Federal Court of Appeal | Cour d'appel fédérale

Date: 20220609

Docket: A-316-21

Citation: 2022 FCA 110

CORAM: **DE MONTIGNY J.A.**
LOCKE J.A.
ROUSSEL J.A.

BETWEEN:

MÉTIS NATIONAL COUNCIL AND MANITOBA METIS FEDERATION INC.

Appellants

and

SHANNON VARLEY and SANDRA LUKOWICH and THE ATTORNEY GENERAL OF CANADA

Respondents

Heard by online video conference hosted by the Registry on June 9, 2022.
Judgment delivered from the Bench at Ottawa, Ontario, on June 9, 2022.

REASONS FOR JUDGMENT OF THE COURT BY: ROUSSEL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on June 9, 2022).

ROUSSEL J.A.

[1] This is an appeal from an order of the Federal Court (2021 FC 1189), dated November 5, 2021, dismissing the appellants' motion for leave to intervene in a class action proceeding brought on behalf of Indigenous persons affected by the Sixties Scoop, whose claims were not resolved in an earlier settlement, involving Status Indians and the Inuit.

[2] The Appellants are respectively the Métis National Council (MNC) and the Manitoba Métis Federation Inc. The former is the representative body of the Métis Nation at the national and international levels, while the latter is the democratic and self-governing representative body of the Manitoba Métis, and a founding Governing Member of the MNC.

[3] In their motion before the Federal Court, the appellants had sought leave to file evidence, deliver a factum and make oral submissions at any settlement approval motion that might occur in the proceeding. The Plaintiffs in the underlying class action consented to the proposed intervention, and the Defendant Attorney General of Canada, did not take a position on the motion.

[4] In denying the appellants' motion for leave to intervene, the Federal Court found, after noting there was no settlement approval motion pending, that the proposed intervention order would be tentative, speculative and contingent on some anticipated settlement between the Respondents. The Federal Court then held that the central issue in a motion for leave to intervene is whether the proposed intervention would assist the Court in determining a factual or legal issue raised by the proceeding. It noted that while the proposed interveners have been recognized as speaking on behalf of their members, they could not tell the Court what they intended to say, what evidence they intended to lead or show in any concrete sense how their intervention would assist the Court. It found that in the absence of a settlement approval motion and a proper intervention motion, it could not exercise its responsibility to issue directions for the conduct of the intervention as required by Rule 109(3) of the *Federal Courts Rules*, SOR/98-106. The Federal Court concluded that the motion, on its proposed terms, did not meet the requirements of

Rule 109(2)(*b*) and that this was not a case where it should exercise its discretion to grant intervener status at that time. In dismissing the appellants' motion, the Federal Court added that it was without prejudice to their right to file "a further and better intervener application".

[5] On appeal, the appellants submit that the Federal Court erred in failing to apply the proper test for intervention, focusing solely on the usefulness of the proposed intervention and disregarding the evidence relevant to the other factors. They further submit that the Federal Court erred in applying an unduly onerous standard of specificity for the proposed submissions and in failing to consider the particular context in which the appellants sought leave to intervene and how this proceeding affected the rights and interests of the Métis Nation as a whole.

[6] Despite counsel's able submissions, we are of the view that the appeal must fail. We are satisfied that the Federal Court applied the proper test for intervention and that in the exercise of its discretion, it considered all the relevant factors as well as all of the appellants' evidence and submissions.

[7] As Justice Stratas of this Court found in *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164, referred to in *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13, the usefulness of a proposed intervener's submissions is a central part of the test for intervention under Rule 109 (*Kattenburg*, at para. 8). This is so because of the wording of Rule 109(2)(*b*), which requires the moving party to describe how their participation will assist the determination of a factual or legal issue related to the proceeding. Most recently, he stated that the best applications to intervene concentrate on usefulness (*Right to Life*

Association of Toronto and Area v. Canada (Employment, Workforce and Labour), 2022 FCA 67 at para 11). The usefulness element of the test for intervention in turn requires that four (4) questions be asked:

> (1) What issues have the parties raised?
>
> (2) What does the proposed intervener intend to submit concerning those issues?
>
> (3) Are the proposed intervener's submissions doomed to fail?
>
> (4) Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?
>
> (*Canadian Council for Refugees*, at para. 6; *Kattenburg*, at para. 9)

[8] The appellants' written submissions in support of their motion for intervention focused essentially on their interest and expertise, particularly in relation to collective remedies, and did not articulate with any specificity how their intervention would assist the Court on any eventual settlement approval motion. As the Federal Court found that the appellants had not demonstrated the usefulness of their proposed intervention, it did not discuss the other elements of the test for intervention, namely the appellants' genuine interest in the matter and whether it was in the interests of justice that the intervention be permitted. Nonetheless, we can infer from the reasons that the Federal Court indeed considered the appellants' interest in the matter, as it explicitly noted that the appellants have been recognized as speaking on behalf of their members. Moreover, it seems clear that the Federal Court felt that it was not in the interests of justice to allow intervention at that time.

[9] The appellants submit that the Federal Court's decision places interveners who want to make submissions on a settlement approval motion in a "Catch-22". If they bring the motion

before a settlement approval motion is pending, their motion will be denied because of prematurity. If they wait until the settlement approval motion is pending, their motion will be denied on the basis that it will disrupt the settlement approval motion hearing date. The appellants have failed to demonstrate the merit of their argument. They have not cited any case in which intervention was denied in such circumstances.

[10] The appellants had the burden of establishing that their proposed intervention met the criteria set out in Rule 109 and the related case law. In the exercise of its discretion and on the basis of the record before it, the Federal Court found they had not. The appellants have not persuaded us that the Federal Court erred in law or committed a palpable and overriding error in dismissing their motion (*Housen v. Nikolaisen*, 2002 SCC 33).

[11] While we are of the view that this Court's intervention is not warranted, we note that the genuineness of the appellants' interest and their significant experience in administering collective remedies do not appear to be a disputed issue. If the class action culminates in a settlement agreement, it will be open to the appellants to bring a new motion. They will then be in a better position to articulate and demonstrate how their participation will be of assistance to the Court.

[12] Accordingly, the appeal will be dismissed without costs.

"Sylvie E. Roussel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE PHELAN DATED NOVEMBER 5, 2021, DOCKET NO. T-2166-18

DOCKET:	A-316-21
STYLE OF CAUSE:	MÉTIS NATIONAL COUNCIL and MANITOBA METIS FEDERATION INC. v. SHANNON VARLEY and SANDRA LUKOWICH and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	JUNE 9, 2022
REASONS FOR JUDGMENT OF THE COURT BY:	DE MONTIGNY J.A. LOCKE J.A. ROUSSEL J.A.
DELIVERED FROM THE BENCH BY:	ROUSSEL J.A.

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