

In the Court of Appeal of Alberta

Citation: Justice Centre for Constitutional Freedoms v Alberta, 2021 ABCA 295

Date: 20210909

Docket: 2101-0079-AC

Registry: Calgary

Between:

Justice Centre for Constitutional Freedoms

Respondent

- and -

Her Majesty the Queen in right of the Province of Alberta

Respondent

- and -

British Columbia Civil Liberties Association

Applicant

**Reasons for Decision of
The Honourable Justice Kevin Feehan**

Application for Permission to Intervene

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I. Overview

[1] The British Columbia Civil Liberties Association seeks permission to intervene in this appeal from a decision of a case management judge dismissing an application of the Justice Centre for Constitutional Freedoms for public interest standing, pursuant to rr 14.37(2)(e) and 14.58 of the *Alberta Rules of Court*, AR 124/2010. The Justice Centre challenged the constitutionality of two provisions of the *Public Health Act*, RSA 2000, c P-37, ss 52.1(2)(b) and 52.21(2)(b), as amended by the *Public Health (Emergency Powers) Amendment Act, 2020*, SA 2020, c 5, on the basis that they contravene ss 55, 90, and 92, of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 (UK), s 45 of the *Constitution Act, 1982*, Schedule B to *Canada Act 1982* (UK), 1982, c 11, and unwritten constitutional principles of the rule of law, democracy, and separation of powers. On direction of the case management judge, it sought confirmation of its standing to bring that constitutional challenge.

[2] The Association was granted intervenor status in the underlying constitutional challenge on November 9, 2020, on the issue of protection of minority rights.

[3] On March 22, 2021, the case management judge ruled on the preliminary standing application that the Justice Centre satisfied the first two requirements of the tripartite test for public interest standing, a serious justiciable issue raised in which the plaintiff has a real stake or genuine interest, but the proposed action was not a reasonable and effective way to bring the issue before the courts since the Minister of Health had released a statement on October 15, 2020 that forthcoming amendments to the *Public Health Act* would repeal the impugned provisions. The case management judge granted leave to the Justice Centre to re-apply after July 1, 2021 if that did not occur. Section 52.21 was repealed on June 17, 2021. The Association did not participate in the public interest standing application but maintained a watching brief. The Justice Centre filed its notice of appeal from the order denying public interest standing on March 31, 2021 and the appeal is set to be heard November 10, 2021. That is the appeal in which the Association now seeks to intervene.

[4] For the reasons below, the application is granted on conditions.

II. The Proposed Intervenor

[5] The Association submits that it is a non-profit, non-partisan, affiliated advocacy group, whose objects include the promotion, defence, sustainment, and extension of civil liberties and human rights. It submits that it has an extensive history of participation in legal proceedings across

Canada which engage civil liberties and human rights, makes submissions to governmental bodies with respect to proposed legislative and policy initiatives, and provides educational workshops on civil liberties issues.

[6] Upon review of the decision under appeal, the Association became concerned with the case management judge's test for and application of the third criterion for public interest standing, and wishes to intervene to make submissions solely on that criterion. It submits this determination will impact its ability, and that of other interest groups, to participate in future proceedings that engage issues of constitutionality and civil liberties. The Association says the decision on this issue will determine whether the underlying constitutional issues may proceed on the merits, and it already has intervenor status in that constitutional challenge.

III. Law on Interventions

[7] The Supreme Court of Canada explained in *R v Morgentaler*, [1993] 1 SCR 462, 463 that the “purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal.” See also *Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238, para 10, 40 Alta LR (6th) 11.

[8] Granting intervenor status is a two-step process. The court first considers the subject matter of the appeal and then determines the proposed intervenor's interest in it: *Orphan Well*, para 8, citing *Papaschase Indian Band v Canada (Attorney General)*, 2005 ABCA 320, para 5, 380 AR 301.

[9] In *AC and JF v Alberta*, 2020 ABCA 309, para 9, this Court described the factors to be examined:

1. whether the proposed intervenor has a particular interest in, or will be directly and significantly affected by the outcome of the appeal, or
2. whether the proposed intervenor will provide some special expertise, perspective, or information that will help resolve the appeal.

See also *Papaschase*, para 5; *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2014 ABCA 340, para 8; 584 AR 255; *UAlberta Pro-Life v Governors of the University of Alberta*, 2018 ABCA 350, para 9; *Wilcox v Alberta*, 2019 ABCA 385, para 12; *Hamm v Canada (Attorney General)*, 2019 ABCA 389, para 5.

[10] The following factors may also be considered:

1. is the presence of the intervenor necessary for the court to properly decide the matter;
2. might the intervenor's interest in the proceedings not be fully protected by the parties;
3. will the intervention unduly delay the proceedings;
4. will there possibly be prejudice to the parties if intervention is granted;
5. will intervention widen the dispute between the parties; and
6. will the intervention transform the court into a political arena.

See *Pedersen v Alberta*, 2008 ABCA 192, para 3, 432 AR 219; *UAlberta Pro-Life*, para 10; *Wilcox*, para 13; *Hamm*, para 6; *AC and JF*, para 10.

[11] This Court also indicated in *Papaschase*, para 6, that the standard for intervenor status is more relaxed in a constitutional case and at the appellate level:

In cases involving constitutional issues or which have a constitutional dimension to them, courts are generally more lenient in granting intervenor status ... Similarly, appellate courts are more willing to consider intervenor applications than courts of first instance.

IV. Analysis

[12] The Association's intervenor status in the underlying action recognizes its interest in the constitutional challenge. The subject matter of this appeal is the determination and application of the test for and application of the third criterion for public interest standing in a constitutional challenge or a matter with a constitutional dimension. The Association's interest in the appeal is two-fold:

- (a) the outcome of the appeal will determine whether the underlying matter will proceed on the merits, which the Association wishes to occur; and
- (b) the Association is an entity which has and will in the future rely upon being granted public interest standing in matters involving civil liberties and human rights. It is interested in the test for standing and the application of that test, in particular the third criterion of that test, as prospectively this will directly and significantly affect its ability to claim such standing in issues of constitutionality and civil liberties.

[13] On the first stated interest above, that the Association seeks to have this litigation proceed on the merits, Alberta concedes the Association “has some interest in the proceedings”.

[14] As noted above, the Association points to its special expertise and perspective in this area, given its involvement in the underlying action and its public interest standing in past and presumably future matters; see for example *Carter v Canada (Attorney General)*, 2011 BCSC 1371; 2011 BCSC 1866; 2012 BCSC 886, 287 CCC (3d) 1; 2012 BCSC 1587, 271 CRR (2d) 224; 2012 BCCA 336, 291 CCC (3d) 373; 2012 BCCA 502, 272 CRR (2d) 255; 2013 BCCA 435, 365 DLR (4th) 351; 2014 SCC no 35591 (January 16, 2014); 2015 SCC 5, [2015] 1 SCR 331; 2016 SCC 4, [2016] 1 SCR 13; *BC Civil Liberties Association v University of Victoria*, 2015 BCSC 39, 326 CRR (2d) 310; *Lamb v Canada (Attorney General)*, 2018 BCCA 266, [2018] 9 WWR 1.

[15] The Association says its participation in the appeal is necessary for the Court to properly decide the matter, and that its intervention will not unduly delay the proceedings nor cause prejudice to any of the parties. The Association intends to limit its submissions to the test for and application of the third criterion for public interest standing. As such, it says it will not widen the dispute between the parties and will not transform the Court into a political arena. Finally, the Association advises that it proposes to provide submissions that will be distinct from those of the Justice Centre based on its own experience, perspective, understanding of the law, and application to its own participation in matters of this kind.

V. Conclusion

[16] The British Columbia Civil Liberties Association has met the criteria for permission to intervene, subject to the conditions set out below. The Association is directly and substantially affected by the outcome of the appeal, and has expertise and a particular perspective on the issues. The Association is granted intervenor status on the following conditions:

- (a) intervenor status is granted only on the test for and application of the third criterion for public interest standing;
- (b) the factum of the Association will be limited to eight pages, exclusive of title page and index of authorities;
- (c) oral submissions of the Association will be limited to 15 minutes;
- (d) the Association will not file any additional evidence, unduly expand the issues, or unreasonably delay or lengthen the hearing of this matter;
- (e) the timing for filing of all submissions and documents are to be as set by the case management officer; and

- (f) the Association will not be entitled to claim costs of this appeal nor will costs be awarded against it.

Application heard on September 1, 2021

Reasons filed at Calgary, Alberta
this 9th day of September, 2021

Feehan J.A.

Appearances:

R.J. Cameron
for the Respondent

B.M. Leclair/N. Parker
for the Respondent

P.R. Mack, Q.C./E. Semenova
for the Applicant