy in Mexico City and a blockade of one of the transportation routes to the mine. In 2009, the leader of the opposition movement, Mr. Abarca, was arrested and held without charges for eight days. The appellants assert that in 2009, shortly following a complaint to the police by Mr. Abarca that two employees of Blackfire had made death threats to him, Mr. Abarca was murdered.

[3] At issue before the Commissioner was whether the Embassy's actions or inactions in assisting Blackfire navigate the political and social opposition to the mine and in liaising between Blackfire and the local, state and national governments in respect of regulatory requirements, conformed to Government of Canada policies in relation to adherence to customary international law and Canada's stated policy to advance and protect human rights. It was the position of the appellants these actions or inactions contributed to the danger faced by Mr. Abarca. The second allegation concerned whether the Embassy reported an act of corruption in a timely manner.

[4] The respondent Attorney General "consents" to the leave to intervene motions of the CLIHR/IJHRC and Amnesty International and opposes the motion by the CFE, arguing that it has not satisfied the test for intervention under Rule 109 of the *Federal Courts Rules*, SOR/98-106. The position of the Attorney General requires comment.

[5] A party cannot "consent" to a motion for leave to intervene: it can support, oppose or it can take no position. Parties can only "consent" to procedural matters such as a delay in completing a procedural step that would work to its advantage. A delay in filing a defence to which it would otherwise be entitled under the Rules is an example.

[6] The question whether an intervention should be allowed is substantive and the consent of a party is irrelevant. At best, it is an acknowledgement on the part of the party that there is no issue of prejudice from its perspective. But that is only one consideration among many. The Court must be satisfied that the intervention is in the overall best interests of justice. If the

Attorney General is of the view that the motions ought to be granted, he should say so, and explain, albeit in a summary way, why that is so.

[7] In a motion under Rule 109(2)(b), a party is to explain how it wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding. The court then assesses and weighs these submissions against the factors as articulated in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, 103 N.E. 391 at para. 3 (*Rothmans, Benson & Hedges Inc.*). As noted by this Court in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 at para. 37 (*Sport Maska Inc.*), these factors are flexible and "well tailored for the task at hand" (*Sport Maska Inc.* at para. 42).

[8] The relevant factors can include whether:

1) the proposed intervener is directly affected by the outcome;
2) there is a justiciable issue and a veritable public interest;
3) there are other reasonable or efficient means to submit the question to the Court;
4) the position of the proposed intervener is adequately defended by one of the parties to the case;
5) the interests of justice are better served by the intervention of the proposed third party; and
6) the Court can hear and decide the cause on its merits without the proposed intervener (*Rothmans, Benson & Hedges Inc.* at para. 12).

[9] Not all factors need be present and some may weigh more heavily than others. There may also be new considerations, unique to a particular case, which are pertinent (see, *e.g.*, *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120 at paras. 5-6 (*Prophet River First Nation*)). For this reason, the criteria are not prescriptive. Criteria identified as pertinent in one case should not be viewed as pre-requisites in another. As noted by Nadon J. in *Sport Maska Inc.*, “flexibility is the operative word” (at para. 42). The over-arching test is whether the Court will be better served in its consideration of the issues with which it has to grapple by the presence of the intervener.

[10] A comment is required on the sixth criteria in *Rothmans.* It asks whether the court can determine the matter without the presence of the interveners. This factor is of doubtful utility and is, if scrutinized, unsound. If the answer is negative, that the matter cannot be heard without the presence of the interveners, there may well be an underlying problem in the proceeding itself. It may be moot, for example. An affirmative answer, on the other hand, that the matter can be heard without the interveners, does nothing to advance the analysis. It simply tells you that there is a properly constituted *lis* between the parties. The question is not whether the presence of the intervener is necessary to the proceeding, rather, the question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter (*Sport Maska Inc.* at para. 40).

[11] Turning to the *Rothmans* factors, none of the parties here are “directly affected” in that they have the same level of “direct interest” an entity or person with full party status would typically have (*Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013

FCA 236 at paras. 19-20; *Canada (Attorney General) v. Pictou Landing First Nation,* 2014 FCA 21, [2015] 2 F.C.R. 253 at para. 9). That is not a barrier, however; indeed if they did have that degree of interest they would likely be a party. Courts have long granted parties in public interest litigation intervener status in the absence of a direct interest. Instead, the court looks for a genuine interest on the part of the intervener in the proceeding.

[12] In asserting a genuine interest, there must be a link between the issue to be decided and the mandate and objectives of the party seeking to intervene. The source of the genuine interest must be identified and it should be clear from the submissions what animates the intervention. Sometimes, a genuine interest is established through the expertise or experience the intervener brings to the issue. Sometimes it is established through the unique perspective it has on the issues. However, in asserting a genuine interest, an intervener must demonstrate more than a "jurisprudential" motivation (*Amnesty International Canada v. Canada (Minister of National Defence*), 2008 FCA 257 at paras. 6-7; *C.U.P.E. v. Canadian Airlines International Ltd.*, 2000 FCA 233 at paras. 11-12). An interest in the legal question alone is insufficient.

[13] Here, the proposed interveners have, through their supporting affidavits, established a historical record of engagement in different facets of the legal issues before the Court. The CLIHR/IJHRC and Amnesty outline their mandates as non-governmental institutions working on international human rights issues, and explain how the issues in this case bear on their work. The CFE also describes, in its materials, its extensive engagement with the issue of public disclosure by government institutions, and its participation in other court cases in the interpretation of the Disclosure Act.

[14] As noted in *Sport Maska Inc.*, the critical question is whether the intervener will bring further, different and valuable perspectives to the Court that will assist it in determining the matter.

[15] This assistance can take many forms (*Tsleil-Waututh Nation v. Canada (Attorney General*), 2017 FCA 102 at para. 49 (*Tsleil-Waututh Nation*)). It may address the broader social or economic context within which a particular case is situated. It may address the policy implications of a decision—the ramifications of a decision which are not apparent on the face of the record, or which have not been identified by the parties. These factors may bear on the purpose of the legislation, and inform the exercise of statutory interpretation.

[16] In this case, the interveners' submissions draw on their understanding of international law, both customary and treaty, and its role in the interpretation of domestic legislation. The focus of the CFE is different—its interest is in the substance of the Disclosure Act and its scope. In its supporting affidavit, the CFE describes initiatives it has undertaken in Canada with respect to the protection of public servants who make disclosures, including the publication of a ten year review of how the Disclosure Act has been implemented and interpreted. More specifically, it proposes to make submissions on the interpretation of sections 8 and 33 of the Disclosure Act.

[17] A proposed intervener's motion will be dismissed if their submissions substantially duplicate those already made by the parties or is not sufficiently distinct (*Zaric v. Canada (Minister of Public Safety and Emergency Preparedness*), 2016 FCA 36 at paras. 16-17). This is not the case here. The interveners have all filed, as part of their motion records, draft outlines of

the arguments that they propose to make. Both Amnesty International and the CLIHR/IJHRC propose to present arguments on the impact of international law on both the statutory interpretations and administrative law principles at the heart of this proceeding. These arguments are not addressed in the memorandum of the parties or in the decision of the Federal Court but may assist this Court in deciding the matter. I am also satisfied, on reviewing the submissions of the CFE and the reasons of the Federal Court, that the legal analysis it proposes is unique and is not replicated in the submissions filed by the principal parties.

[18] As noted, the controlling consideration is whether the interests of justice are better served by allowing the intervention. It is under this factor that the Court can address “the particular facts and circumstances of the case in respect of which intervention is sought” (*Sport Maska Inc.* at paras. 39 and 42). The relevant considerations can be both substantive and procedural. They are not exhaustive and will vary from case to case. They can include whether the moving party intends to work within the current proceedings, whether they intend to add anything to the evidentiary record (*Tsleil-Waututh Nation* at para. 49), whether they were involved in earlier proceedings, whether the issues before the Court have a public dimension which can be illuminated by the perspectives offered by the interveners, whether any terms should be attached to the intervention (*Prophet River First Nation* at para. 6), whether the intervention was timely or whether it will delay the hearing and prejudice the parties.

[19] In this instance, there are no specific facts that would weigh against either Amnesty International, the CLIHR/IJHRC or the CFE. They have not delayed in bringing their motions,

they have outlined the nature of their representations and have restricted themselves to the evidentiary record already before the court.

[20] The Attorney General advances three main objections to the intervention of the CFE. I do not find these compelling.

[21] The first is that the appeal does not raise any new legal issues and can be disposed of based on settled precedent. This assumes, of course, there is nothing unique in the facts of this case that would distinguish its consideration from prior cases. Without prejudging what this Court may decide with respect to the merits after hearing the appeal, it is sufficient to note that assumption is not made out in the argument on this motion.

[22] The second objection is that the CFE's argument is simply a challenge to the reasonableness of the Commissioner's decision. On reading the CFE's proposed submissions, I do not agree that this is a proper characterization, particularly in light of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. The thrust of the CFE submissions is on the correct legal test, and the scope of legal or policy obligations that inform the interpretation of sections 8 and 33 of the Disclosure Act.

[23] The third objection is that the CFE's interest is purely jurisprudential. While I agree with counsel that the focus of the CFE's submission is on the nature of the legal tests, it is nonetheless a genuine interest because of the link between the CFE's mandate and expertise and the issue. The requirement that a party demonstrate more than a purely jurisprudential interest serves as a

gatekeeper—it excludes busybodies. It is not meant to exclude those with a genuine interest in the legal framework within which it may operate, whether a non-governmental organization or corporation.

[24] On balance I am satisfied that the proposed interveners have demonstrated through their submissions that they have a genuine interest in the matter before this Court, that their proposed submissions are not duplicated by either party and that it would be in the interests of justice to grant them intervener status. That said, I am also satisfied, having regard to the slight overlap in some of the arguments, and complexity and novelty of others, that some adjustment in the amount of time for oral argument allotted to the interveners is warranted. This is reflected in the allocation of time in the order.

[25] I make one final observation. There is a distinction to be made between public interest issues determined on the basis of the application of settled jurisprudence, established doctrine and cases where, as described by Stratas JA in *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164, "interveners advance too much policy talk, untethered to the facts and legal doctrine," and cautions that this may seep into the Court's consideration of legal issues.

[26] This is not the case before me. Here, while the interventions arise in the context of a broader policy question of Canada's role in relation to the advancement of human rights abroad, the interventions do not seek to engage the court in the merits of that discussion. All focus on the proper interpretation of a statute. All draw on authoritative legal sources of international law. All

the arguments pivot on questions of legal doctrine. Unlike *Kattenberg*, they do not directly bring geo-political considerations to the table.

[27] The motions for leave to intervene by the Canadian Lawyers for International Human Rights and the International Justice and Human Rights Clinic (a single intervention), Amnesty International Canada and the Centre for Free Expression are granted without costs. The title of the proceeding shall be modified to include these parties as interveners. The leave to intervene is granted on the following terms:

1) The interveners are required to accept the record as adduced by the parties and shall not be entitled to file any additional evidence.
2) The interveners Canadian Lawyers for International Human Rights and the International Justice and Human Rights Clinic are entitled to file a memorandum of fact and law not exceeding 20 pages.
3) The interveners Amnesty International and the Centre for Free Expression are each entitled to file a memorandum of fact and law not exceeding 15 pages.
4) The interveners' memoranda of fact and law are to be filed on or before December 4, 2020.
5) The reply of the Attorney General is limited to 10 pages per intervention, to be filed on or before December 15, 2020.
6) The interveners Canadian Lawyers for International Human Rights and the International Justice and Human Rights Clinic are allowed to make oral submissions to the Court, not exceeding 30 minutes.

7) The interveners Amnesty International and the Centre for Free Expression are allowed to make oral submissions to the Court, not exceeding 10 minutes each.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-290-19
STYLE OF CAUSE:	MIRNA MONTEJO GORDILLO ET AL. v. ATTORNEY GENERAL OF CANADA and AMNESTY INTERNATIONAL CANADA ET AL.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY:	RENNIE J.A.
DATED:	NOVEMBER 16, 2020

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