

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160823

Docket: A-41-16

Citation: 2016 FCA 208

Present: WEBB J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

**OLEG SHAKOV, THE OFFICE OF THE
COMMISSIONER FOR FEDERAL JUDICIAL
AFFAIRS, MARC GIROUX and NIKKI
CLEMENHAGEN**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 23, 2016.

REASONS FOR ORDER BY:

WEBB J.A.

Federal Court of Appeal



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REASONS FOR ORDER

WEBB J.A.

[1] The Commissioner of Official Languages for Canada (Commissioner) has brought a motion for leave to intervene in this appeal. The Public Service Commission had adopted the conclusions of an investigative report related to the appointment of Mr. Oleg Shakov as Director of International Programs for the Office of the Commissioner for Federal Judicial Affairs. This report had concluded that there was improper conduct by aligning the language requirements of the position to correspond to Mr. Shakov's linguistic abilities. The Public Service Commission

ordered the revocation of Mr. Shakov's appointment and imposed certain sanctions on the individuals involved. The Federal Court allowed the application for judicial review and set aside the decision of the Public Service Commission.

[2] The Commissioner did not intervene in the matter before the Federal Court but is seeking to intervene in this appeal. Rule 109 of the *Federal Courts Rules*, SOR/98-106 provides that:

109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

109 (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

(2) Notice of a motion under subsection (1) shall

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir:

(a) set out the full name and address of the proposed intervenor and of any solicitor acting for the proposed intervenor; and

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

(b) describe how the proposed intervenor wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

[3] Stratas J.A., dismissed a motion for an individual to intervene in *Canada (Minister of Public Safety and Emergency Preparedness) v. Zaric*, 2016 FCA 36 (*Zaric*). After referring to the test as set out in *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, 456 N.R. 365, Stratas J.A. noted that:

16 Mr. Duhamel has failed to demonstrate how he will assist in the determination of a factual or legal issue related to the proceeding. The Minister

suggests that Mr. Duhamel's participation is entirely duplicative of that of the appellant—essentially a co-counsel for the appellant—and adds nothing.

17 In the circumstances of this case, I agree. Mr. Duhamel's proposed submissions substantially duplicate those already made in the appellant's memorandum of fact and law. They emphasize different things, but are not sufficiently distinct to be of assistance to the Court in determining the issues in this appeal.

[4] In *Bauer Hockey Corp. v. Easton Sports Canada Inc.*, 2016 FCA 44, 480 N.R. 387, this Court confirmed that the criteria as set out by this Court in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, [1989] F.C.J. No. 707 (*Rothmans*), are still applicable.

[5] In *Rothmans*, this Court heard two appeals together – one from the Order related to the application of the Institute of Canadian Advertising (ICA) for leave to intervene ([1990] 1 F.C. 84, [1989] F.C.J. No. 468) and the other from the Order related to the application of the Canadian Cancer Society for leave to intervene ([1990] 1 F.C. 74, [1989] F.C.J. No. 446). In the reasons for the Order related to ICA, the Federal Court Judge listed four criteria that were gleaned from the jurisprudence and in the other reasons, six such criteria were listed. This Court in *Rothmans* simply noted that:

3 We are all of the view that Rouleau J. correctly enunciated the criteria which should be applicable in determining whether or not to allow the requested interventions....

[6] In the reasons related to the application by the Canadian Cancer Society, Rouleau J. noted that:

12 In order for the Court to grant standing and to justify the full participation of an intervenor in a "public interest" debate, certain criteria must be met and gathering from the more recent decisions the following is contemplated:

- (1) Is the proposed intervenor directly affected by the outcome?
- (2) Does there exist a justiciable issue and a veritable public interest?
- (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
- (4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
- (5) Are the interests of justice better served by the intervention of the proposed third party?
- (6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

[7] In my view, this application for leave to intervene should be dismissed for the same reason that the application was denied in *Zaric*. Just as in *Zaric* the proposed intervener has not established that the position of such intervener would not be adequately defended by one of the parties, which is one of the criteria approved in *Rothmans*.

[8] In this motion, the positions that the Commissioner will take are summarized in paragraph 12 of the notice of motion. The Commissioner will, according to this paragraph, take the position that:

- a. Any interpretation of obligations pursuant to the PSEA [*Public Service Employment Act, SC 2003, c 22*] must be consistent with federal institutions'

obligations under the OLA [*Official Languages Act, RSC 1985, c 31 (4th Supp.)*], a quasi-constitutional statute.

- b. The criteria found in section 91 of the OLA are objective; they pertain to the duties of the position and not potential candidates for the position.
- c. Part V of the OLA creates a positive duty for federal institutions to take measures to establish and maintain work environments that are conducive to the effective use of both official languages.
- d. In designated bilingual regions and the National Capital Region, the right of employees to be supervised in their preferred official language exists regardless of the proficiency in either official language.

[9] In the memorandum of fact and law filed by the Attorney General of Canada, paragraphs 37 to 44 outline the Attorney General's argument that "Official language obligations limit managerial discretion". The arguments contained in these paragraphs substantially embody the same positions that the Commissioner will be taking, albeit using different words. However, the Commissioner, in my view, has failed to establish how its position or arguments in relation to these issues would be sufficiently different from that of the Attorney General to warrant granting it the right to intervene. Repeating the arguments of the Attorney General by rephrasing them in its own words, does not warrant the right to intervene in an appeal (*Li v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 267, 327 N.R. 253, at paragraph 9) and does not establish that the Commissioner's position could not be adequately addressed by the Attorney General.

[10] As a result, I would dismiss the motion of the Commissioner for leave to intervene in this appeal. No costs will be awarded in relation to this motion.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-41-16

STYLE OF CAUSE:

ATTORNEY GENERAL OF
CANADA v. OLEG SHAKOV,
THE OFFICE OF THE
COMMISSIONER FOR FEDERAL
JUDICIAL AFFAIRS, MARC
GIROUX AND NIKKI
CLEMENGHAGEN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

WEBB J.A.

DATED:

AUGUST 23, 2016

WRITTEN REPRESENTATIONS BY:

Kevin Shaar
Mathew Croitoru

FOR THE PROPOSED
INTERVENER

SOLICITORS OF RECORD:

Office of the Commissioner of Official languages

FOR THE PROPOSED
INTERVENER