Federal Court of Appeal  Cour d'appel fédérale

Date: 20230323

Docket: A-92-22

Citation: 2023 FCA 66

Present: **STRATAS J.A.**

BETWEEN:

LE-VEL BRANDS, LLC

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 23, 2023.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The Canadian Health Food Association and the Direct Sellers Association of Canada move for leave to intervene in this appeal. For the following reasons, the Court will dismiss the motion.

A. This appeal

[2] In this appeal, the Court will consider the reasonableness of a decision of the Minister of Health. The Minister decided that the appellant, Le-Vel Brands, contravened the *Natural Health Product Regulations*, S.O.R./2003-196 by selling a "natural health product" without a product licence.

[3] In doing so, the Minister purported to interpret relevant provisions of the Regulations to arrive at a definition of a "natural health product". The Minister also decided that under this regulatory regime foreign marketing materials could be relied upon to determine the nature of the appellant's product. Finally, again under this regulatory regime, the Minister issued a "stop sale" order. All of these issues very much turn on whether the Minister's view of this regulatory regime, specifically the Minister's interpretation of the Regulations, was reasonable under *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.

[4] The appellant says that the Minister's interpretation of the Regulations was unreasonable. It also says that the Minister's reliance on foreign marketing materials was unreasonable. Finally, it says that a reasoned explanation for the decision cannot be discerned: the Minister failed to provide a clear rationale on a key point and did not address the appellant's key submissions.

[5] The main thrust of the proposed interveners' submissions is that they want the Regulations to be interpreted in a "reasonable" way, one that will give their member companies certainty, predictability and clarity.

B. The test for intervention

[6] On occasion, moving parties, such as the proposed interveners here, submit that the test for intervention in this Court is in conflict. It is not. The approach of this Court on the fundamentals underlying the test is consistent.

[7] All of the intervention decisions of this Court expressly or impliedly emphasize three elements to be considered: (1) the usefulness of the intervener's participation to what the Court has to decide, (2) a genuine interest on the part of the intervener, and (3) a consideration of the interests of justice.

[8] In some cases, all of these are live and so all three are expressly mentioned. In others, some are not live and so only one or some of the three are expressly mentioned. For this reason, at a superficial level, cases sometimes appear to conflict. But in fact there is no conflict. Everyone in this Court agrees that all three elements are potentially relevant in a case. Those applying to intervene should address all three.

[9] As far as full-panel decisions of this Court are concerned, *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3 is the most-recent and leading authority. Its main

contribution to the jurisprudence is its statement that the consideration of one of the three elements—the interests of justice—should be a flexible, fact-responsive approach. Thus, different individual judges, reacting to the facts of different cases, may emphasize different considerations. But at a conceptual level, the cases do not conflict.

[10] In this case, the proposed interveners rely heavily on *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, (1990), 45 C.R.R. 382 (C.A.). *Rothmans* has been criticized by members of this Court for good reason: see, *e.g.*, *Pictou Landing First Nation v. Canada (Attorney General)*, 2014 FCA 21, [2015] 2 F.C.R. 253. Indeed, *Sport Maska* suggested that elements of the test for intervention in *Rothmans* are inapt and so it adopted only part of *Rothmans*.

[11] In any consideration of a motion for leave to intervene, it is best to start with *Sport Maska*, the most recent decision of a panel of this Court on intervention.

[12] *Sport Maska* reaffirms the threefold elements in the test for intervention: the intervener must be useful to what the Court has to decide, the intervener must have a genuine interest, and the intervention must be consistent with the interests of justice.

[13] Of these three, proposed interveners often ignore usefulness or do not offer sufficiently rigorous submissions concerning it. In the Court’s experience, failure to demonstrate usefulness is the most frequent reason why intervention motions fail.

[14] Usefulness is set out in Rule 109 of the *Federal Courts Rules*, S.O.R./98-106. Rule 109 is not a practice advisory or an optional extra. It is part of a binding regulation. It is law on the books. It is to be followed.

[15] Rule 109 requires a proposed intervener to show "how [its] participation will assist the determination of a factual or legal issue related to the proceeding", in other words how it will be useful. If a proposed intervener cannot persuade the Court that its participation is useful to the actual debate before the Court, the Court is legally bound to dismiss the motion for leave to intervene.

[16] Key to the assessment of usefulness is a consideration of what the actual, real issues in the proceeding are. Proposed interveners must examine this with particularity. For example, while this appeal might loosely be said to be about the interpretation of the Regulations, the Court, engaged in reasonableness review, is not going to interpret the Regulations itself and impose it on the administrative decision-maker. That would be correctness review. Instead, among other things, delving into the particularity of this case, the Court will have to examine whether the Minister was sufficiently alive to the text, context and purpose of the legislation and reached an interpretation that was acceptable and defensible. See *Vavilov* at paras. 115-124.

[17] An intervener that intends to urge this Court to adopt a particular interpretation of legislation and impose it on the administrative decision-maker is barking up the wrong tree. Except in rare instances where *mandamus* is warranted, this Court, as a reviewing court engaged in reasonableness review, will not develop its own interpretation of the Regulations and use it as

a yardstick to see whether the administrative decision-maker's interpretation measures up, nor will it impose its interpretation over that of the administrative decision-maker: *Vavilov* at para. 83, citing *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 28; see also *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556 at paras. 31-33. After all, it is for the administrative decision-maker to decide the merits, including issues of legislative interpretation; the reviewing court reviews the administrative decision, nothing more: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263; 9 Admin LR (6th) 296; *'Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 and cases cited therein. At most, under reasonableness review, this Court can coach the administrative decision-maker on the methodology of legislative interpretation and how to go about its task. But it cannot tell the administrative decision-maker how the interpretive methodology should play out in a particular case.

[18] This Court's decision on intervention in *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 illustrates this well. There, several parties sought to intervene in a judicial review in order to tell this Court how it should interpret the legislation in issue and how it should apply international law. But that was no part of this Court's task on judicial review. Its task was only to conduct reasonableness review of the administrative decision-maker's interpretation of the legislation and its use of international law, not to impose its own view of the legislation and international law over that of the administrative decision-maker. As a result, this Court dismissed the intervention motions because the proposed interventions would not be useful to the Court.

[19] Overall, what is the test for intervention in this Court? As mentioned above, it consists of three elements, usefulness, genuine interest, and consistency with the interests of justice:

I. Will the proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues? To determine usefulness, four questions need to be asked:

- What issues have the parties raised?
- What does the proposed intervener intend to submit concerning those issues?
- Are the proposed intervener's submissions doomed to fail?
- Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?

II. Does the proposed intervener have a genuine interest in the matter before the Court 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?

III. Is it in the interests of justice that intervention be permitted? A flexible approach is called for. The list of considerations is not closed but includes at least the following questions:

- Is the intervention consistent with the imperative in Rule 3 that the proceeding be conducted “so as to secure the just, most expeditious and least expensive outcome”? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?
- Has the matter 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?
- Has the first-instance court in this matter admitted the party as an intervener?
- Will the addition of multiple interveners create the reality or an appearance of an “inequality of arms” or imbalance on one side?

(*Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour*), 2022 FCA 67 at para. 10; see also *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13, 481 C.R.R. (2d) 234, *Alliance for Equality of Blind Canadians v. Canada (Attorney General)*, 2022 FCA 131 and *Canada (Environment and Climate Change) v. Ermineskin Cree Nation*, 2022 FCA 36.)

C. Applying the test

(1) The first requirement: usefulness

[20] In this case, the proposed interveners have not satisfied the requirement of usefulness. They urge this Court to interpret the relevant legislation in a particular way. As mentioned above, they want the Court to adopt its own interpretation of the legislation, one that will make the legislation reasonable and give their member companies certainty, predictability and clarity. But, as explained in paragraphs 16-18 above, the Court cannot and will not impose on the Minister its own interpretation of the legislation or the objectives the proposed interveners suggest. This Court's role on judicial review is limited to assessing the reasonableness of the interpretation of the Regulations the Minister expressly or impliedly adopted.

[21] As explained in paragraphs 16-18 above, under this legislative regime, it is not for us to interpret the legislation. It is the Minister's task. In carrying out that task, the Minister must objectively and dispassionately, in a non-tendentious way, examine the text, context and purpose of the legislation with a view to identifying the authentic meaning of the text of the legislation:

see generally *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 115-124; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174; *Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328 at paras. 79-80; *Hillier*, above; see also *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, *R. v. Rafilovich*, 2019 SCC 51, [2019] 3 S.C.R. 838 and *Michel v. Graydon*, 2020 SCC 24, 449 D.L.R. (4th) 147. This means the Minister cannot impose his or her own views about what the legislation should say or inject into the legislation whatever the Minister feels is reasonable or appropriate in a policy sense.

[22] The Attorney General submits that to the extent the intended submissions of the proposed interveners are consistent with the Court's task to assess reasonableness, they largely duplicate those of the appellants. In this sense, they say that the intended submissions are not useful. I agree.

[23] Therefore, the proposed interveners have not satisfied the requirement of usefulness. For this reason alone, the motion for leave to intervene will be dismissed.

[24] The proposed interveners' perspective as they have enunciated it here—though not useful here—may be useful elsewhere. In a future case they might try to offer submissions before the Minister in order to affect how the Minister interprets the Regulations. They might try to persuade the Minister to adopt one or more policy statements that are consistent with the proper interpretation of the legislation. They might even push for legislative reform of the Regulations. But under reasonableness review, this Court cannot pursue any of these avenues.

(2) The second element: the genuine interest of the proposed interveners

[25] The proposed interveners are industry organizations dedicated to ensuring that their member companies can reliably and predictably market products under Canada's regulatory framework. Without question, they meet the requirement of genuine interest. For good measure, it is obvious that they are capable of offering articulate, well-informed submissions.

(3) The third element: the interests of justice

[26] Those who have a valuable perspective and who are "[k]een for their important viewpoint to be heard" act quickly and "jump off the starting blocks when they hear the starter's pistol": *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167 at para. 28. This minimizes delay and furthers the quick and orderly progression of the case.

[27] This appeal began in April 2022. The parties filed their memoranda of fact and law in September and November 2022. But the proposed interveners did not announce their intention to intervene until December 2022. They did not get around to filing their motion material until February 2023.

[28] This appeal has been ready for hearing since November 2022. However, it has been put on hold because of this intervention motion. Were the motion granted, more delay would ensue: the interveners would file their submissions and then the other parties would have to respond.

[29] Overall, the delay is contrary to the imperatives of Rule 3. It militates against granting leave to intervene.

D. Concluding observations

[30] Although their intervention motion is unsuccessful, the proposed interveners filed a high-quality motion and prosecuted it well. The following remarks are not directed at them.

[31] The Court is aware of recent criticism concerning recent judicial comments about the proper limits to intervention: see, *e.g.*, *R. v. McGregor*, 2023 SCC 4 at paras. 98-115. This criticism is misplaced. It calls for response.

[32] At the root of the criticism is a view held by some—a wrong view—about how courts should decide cases.

[33] To some, courts should inject their view of what is right, just and reasonable into any case that comes before them. For example, some see legislative interpretation as an open-ended task where courts are free to do “the right thing”, adopt the “good ideas” of academics and experts, and express what “most” would think is “right” or “reasonable”. Others feel that interveners, with their “valuable perspectives”, should be able to place before the Court academic articles full of untested social science assertions that are “right”. Still others think that courts should wade in where legislatures fear to tread in order to correct “injustices”.

[34] Often we see this in cases about legislative interpretation. When interpreting legislation, courts must identify the legislature's purpose behind the text it adopted. But on occasion, interveners divert courts from that task by proffering their preferred policies as the purpose. This is heresy: see generally Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 Alta L Rev 919. Some interveners go even further: they offer untested new evidence, make submissions without evidence, and commandeer cases that directly affected parties have prosecuted and defended for years at great cost and stress: *Right to Life* at para. 13; *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88 at para. 14; *Atlas Tube Canada ULC v. Canada (National Revenue)*, 2019 FCA 120, [2019] D.T.C. 5062 at para. 8; *Canadian Council for Refugees* at para. 27.

[35] Interveners admitted into our proceedings usually are those who have shown an understanding of the judiciary's proper role. They advocate legal positions consistent with that role. The key is to understand the nature of that role.

[36] In our democracy, three branches of government—the legislative branch, the executive branch and the judiciary—share in our governance, each playing different and distinct roles. The judiciary decides legal disputes in accordance with legal doctrine. Over decades, the judiciary has shaped, settled and revised that doctrine based on the judiciary's practical experience in real life cases, not based on the personal feelings, free-standing policy preferences or values of individual judges: Frederic R. Kellogg, "Law, Morals, and Justice Holmes" (1986), 69 *Judicature* 214; Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 22 and 23. Guarantees of freedom from interference by other branches

together with a commitment to apply time-honoured doctrine allow the judiciary to resist result-oriented reasoning or populist pressures of the moment. See *Ishaq v. Canada (Citizenship and Immigration)*, 2015 FCA 151, [2016] 1 F.C.R. 686.

[37] In the case of judge-made law, the judiciary follows settled legal doctrine. Where the doctrine is underdeveloped or in need of revision, the judiciary develops it incrementally through accepted pathways of legal reasoning in accordance with sensible, widely accepted underlying principles: *R. v. Salituro*, [1991] 3 S.C.R. 654, 68 C.C.C. (3d) 289; *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, [2016] 1 F.C.R. 446, at paras. 116-117.

[38] In the case of statute law, the judiciary interprets it—exactly as drafted by those we elect—to ascertain and implement its authentic meaning, not to amend it: see *TELUS*, *Rafilovitch*, *Michel*, *Williams*, *Cheema*, *Hillier*, all above.

[39] And in the case of the Constitution, the judiciary fearlessly gives it force and effect but should follow precedent, moving incrementally, avoiding any temptation to treat the Constitution as just "an empty vessel to be filled with whatever meaning [it] might wish from time to time": *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at para. 151.

[40] In all these areas, the judiciary, acting within its proper sphere, strives to make legal doctrine stable, simple and clear. This furthers freedom: it gives us certainty and predictability, it arms us with knowledge of what we can do, and it warns us about what we cannot do.

[41] In short, freestanding policy-making and law-making is not for the judiciary. Judges are nothing more than cloistered, well-off, tenured lawyers who happen to hold a judicial commission. Freestanding policy-making and law-making is for the politicians we elect. If we do not like their policies and laws, we can vote them out of office.

[42] What is the take-away here for those bringing motions to intervene? Those who understand the proper role of the judiciary and show how they can help the Court on the real issues in a case are more likely to be admitted. And once admitted, their submissions can be decisive.

E. Disposition

[43] The motion will be dismissed but without costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-92-22
STYLE OF CAUSE:	LE-VEL BRANDS, LLC v. THE ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MARCH 23, 2023

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