In the Court of Appeal of Alberta

Citation: UAlberta Pro-Life v Governors of the University of Alberta, 2018 ABCA 350

Date: 20181029
Docket: 1703-0283-AC
Registry: Edmonton

Between:

UAlberta Pro-Life, Amberlee Nicol and Cameron Wilson

Appellants

- and -

Governors of the University of Alberta

Respondent
(on appeal and motion)

- and -

British Columbia Civil Liberties Association

Applicant

Reasons for Decision of
The Honourable Madam Justice Frederica Schutz

Application for Permission to Intervene

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Introduction

[1] The British Columbia Civil Liberties Association (the "BCCLA") seeks leave to intervene in the appeal of one of two decisions under appeal from: ***UAlberta Pro-Life v Governors of the University of Alberta,*** 2017 ABQB 610; namely, the chambers judge's judicial review decision referred to as the "Security Costs Decision".

[2] I will review relevant background only to the extent needed to put the proposed intervenor's application into context.

[3] The appellants represent an approved University of Alberta student association. In early 2015, the appellants held an event on campus. The event attracted a large number of people who held views contrary to those of the appellants. University of Alberta Protective Services, the University's campus security unit, monitored the event and decided to set up a designated area to which opponents of the appellants' event and displays would be confined. Persons opposed did not remain in the designated area; instead, they positioned themselves in front of the appellants' displays so as to obstruct the view of passers-by and also verbalized their opposition to the appellants' messaging. Subsequently, the appellants initiated a complaint with Protective Services, alleging that approximately 100 people who had not stayed in the designated area had violated the University Code of Student Behaviour (the "Code"). The chambers judge dismissed the appellants' judicial review of the Discipline Officer's decision that sustained the Protective Services' Director's decision not to proceed with the appellants' complaint. The proposed intervenor is not seeking to intervene in this aspect of the appeal.

[4] In January 2016, the appellants sought appropriate approval from the University to hold a second event that would be similar in format to the earlier one. The University told the appellants that they were to work with Protective Services on a security assessment for the event. The appellants did so. The security assessment concluded that costs of security for the event would total approximately $17,500. The University approved the event, but subject to the condition that the appellants pay the actual costs of security, including an initial $9000 deposit ("Security Costs Decision"). The appellants sought judicial review of the Security Costs Decision.

[5] In essence, the appellants contended that the Security Costs Decision unjustifiably infringed their freedom of expression guaranteed by s 2(b) of the *Charter*, and its imposition effectively prevented the appellants from fully participating in campus life on an equal footing with other students. The appellants further argued that the University's decision was unreasonable because it framed the appellants' event as the cause of the security concerns, rather than the conduct of the Code-violating opponents of their event. In response, the University argued that the

Charter did not apply to it and that the common law did not require the University to consider freedom of expression.

[6] In dismissing the appellants' judicial review application of the Security Costs Decision, the chambers judge decided there was no need to decide whether the *Charter* applied to universities, on the basis that the University ". . . voluntarily assumed responsibility for considering freedom of expression in this instance": *ibid* at para 46. In apparent support of this view, the chambers judge pointed to statements made in the Code, as well as a statement released by the University President that spoke of the University's respect for students' freedom of expression.

[7] The British Columbia Civil Liberties Association seeks leave to intervene only in respect of this aspect of the appeal.

Test for Leave to Intervene

[8] Rules 14.37(2)(e) and 14.58 of the *Alberta Rules of Court,* Alta Reg 124/2010 authorize a single judge to consider an application to intervene and to impose conditions. As an exercise of discretion, intervenor status should be granted sparingly: ***Telus Communications Inc v Telecommunications Workers Union,*** 2006 ABCA 297 at para 4, 401 AR 57 [***Telus***]; ***Pedersen v Alberta***, 2008 ABCA 192 at para 4, 432 AR 219 [***Pedersen***].

[9] Generally, the Court must first consider the subject matter of the proceeding and then determine the proposed intervenor's interest in that subject matter: ***Papaschase Indian Band (Descendants of) v Canada (Attorney General)***, 2005 ABCA 320 at para 5, 380 AR 301 [***Papaschase***]. A proposed intervenor's interest in the subject matter is determined by assessing the following considerations:

a. whether the proposed intervenor would be directly and "specially" affected by the outcome of the appeal or,

b. whether the proposed intervenor has special expertise or a unique perspective relating to the subject matter of the appeal that will assist the Court in its deliberations.

Papaschase at para 2; ***Telus*** at para 4; ***Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)***, 2014 ABCA 340 at para 8, 584 AR 255 [***Edmonton (City)***].

[10] The following questions are also relevant to the consideration of whether an intervenor application ought to be granted:

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?

6. Will the intervention transform the court into a political arena?

Pedersen at para 3; ***Edmonton (City)*** at paras 8-14; ***Stewart Estate (Re)***, 2014 ABCA 222 at para 5, 577 AR 57; ***Styles v Canadian Association of Counsel for Employers***, 2016 ABCA 218 at paras 13-15.

[11] Further, if intervenor status is granted, an intervenor may not raise or argue issues not raised by the parties to the appeal unless otherwise ordered: Rule 14.58(3). Finally, a proposed intervenor should define the question on which they wish to intervene with particularity: ***R v Neve***, 1996 ABCA 242 at para 16, 184 AR 359.

Analysis

[12] The BCCLA concedes that it would not be "specially affected" by the outcome of this appeal and that its interest lies in "the proper development of the law raised by the issues on appeal. . .". The BCCLA submits that it possesses special expertise in the arena of civil liberties, especially as it pertains to freedom of expression.

[13] BCCLA senior counsel swore an affidavit in support of this application, in which it is explained that BCCLA has expertise in free expression and the application of the *Charter* to universities, stemming from litigating two freedom of expression cases against the University of Victoria. Further, more generally, the BCCLA has an extensive history of participating in s 2(b) *Charter* cases. The affiant confirmed the BCCLA's experience and competence as an intervenor, having intervened dozens of times at the Supreme Court of Canada and in other courts on issues that engage civil liberties.

[14] The respondent University opposes the proposed intervention. The University argues that the BCCLA is not "specially affected" nor does it possess special expertise or insight necessary for this Court to decide the appeal. The appellants support the BCCLA's application.

[15] Concerns about unduly delaying the proceedings, or prejudice, or any concern that the BCCLA would transform this Court into a political arena were not strongly pressed. Any concerns about timeliness, or widening of the issues or *lis* between the parties might best be addressed by conditions, if necessary. Thus, the crux of the matter is whether the BCCLA can offer a special expertise in the area of *Charter* rights that may be of assistance to the Court in its deliberations.

[16] If granted intervenor status, the BCCLA proposes to make the following four submissions:

a. Universities perform the core public function of providing education;

b. The recent Supreme Court decisions in ***Loyola High School v Quebec (Attorney General)***, 2015 SCC 12 [***Loyola***], ***Law Society of British Columbia v Trinity Western University***, 2018 SCC 32 [***TWU 1***], and ***Trinity Western University v Law Society of Upper Canada***, 2018 SCC 33 [***TWU 2***], have altered the ***Doré v Barreau du Québec***, 2012 SCC 12, [2012] 1 SCR 395 [***Doré***] analysis;

c. The scope of the ss 2(b), (c) and (d) *Charter* rights at issue must be identified, considered and afforded substantial weight in light of the new *Doré/Loyola* test;

d. ***Pridgen v University of Calgary***, 2012 ABCA 139 [***Pridgen***] is not distinguishable from the present case.

[17] I will discuss each of the areas in which the BCCLA asserts expertise.

a. Universities perform the core public function of providing education

[18] I am satisfied that the BCCLA possesses special expertise regarding the highly complex issue of whether, and under what circumstances, a university can be characterized as exercising a government function. ***BC Civil Liberties Association v University of Victoria***, 2016 BCCA 162 [***University of Victoria***], leave to appeal dismissed, 2016 CanLII 82919 (SCC) is factually very similar. I reject the University's contention that the BCCLA's expertise ought to be discounted because its position did not prevail, since it appears that Alberta cases which bore on the outcome were distinguished, *inter alia*, on the basis that they engaged Alberta legislation.

[19] Further, I may properly consider the risk that a party may not fully protect the interests of the proposed intervenor: ***Pedersen*** at para 3. It appears that the appellants' articulation of a university's public function is narrower than that of the BCCLA; moreover, the BCCLA proposes to offer submissions on the relevance of ***McKinney v University of Guelph***, [1990] 2 SCR 229, 76 DLR (4th) 545, a dated decision heavily relied upon by the British Columbia Court of Appeal in ***University of Victoria***, but not addressed by the appellants.

[20] Without saying more than is necessary to dispose of this application, I am satisfied that the BCCLA possesses special expertise sufficient to warrant granting leave to intervene on this issue.

b. The *Doré* analysis must be interpreted in light of recent Supreme Court decisions

[21] As the University rightly points out, an intervenor's submissions are unnecessary where issues have received extensive Supreme Court and appellate guidance: see, for example, ***Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)***, 2017 ABCA 280 at para 17. The issue the appellants' raised before the chambers judge, and again on appeal, does not benefit from a sustained and settled body of law. ***Loyola***, ***TWU 1***, and ***TWU 2*** from the Supreme Court of

Canada are of recent vintage and binding appellate authority applying the "*Doré/Loyola* analysis" in light of these cases, is limited.

[22] Although the University submits that the parties are "fully capable of discussing" this case law, the parties do not actually aid the Court in their submissions in this regard and the suggestion that this Court be provided last minute cases with no organized submissions to accompany them, is not the most efficient use of court resources.

[23] I am satisfied that the panel of this Court hearing this aspect of the appeal would benefit from the BCCLA's submissions on the nuances of what appears to be a recently clarified *Doré/Loyola* analytical framework.

c. The scope of ss 2(b), (c), and (d) rights at issue must be identified, considered and afforded substantial weight in light of the new *Doré/Loyola* test

[24] The BCCLA wishes to make submissions about whether the s 2(b) *Charter* rights asserted in the present case can be properly characterized as "positive" or "negative". I am satisfied that the BCCLA is capable of contributing to this Court's deliberations on this question, since the University asserts the rights are "positive" and the appellants make no express submissions thereon.

[25] I also accept the University's objection, however, that any discussion of ss 2(c) and (d) *Charter* rights would unacceptably widen the scope of the appeal beyond what was raised by the parties. Therefore, the BCCLA will not be permitted leave to make any submissions relating to *Charter* rights other than freedom of expression under s 2(b) of the *Charter*.

d. *Pridgen* is not distinguishable from the present case

[26] Relying heavily on ***Pridgen***, the appellants acknowledge that the *Charter* only applies to universities under certain circumstances, but argue that the Security Costs Decision was made in such a circumstance. Specifically, the appellants argue that participation in university society is an important aspect of the *Post-Secondary Learning Act*, SA 2003, c P-19.5, and the delegation of government authority to the University. The appellants suggest that the University's ability to regulate such activities does not form part of its day-to-day operations such that it falls outside of *Charter* scrutiny.

[27] Regardless of the *Charter*'s applicability, the appellants argue in the alternative that their actions were protected by the common law right to freedom of speech and expression.

[28] With respect to the reasonableness of the Security Costs Decision itself, the appellants argue that chambers judge made the same error as the University by attributing the cause of danger to the appellants' event when that danger ought to have been attributed to the people who opposed the appellants' event and displays.

[29] The parties already discuss ***Pridgen*** extensively in their submissions. To the extent that the parties do not address the disciplinary character of ***Pridgen***, I agree with the University that this is not a matter of contention between the parties. Consequently, granting permission to intervene on this point would unacceptably widen the scope of the appeal.

[30] In any event, arguing that an authority is distinguishable from the present case is well within the purview of the parties and leads me to conclude that the BCCLA does not possess any special expertise or insight on this question that would benefit the Court.

[31] The BCCLA is denied permission to intervene on the question of whether the disciplinary character of the proceedings at issue in ***Pridgen*** is a proper basis for distinguishing it from the present case.

Conclusion

[32] I am satisfied that the BCCLA has special expertise on this matter that would benefit the Court on appeal. The BCCLA is granted leave to intervene and to make submissions with respect to the following:

a. Universities perform the core public function of providing education;

b. The recent Supreme Court decisions in ***Loyola***, ***TWU 1***, and ***TWU 2***, have altered the ***Doré*** analysis;

c. The scope of the s 2(b) *Charter* right at issue must be identified, considered and afforded substantial weight in light of the new *Doré/Loyola* test.

[33] The BCCLA shall file submissions not to exceed 15 pages, no later than 7 calendar days after the date of issuance of this decision, and shall effect proper service on the same day. The respondent, the Governors of the University of Alberta, shall file its Reply no later than 10 calendar days after the date of service upon it of the BCCLA's submissions.

[34] The time limit for the BCCLA's oral submissions shall be 25 minutes. Failing agreement, costs of this application and the appeal shall be heard and determined by the panel at the conclusion of the appeal.

[35] I invite immediate contact with the Case Management Office if I have omitted to provide any necessary direction.

Application heard on October 23, 2018

Reasons filed at Edmonton, Alberta
this 29th day of October, 2018

Schutz J.A.

Appearances:

R.J. Cameron
for UAlberta Pro-Life, Amberlee Nicol, Cameron Wilson

M.A. Woodley/P.T. Buijs
for Governors of the University of Alberta

N.J. Whitling
for British Columbia Civil Liberties Association