Court File No. A-407-14

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA and
MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellants

- and -

CANADIAN DOCTORS FOR REFUGEE CARE,
THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS,
DANIEL GARCIA RODRIGUES, HANIF AYUBI
and JUSTICE FOR CHILDREN AND YOUTH

Respondents

- and -

REGISTERED NURSES' ASSOCIATION OF ONTARIO and
CANADIAN ASSOCIATION OF COMMUNITY HEALTH CENTRES

Intervenors

MOTION RECORD of the WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

Motion of the Women's Legal Education and Action Fund Inc. for leave to intervene (Pursuant to Rule 369)

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TO:

The Administrator
Federal Court of Appeal

AND TO:

Lorne Waldman/
Adrienne Smith

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- and -

REGISTERED NURSES' ASSOCIATION OF ONTARIO and
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Interveners

NOTICE OF MOTION of the WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. for leave to intervene

---

TAKE NOTICE THAT the Women's Legal Education and Action Fund Inc. ("LEAF") will make a motion to the Court in writing under Rule 369 of the *Federal Court Rules*.

THE MOTION IS FOR:

1. An Order:

   (a) granting LEAF status to intervene in this appeal on the following terms:

      (i) LEAF will not lead evidence, but will rely on the evidence adduced by the parties or the documents referred to in the reasons of the Federal Court, as

well as any other documents of which this Honourable Court may take judicial notice;

(ii) LEAF will be served with all materials of the parties;

(iii) LEAF will file its memorandum of fact and law not exceeding 25 pages within 21 days of the filing of the Respondents' memorandum of fact and law;

(iv) LEAF will be consulted on hearing dates for the hearing of this matter;

(v) LEAF will have the right to make oral submissions before the Court;

(vi) LEAF will not seek costs, nor shall costs be awarded against it; and

(b) allowing this motion to be decided on the basis of written representations.

THE GROUNDS FOR THE MOTION ARE:

1. The appeal raises justiciable issues of public interest;

2. The appeal raises important issues about the interpretation of s. 15 of the *Charter* and the gendered impact of the 2012 changes to the Interim Federal Health Program ("IFHP") experienced by refugee women;

3. LEAF has a unique perspective and expertise in *Charter* equality rights litigation that will assist the Court in the resolution of the issues raised by the appeal that will not be fully addressed by the other parties;

4. Through its perspective, LEAF can assist the Court in understanding the impact of the 2012 changes to the IFHP upon refugee women. The 2012 changes create a unique discriminatory effect upon refugee women and other individuals who experience complex forms of inequality arising from the intersection of multiple grounds of discrimination. Consequently, LEAF's participation will assist this Court in deciding the appeal;

5. Granting LEAF leave to intervene is a reasonable and efficient means to ensure full argument on the issues raised in the appeal before the Court;

6. LEAF's intervention in this appeal will not prejudice any party, or overly complicate this appeal;

7. Rules 109 and 369 of the *Federal Court Rules*, SOR/98-106; and

8. Such further and other grounds as counsel may advise and this Honourable Court permits.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Notice of Motion;

2. The Affidavit of Diane O'Reggio, sworn December 19th, 2014; and

3. Such further and other material as counsel may advise and this Honourable Court permit.

December 22, 2014

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TO:

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Lawyers for the Appellants, Attorney General of Canada and Minister of Citizenship and Immigration

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Respondents

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REGISTERED NURSES' ASSOCIATION OF ONTARIO and
CANADIAN ASSOCIATION OF COMMUNITY HEALTH CENTRES

Intervenors

AFFIDAVIT OF DIANE O'REGGIO
(sworn December 19th, 2014)

I, Diane O'Reggio, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Executive Director of the Women's Legal Education and Action Fund Inc. ("**LEAF**"). As such, I have personal knowledge of the matters set out herein except where stated to be based on information and belief, in which case I believe such information to be true.

2. LEAF seeks leave to intervene in the within appeal, with a focus on the issues that arise in the area of equality and discrimination, about which LEAF has intensive expertise. LEAF would provide unique assistance to the Court in the resolution of these issues.

Nature and Expertise of LEAF

3. LEAF is a national, federally incorporated, non-profit organization founded in April 1985 to advance the equality rights of women and girls in Canada as guaranteed by the *Charter of Rights and Freedoms* (the "***Charter***"). To this end, LEAF engages in equality and human rights litigation, law reform work and public education.

4. With branches across the country, and an affiliated organization, West Coast LEAF, in British Columbia, LEAF's membership is broad and includes women of all ages and backgrounds located across Canada.

5. Through its litigation work, LEAF gives a voice to women who experience discrimination on the basis of sex or gender, and those who experience discrimination arising from the intersection of multiple personal characteristics, such as sex, gender, family status, race, ethnic origin, religion, disability, marital status, sexual orientation, and socio-economic status.

6. LEAF began its equality rights litigation in 1985 and quickly became a key participant in some of the most significant cases through which equality rights in Canada have been developed and defined. LEAF has contributed to the evolution of the meaning of substantive equality and equality rights jurisprudence in Canada through interventions in dozens of cases throughout the last 29 years including: *Canadian Newspapers Co. v Canada (Attorney General)*, [1988] 2 S.C.R. 122; *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Borowski v The Attorney General of Canada*, [1989] 1 S.C.R. 342; *Brooks v Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Janzen and Govereau v Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Tremblay v Daigle*, [1989] 2 S.C.R. 530; *R. v Keegstra*, [1990] 3 S.C.R. 697; *The Canadian Human Rights Commission v Taylor*, [1990] 3 S.C.R. 892; *Schachter v Canada* [1992] 2 S.C.R 679, *R. v Sullivan*, [1991] 1 S.C.R. 489; *R. v Seaboyer; R. v Gayme*, [1991] 2 S.C.R. 577; *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *R.*

v Butler, [1992] 1 S.C.R. 452; *M.(K) v M (H)*, [1992] 3 S.C.R. 6; *Moge v Moge,* [1992] 3 S.C.R. 813; *Weatherall v Canada (Attorney General)*, [1993] 2 S.C.R. 872; *R. v Whitley*, [1994] 3 S.C.R. 830; *R. v O'Connor*, [1995] 4 SCR 411; *Thibaudeau v Canada*, [1995] 2 S.C.R. 627; *A. (L.L.) v B. (A.),*, [1995] 4 S.C.R. 536; *Gordon v Goertz*, [1996] 2 S.C.R. 27; *Vriend v Alberta,* [1998] 1 S.C.R. 3; *R. v Ewanchuk*, [1999] 1 S.C.R. 330; *M. v H.*, [1999] 2 S.C.R. 3; *British Columbia (Public Service Employee Relations Commission) v BCGSEU ["Meiorin"]*, [1999] 3 S.C.R. 3; *R. v Mills*, [1999] 3 S.C.R. 668; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44; *R. v Darrach*, [2000] 2 S.C.R. 443; *R. v Shearing*, [2002] 3 S.C.R. 33; *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 S.C.R. 381; *Dickie v Dickie*, 2007 SCC 8; *Honda Canada Inc. v Keays,* 2008 SCC 39; *Withler v Canada (Attorney General)* 2011 SCC 12; *R. v J.A.*, 2011 SCC 28; *L.M.P. v L.S.*, 2011 SCC 64; *Quebec (Attorney General) v A.*, 2013 SCC 5; and *Saskatchewan (Human Rights Commission) v Whatcott,* 2013 SCC 11.

7. LEAF has also previously intervened at the Federal Court of Appeal in *Schachter v Canada*, [1990] 2 F.C. 129; *Miller v Canada (Attorney General)*, 2002 FCA 370; *Canada (Attorney General) v Lesiuk*, 2003 FCA 3; *Jean v Canada*, 2009 FCA 377; and *Canada (Attorney General) v Johnstone*, 2014 FCA 110.

8. Through its interventions, LEAF has successfully argued for novel approaches to the judicial consideration of *Charter* rights. For example:

   (a) LEAF was central in gaining recognition of new analogous grounds under s. 15(1) of the *Charter* in such cases as: *Andrews v Law Society of British Columbia, supra*; *Vriend v Alberta, supra*; and *Falkiner v Ontario (Minister of Community and Social Services)*, 2002 CanLII 44902 (ON CA);

   (b) LEAF played a key role in the Supreme Court of Canada's decision in *Withler v Canada (Attorney General), supra,* to eliminate the requirement of a mirror image comparator group in s. 15(1) analysis; and

   (c) Of particular importance to this case, LEAF has developed and advanced approaches to s. 15(1) analysis that consider and account for the reality that

discrimination based on sex or gender is experienced differently by those whose identities also encompass other prohibited grounds of discrimination such as race, class, Aboriginal status, sexual orientation, religion, poverty, and/or disability. LEAF thus has expertise regarding women's experiences of inequality as shaped by the intersection of multiple prohibited grounds. Examples include: *Norberg v Wynrib*, [1992] 2 S.C.R. 226; *Winnipeg Child and Family Services v G.(D.F.)*, [1997] 3 S.C.R. 925; *Eldridge v British Columbia (Attorney General), supra*; *Falkiner v Ontario*, *supra*; *Jean v Canada, supra*; and *R. v N.S.*, 2012 SCC 72; and *R. v D.A.I.*, 2012 SCC 5.

9. Significantly, LEAF has also engaged in legal challenges on behalf of refugees in the past, from our early intervention in *Canada Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, to our 2012 joint submission with the Barbra Schlifer Commemorative Clinic and METRAC to the Parliamentary Committee on Immigration on the damaging impact on refugee women of Bill C-31, Protecting Canada's Immigration System Act.

LEAF's Interest in this Appeal

10. This appeal raises important substantive equality questions under s. 15 of the *Charter*, including:

(a) the gendered impacts of the 2012 changes to the Interim Federal Health Program ("IFHP"), which creates a unique discriminatory effect for refugee women;

(b) the scope of analogous grounds of discrimination under s. 15(1) of the *Charter*;

(c) how s. 15(1) *Charter* analysis should consider complex forms of discrimination, including how laws and policies that create a distinction among groups may have a particularly adverse impact on people such as refugee women who experience discrimination on multiple grounds, and who thus experience greater and distinctive effects of inequality; and

(d) the scope of the s. 15(2) test for whether an impugned distinction forms part of an ameliorative program, having regard to the Supreme Court of Canada's clear statements in *R. v Kapp* 2008 SCC 41 that the jurisprudence with respect to s.15(2) is "at an early stage of development" and may need to be "adjusted" and "refined" in future cases.

11. The way courts approach these issues affects how they evaluate *Charter* claims and this in turn affects the protection of equality rights more broadly. As an organization that actively participates in litigation to expand the scope of equality rights, LEAF has an interest in this appeal and the *Charter* issues it raises.

12. I believe that LEAF's expertise and perspective as an experienced intervenor in equality rights litigation will assist the Court in ensuring that its interpretation of s. 15 of the *Charter* is responsive to the social, economic and political realities facing refugee women and follows a purposive and inclusive approach to *Charter* law.

LEAF's Unique Perspective

13. LEAF will provide the Court with a unique perspective and particular expertise on the issues raised in this appeal because LEAF:

(a) represents a diversity of women across Canada;

(b) has particular expertise concerning equality law and theory;

(c) has particular expertise in the development of key equality jurisprudence recognizing and advancing substantive equality;

(d) has particular expertise on the adverse impact of differential treatment experienced by refugee women;

(e) has particular expertise regarding how women's experiences of inequality are shaped by the intersection of multiple prohibited grounds, an issue likely to arise in cases involving refugees. LEAF is thereby in a position to advance arguments regarding the impact of any approach to s. 15 analysis on refugee women who may not share all the characteristics of the individual respondents in this case.

This is a critical perspective given that none of the applicants in this case were women, but 51% of refugee claimants in Canada are women; and

(f) knows that refugee women, some of the most marginalized members of society, do not have the resources, economic or otherwise, to litigate their rights before the Federal Court of Appeal. The opportunity for LEAF to intervene before this Court to make submissions on the gendered dimensions of this appeal is an important way to provide access to justice for refugee women.

LEAF's Intended Arguments

14. I confirm that if granted leave to intervene, LEAF proposes to make the arguments as set out in the Written Representations filed in support of this motion.

15. In addition to the fact that LEAF's arguments will be substantively different from those of the other parties, the process LEAF will follow in developing its legal analysis is unique. LEAF develops its legal arguments in consultation and collaboration with leading academics, experts, and practitioners from across Canada who have considerable experience in studying and exposing social inequality and the impact that inequality has on vulnerable groups. LEAF uses this extensive review process to ensure its submissions as an intervenor are of use to the Court and do not duplicate the submissions of the other parties. LEAF's expertise and attention to diverse perspectives would contribute to a fuller hearing of the issues by this Court.

Proposed Terms for Intervention

16. I do not believe that an intervention by LEAF will cause prejudice to other parties, especially in light of the terms upon which LEAF proposes to participate.

17. I confirm that LEAF seeks leave to intervene on the following terms:

(a) LEAF will not lead evidence but will rely on the evidence adduced by the parties and on the documents referred to in the lower court decision, as well as any other documents of which this Court may take judicial notice;

(b) LEAF will be served with all materials of the parties and other intervenors;

(c) LEAF will file and serve its memorandum of fact and law of no more than 25 pages within 21 days of the filing of the Respondents' memorandum of fact and law;

(d) LEAF will be consulted on dates for the hearing of the appeal;

(e) LEAF will have the right to make oral submissions before the Court; and

(f) LEAF will not seek costs, nor shall costs be awarded against it.

18. I swear this Affidavit in support of LEAF's motion for leave to intervene, to file written submissions, and to present oral argument in *Canadian Doctors for Refugee Care et al v Canada* and for no other purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario this 19th day of December, 2014

Commissioner for Taking Affidavits
Kim Stanton, LSUC #61160H

DIANE O'REGGIO

Court File No. A-407-14

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Intervenors

WRITTEN REPRESENTATIONS OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

Motion of the Women's Legal Education and Action Fund Inc. for Leave to Intervene

---

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Lawyers for the proposed intervenor,
Women's Legal Education and Action Fund Inc.

TABLE OF CONTENTS

PART I: OVERVIEW

1. The Women's Legal Education and Action Fund Inc. ("**LEAF**") seeks leave to intervene in this appeal pursuant to Rule 109 of the *Federal Court Rules*, with a particular focus on the issue of the disproportionate impact of the 2012 changes to the Interim Federal Health Program ("**IFHP**") on refugee women.

2. LEAF's intervention will assist the Court since this appeal raises issues that go to the core of LEAF's expertise, namely highlighting the specific impacts of laws and policies on women and the interpretation and application of s. 15 of the *Charter of Rights and Freedoms* (the "***Charter***").

3. If LEAF is granted leave to intervene, its arguments will provide a unique and informed perspective on the issues raised in the appeal. LEAF intends to address issues relating to s. 15 of the *Charter*, particularly the impact of the IFHP cuts on refugee women and others who experience complex forms of inequality. These arguments are grounded in LEAF's expertise in equality rights and its experience as a leader in *Charter* litigation, and will assist this Court in resolving the important public issues raised in the appeal.

PART II: THE FACTS

A. Background of the Women's Legal Education and Action Fund ("LEAF")

4. LEAF is a national, federally incorporated, non-profit organization founded in April 1985 to advance the equality rights of women and girls in Canada as guaranteed by the *Charter*. To this end, LEAF engages in equality and human rights litigation, law reform work and public education.

> Affidavit of Diane O'Reggio sworn December 19, 2014 ("O'Reggio Affidavit") **[LEAF Record, Tab B, p. 6, para. 3]**

5. With LEAF branches across the country, and an affiliated organization, West Coast LEAF, in British Columbia, LEAF's membership is broad and includes women of all ages and backgrounds. Through its litigation work, LEAF provides a voice for women who experience discrimination on the basis of sex or gender, and for those who experience unique forms of discrimination arising from the intersection of multiple grounds of discrimination, such as sex,

gender, family status, race, ethnic origin, religion, disability, marital status, sexual orientation, and socio-economic status.

O'Reggio Affidavit **[LEAF Record, Tab B, p. 6, para. 4]**

6. The nature and scope of LEAF's work renders it uniquely experienced and qualified to speak to the interests of people who experience discrimination and inequality and to articulate the scope of the rights that protect those interests.

B. LEAF's Experience in *Charter* and Equality Rights Litigation

7. LEAF has substantial and meaningful experience in the development of *Charter* and human rights jurisprudence and has assisted the courts in numerous cases dealing with equality rights.

8. LEAF began its equality rights litigation in 1985 and quickly became a key participant in some of the most significant cases through which equality rights in Canada have been developed and defined. LEAF has contributed to the evolution of the meaning of substantive equality and equality rights jurisprudence in Canada through interventions in dozens of cases throughout the last 29 years including: *Canadian Newspapers Co. v Canada (Attorney General)*, [1988] 2 S.C.R. 122; *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Borowski v The Attorney General of Canada*, [1989] 1 S.C.R. 342; *Brooks v Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Janzen and Govereau v Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Tremblay v Daigle*, [1989] 2 S.C.R. 530; *R. v Keegstra*, [1990] 3 S.C.R. 697; *The Canadian Human Rights Commission v Taylor*, [1990] 3 S.C.R. 892; *Schachter v Canada* [1992] 2 S.C.R 679; *R. v Sullivan*, [1991] 1 S.C.R. 489; *R. v Seaboyer; R. v Gayme*, [1991] 2 S.C.R. 577; *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *R. v Butler,* [1992] 1 S.C.R. 452; *M.(K) v M (H)*, [1992] 3 S.C.R. 6; *Moge v Moge,* [1992] 3 S.C.R. 813; *Weatherall v Canada (Attorney General)*, [1993] 2 S.C.R. 872; *R. v Whitley*, [1994] 3 S.C.R. 830; *R. v O'Connor*, [1995] 4 SCR 411; *Thibaudeau v Canada*, [1995] 2 S.C.R. 627; *A. (L.L.) v B. (A.),*, [1995] 4 S.C.R. 536; *Gordon v Goertz*, [1996] 2 S.C.R. 27; *Vriend v Alberta,* [1998] 1 S.C.R. 493; *R. v Ewanchuk*, [1999] 1 S.C.R. 330; *M. v H.*, [1999] 2 S.C.R. 3; *British Columbia (Public Service Employee Relations Commission) v BCGSEU ["Meiorin"]*, [1999] 3 S.C.R. 3; *R. v Mills*, [1999] 3 S.C.R. 668; *Blencoe v British Columbia (Human Rights*

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O'Reggio Affidavit **[LEAF Record, Tab B, pp. 6-7, para. 6]**

9. In a number of equality rights cases, LEAF successfully argued for novel approaches to the judicial consideration of *Charter* rights. For example:

(a) LEAF was central in gaining recognition of new analogous grounds under s. 15(1) of the *Charter* in such cases as: *Andrews v Law Society of British Columbia, supra*; *Vriend v Alberta, supra*; and *Falkiner v Ontario (Minister of Community and Social Services)*, 2002 CanLII 44902 (ONCA);

(b) LEAF played a key role in the Supreme Court of Canada's decision in *Withler v Canada (Attorney General), supra,* to eliminate the requirement of a mirror image comparator group in s. 15(1) analysis; and

(c) Of particular importance to this case, LEAF has developed and advanced approaches to s. 15(1) analysis that consider and account for the reality that discrimination based on sex or gender is experienced differently by those whose identities also encompass other prohibited grounds of discrimination such as race, class, Aboriginal status, sexual orientation, religion, poverty, and/or disability. Thus, LEAF has expertise on women's experiences of inequality as shaped by the intersection of multiple prohibited grounds of discrimination. Examples include: *Norberg v Wynrib*, [1992] 2 SCR 226; *Winnipeg Child and Family Services v G (D.F.)*, [1997] 3 SCR 925; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624; *Falkiner v Ontario, supra; Jean v Canada (Indian Affairs and Northern Development),* 2009 FCA 377; *R. v N.S.*, 2012 SCC 72; and *R. v D.A.I.*, 2012 SCC 5.

O'Reggio Affidavit **[LEAF Record, Tab B, pp. 7-8, para. 8]**

10. Significantly, LEAF has also engaged in legal challenges on behalf of refugees, from its early intervention in *Canada Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, to its 2012 joint submission with the Barbra Schlifer Commemorative Clinic and METRAC to the Parliamentary Committee on Immigration on the damaging impact on refugee women of Bill C-31, Protecting Canada's Immigration System Act.

O'Reggio Affidavit **[LEAF Record, Tab B, p. 8, para. 9]**

11. LEAF has intervened at the Federal Court of Appeal in *Schachter v Canada*, [1990] 2 F.C. 129; *Miller v Canada (Attorney General)*, 2002 FCA 370; *Canada (Attorney General) v Lesiuk*, 2003 FCA 3; *Jean v Canada, supra*; and most recently in *Canada (Attorney General) v Johnstone*, 2014 FCA 110.

O'Reggio Affidavit **[LEAF Record, Tab B, p. 7, para. 7]**

12. LEAF's deep history and breadth of experience as a leading organization working on behalf of the interests of people who are discriminated against informs its expertise and its distinct perspective on equality rights generally, s. 15 of the *Charter* specifically, and the role of the courts in the development of *Charter* rights.

C. LEAF'S Intended Arguments

13. If granted leave to intervene in this appeal, LEAF intends to focus its submissions on s. 15 of the *Charter*. LEAF will argue:

(a) that refugee women are disproportionately affected by the IFHP cuts because of their gender. For example, the lack of coverage for prenatal and antenatal care severely affects refugee women. Further, as LEAF argued in *Johnstone v CBSA, supra,* caregiving of children, family members with disabilities and elders still predominantly falls to women, and refugee women are no different. Thus, when a refugee woman is ill and cannot get care, this creates a disproportionate, adverse and discriminatory effect upon refugee women;

(b) for a more expansive application of s. 15 than that in Mactavish J.'s decision. In particular, LEAF intends to argue the government's conduct

in making cuts to the IFHP has the effect of perpetuating a substantive and prejudicial disadvantage on refugees, and specifically, on refugee women, based on their membership in groups covered by the enumerated or analogous to grounds of discrimination in s. 15;

(c) that jurisprudence under s. 15(1) of the *Charter* must respond to intersectionality, which in this case arises with respect to refugee women. Where the identities of refugee claimants encompass more than one of the enumerated and/or analogous grounds, those grounds must be understood to constitute one identity that cannot be dissected into constituent parts. LEAF intends to argue, in part, that any analysis of the impact of the cuts to the 2012 IFHP must consider that:

(i) refugee women have different and additional needs as compared to refugee men owing to their different experiences as refugees. As such, a gendered analysis of the 2012 cuts to the IFHP must be grounded in an understanding of the interconnected impact of the denial of access to basic health care needs and the experiences of flight, loss, trauma, and survival of conflict and violence in the lives of refugee women. Even without the 2012 IFHP cuts, refugee women face greater difficulties in accessing basic health care due to gender inequality in the allocation of resources, such as income, education, and employment. Thus, refugee women face differential exposures and vulnerabilities with respect to health care, which are exacerbated by the 2012 cuts to the IFHP;

(ii) refugees disproportionately suffer disadvantage often by virtue of their prior experiences of persecution and their vulnerability due to their inability to return to their country of nationality[1]. Should conditions in Canada prove undesirable, refugees cannot return home or seek consular assistance without endangering themselves or their families who remain in their country of origin; and

[1] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 99

(iii) refugees have experienced some of the worst oppression in the world; oppression that creates unique forms of inequality when experienced by those who face discrimination on the basis of multiple or intersecting identities, such as racialized, poor and lesbian refugee women;

(d) that interpretation of analogous grounds in s. 15 is unsettled. The question of whether "immigration status" is an analogous ground has not been definitively decided as suggested by Mactavish J. in her decision. As LEAF argued in *Irshad (Litigation Guardian of) v Ontario (Minister of Health)*, 2001 CanLII 24155 (ONCA), immigrants are a politically vulnerable group that has suffered stereotyping and prejudice historically and in the present day. LEAF will argue that a broad range of factors must be considered in determining whether immigration status is an analogous ground. LEAF will also argue that additional analogous grounds, including, for example, "citizenship", require some consideration in assessing the impact of the cuts to the IFHP;

Canadian Doctors for Refugee Care et al v Canada (CIC), 2014 FC 651 at paras. 856-870 **[LEAF Record, Tab D-1]**

(e) that the test for whether an impugned distinction forms part of an ameliorative program should be clarified. LEAF will draw upon its expertise with respect to s. 15(2) analysis, as displayed in its interventions in such cases as *Jean v Canada*, *supra,* and *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, to propose a relatively rigorous threshold such that s. 15(1) scrutiny cannot be avoided by claiming that a distinction made by a government program is part of an ameliorative program;

Canadian Doctors for Refugee Care, *supra*, at paras. 778ff **[LEAF Record, Tab D-1]**

(f) that the analysis of other *Charter* rights violations, such as those suffered by refugees under sections 7 and 12 due to the IFHP cuts, should be

carried out through the lens of s. 15 since the Supreme Court has determined that equality is a fundamentally important *Charter* value and an interpretive lens that applies to and supports all other rights guaranteed by the *Charter*[2];

(g) that international human rights law supports a right of women and refugees to a basic level of health, and a universal right to health care services without discrimination. Although Mactavish J. acknowledges the interpretive importance of Canada's international obligations in her decision, she does not directly explore these commitments in her s. 15 analysis. This is particularly problematic since several international human rights treaties specifically address signatory countries' obligation to provide refugees, women, and children with health care[3]. These treaties should act as an interpretive aid in defining the scope and content of the Respondents' s. 15 rights in this case. Advancing these arguments has the potential to add substance to the Court's substantive equality analysis and strengthen the interaction between international law and the s. 15 equality guarantee. Further, Canadian legislation must be interpreted and applied in a manner that complies with the international human rights instruments that are binding on Canada.

O'Reggio Affidavit **[LEAF Record, Tab B, pp. 8-9, para. 10]**

PART III: ISSUES

14. At issue in this motion is whether LEAF should be granted leave to intervene in the appeal.

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[2] *J.G. v New Brunswick (Minister of Health and Community Services)*, [1999] 3 S.C.R. 46 at paras. 112-115, per L'Heureux-Dubé, Gonthier and McLachlin JJ. citing McIntyre J. in *Andrews v Law Society of British Columbia*, *supra* at 185

3 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Can TS.1982 no. 31, Ga Res. 34/180; *Convention on the Rights of the Child*, UN GA, 20 November 1989, UNTS vol 1577 at 3; *International Covenant on Economic, Social and Cultural Rights*, UNTS, vol. 933, p. 3, CTS 1976/46 (ICESCR); UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, available at: http://www.unhcr.org/refworld/docid/45139acfc.html, at para. 5; UN Human Rights Committee (HRC), CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, 27 July 1990, available at: http://www.unhcr.org/refworld/docid/45139bd74.html, at paras. 1, 3-5; *DeGuzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436; [2005] F.C.J. No. 2119, at paras. 71-83.

PART IV: SUBMISSIONS

15. This Court should grant LEAF's motion for leave to intervene. The Court will benefit from hearing LEAF's arguments, which are rooted in its unique perspective on the issues in the appeal and its expertise in *Charter* litigation and constitutional analysis developed over almost thirty years of promoting and protecting the equality rights of women.

A. The Test for Leave to Intervene

16. Rule 109 of the *Federal Court Rules* provides that leave to intervene will be granted where the intervenor will assist the court in determining a factual or legal issue raised in the proceeding.

17. The decision to grant intervenor status is discretionary and the factors considered may vary from case to case. For example, a public interest organization such as LEAF need not be "directly affected by the outcome" in order to obtain leave to intervene in cases engaging issues of constitutional rights or other fundamental public interests. The ultimate question is whether the intervention will assist the court in its determination of a factual or legal issue.

> *Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 ("*CUPE*") at para. 8 **[LEAF Record, Tab D-2]**
>
> *Rothmans, Benson and Hedges Inc. v Canada (Attorney General)*, [1989] F.C.J. No. 446 (TD) [1990] 1 F.C. 74 at paras. 10-11, 17-18, 22 ("*Rothmans*") **[LEAF Record, Tab D-3]**
>
> *Sawridge Band v Canada*, [2000] F.C.J. No. 749 (TD) at para. 11 **[LEAF Record, Tab D-4]**
>
> *Canada (Attorney General) v United States Steel Corp.*, 2010 FC 1330 at para. 26 **[LEAF Record, Tab D-5]**

18. The test for intervenor status should be applied in a flexible and purposive manner consistent with the Supreme Court's recent guidance on public interest standing in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*. While public interest standing involves a slightly different analysis, LEAF submits the following comments are equally applicable to the question of whether intervenor status should be granted under Rule 109:

> The decision to grant or refuse standing involves the careful exercise of judicial discretion through the weighing of three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner.
>
> It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.
>
> *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524 ("*Downtown Eastside*") at paras. 35-36 **[LEAF Record, Tab D-6]**

19. In *Canada v Pictou Landing Band Council*, Stratas J.A. held that the *CUPE* test, which had set out six different factors to be considered, required "modification in light of today's litigation environment." He considered each of the *CUPE* factors in turn, effectively synthesizing them and holding that the following factors should apply when considering an application for intervenor status:

1. Does the proposed intervenor have a genuine interest in the precise issue(s) upon which the case is likely to turn?

2. Is the position of the proposed intervenor adequately defended by one of the parties to the case?

3. Are the interests of justice better served by the intervention of the proposed third party?

4. Will the intervenor bring further, different and valuable insights and perspectives that will assist the court in determining the matter?

> *Canada (Attorney General) v Pictou Landing Band Council*, 2014 FCA 21 ("*Pictou Landing*") at paras. 6-7, 9 **[LEAF Record, Tab D-7]**

20. The present appeal involves constitutional issues of fundamental importance to the public interest, namely the impact of the 2012 changes to the IFHP on refugee claimants, approximately

51% of whom are women. How the 2012 IFHP cuts specifically impact refugee women and others who experience complex forms of inequality are issues that go to the heart of equality law as protected by s. 15 the *Charter*. Consequently, LEAF submits that the principles set out in *Pictou Landing,* above, with respect to the flexible and purposive application of the test for intervenor status in constitutional or public interest litigation should be applied in determining this application.

O'Reggio Affidavit **[LEAF Record, Tab B, pp. 9-10, para. 13]**

B. LEAF Meets the Test for Leave to Intervene

(a) LEAF has a Genuine Interest in the Outcome

21. As an organization representing women who experience inequality due to their sex and other intersecting grounds of discrimination, and as a leader in the development of Canada's equality jurisprudence, LEAF submits that it has a genuine interest in the outcome of the appeal; an interest that has been repeatedly recognized by Canadian courts in other appeals (as noted above).

O'Reggio Affidavit **[LEAF Record, Tab B, pp. 6-8, paras. 6, 8]**

22. This Court has affirmed that, in proceedings involving constitutional or other public interest issues, the nature of the interest sufficient to justify intervention is broadly interpreted to permit intervenors to provide courts with their special knowledge and expertise:

> ... notably, the Supreme Court of Canada [has] permitted interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues. In some cases, the ability of a proposed intervenor to assist the court in a unique way in making its decision will overcome the absence of direct interest in the outcome. What the Court must consider in applications...is the nature of the issue involved and the likelihood of the applicant being able to make a useful contribution to the resolution of the action, with no injustice being imposed on the immediate parties.

Rothmans, supra at paras. 10 and 18 **[LEAF Record, Tab D-3]**

23. More recently, in *Pictou Landing*, Stratas J.A. held that the proposed intervenor should have a genuine interest in the issue "upon which the case is likely to turn", so the court can be

assured that "the proposed intervenor will apply sufficient skills and resources to make a meaningful contribution to the proceeding."

Pictou Landing, *supra* at para. 9 **[LEAF Record, Tab D-7]**

24. What the court must consider then is whether the proposed intervenor will make a "meaningful contribution to the proceeding". As noted above, LEAF has a long history as an equality rights leader due to its expertise in articulating the relationship between law and the inequalities experienced by women and other historically disadvantaged groups. LEAF has a genuine interest in ensuring the impact of the 2012 cuts to the IFHP on refugee women is before the Court in order to assist in the determination of the constitutional issues engaged by this appeal.

O'Reggio Affidavit **[LEAF Record, Tab B, pp. 6-9, at paras. 6, 8, 10]**

25. LEAF's interest and expertise has been recognized by various levels of courts, including the Supreme Court of Canada and this Court. In particular, LEAF has participated as an intervenor in many of the leading cases on equality rights, and will be able to provide an informed perspective on how the 2012 IFHP cuts adversely impact refugee women and how the Court must consider the unique forms of inequality experienced by those who face discrimination on the basis of intersecting grounds. Indeed, such people are among the most marginalized members of Canadian society, and thus most in need of *Charter* protection.

O'Reggio Affidavit **[LEAF Record, Tab B, pp. 8-9, at para. 10]**

Rothmans, *supra* at para. 16 **[LEAF Record, Tab D-3]**

(b) Justiciable Issue and Veritable Public Interest

26. The appeal raises serious constitutional issues that engage the public interest. LEAF has summarized the nature of its proposed submissions in paragraph 13 above, noting in particular that the appeal raises the issue of how s. 15 analysis should respond to complex inequalities, an issue that has significant implications for the development of equality jurisprudence in Canada.

27. In *Pictou Landing*, Stratas J.A. held that the question of whether there is a justiciable issue is irrelevant to whether intervention should be granted. Previously, the Federal Court held that a "justiciable issue" need not exist as between a party and an intervenor. Rather, a "public

interest" can arise from the interpretation and application of legislation. As a result, the Federal Court has granted leave to intervene where "realistically the court could hear and decide [an] Application on the merits without the intervenors", but decided it "would have much less information" if it did so.

Pictou Landing, *supra* at para. 9 **[LEAF Record, Tab D-7]**

Canada (Attorney General) v United States Steel Corp., *supra* at paras. 38, 40, 42 and 64 **[LEAF Record, Tab D-5]**

28. In general, the authorities emphasize that special knowledge and expertise weigh in favour of the participation of public interest groups as intervenors. In this respect LEAF is similar to the public interest organization granted intervenor status by this Court in *Rudolph v Canada*, a non-profit education and advocacy organization "whose mandate is to expose racism and bigotry and enhance human rights" and that had "continuing involvement in legal proceedings, legislative initiatives, educational programs and community action bearing directly on its mandate".

Rudolph v Canada (Minister of Employment and Immigration), [1992] F.C.J. No. 62 (CA) at 3-4 (QL) **[LEAF Record, Tab D-8]**

(c) A Reasonable and Efficient Means to Submit the Question to the Court

29. Stratas J.A., in *Pictou Landing*, found this factor to be irrelevant to the question of whether intervenor status should be granted. LEAF submits that this criterion is not a strict or technical requirement and if it is to be considered, it must be applied flexibly and purposively in a manner consistent with the Supreme Court's guidance in *Downtown Eastside*, above.

30. In *Downtown Eastside,* the Supreme Court examined the "reasonable and effective" means criterion in the public standing test and held it is a consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations, a reasonable and effective means to bring the challenge to court. Consequently, this criterion weighs in favour of granting standing where the proposed action itself is "a reasonable and efficient means of presenting the issues" and where it would be reasonable and efficient to have the proposed intervenor participate to ensure a particular argument is put before the Court in an effective or meaningful way.

Downtown Eastside, *supra* at paras. 44, 48, 50-51 **[LEAF Record, Tab D-6]**

Pictou Landing, *supra* at para. 9 **[LEAF Record, Tab D-7]**

Canada v United States Steel Corporation, *supra* at para. 50 **[LEAF Record, Tab D-5]**

31. LEAF submits that its demonstrated experience and expertise in equality jurisprudence establish its ability to ensure that the particular kinds of discrimination experienced by refugee women will be put before the Court in an "effective and meaningful way". LEAF's contributions will be beneficial to the Court and assist in the determination of the s. 15 issues.

(d) Position not Adequately Defended by the Parties

32. LEAF submits that its perspective, expertise and position on the issues are sufficiently distinct and not adequately defended by the existing parties. None of the applicants, other parties or intervenors are refugee women and none speak to the experiences of refugee women. As set out in more detail herein, LEAF will provide the Court with a unique perspective and with specific expertise on the disproportionate impact of the 2012 IFHP cuts on refugee women and the interpretation and application of s. 15 of the *Charter* in this context.

O'Reggio Affidavit **[LEAF Record, Tab B, pp. 8-9 at paras. 10, 12]**

33. The courts have held that in public interest litigation, granting intervenor status is justified where the proposed intervenor can provide a different perspective from the parties that may assist the court. In *Pictou Landing*, Stratas J.A. stated the key question in deciding whether to grant intervenor status is "whether the intervenor will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter." The fact that there may be some overlap between the arguments of the parties and the proposed intervenor is not grounds for denying intervenor status.

Pictou Landing, *supra* at para. 9 **[LEAF Record, Tab D-7]**

Rothmans, *supra* at paras. 15 and 19 **[LEAF Record, Tab D-3]**

Rudolph, *supra* at 4 **[LEAF Record, Tab D-8]**

Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada Ltd., 1990 CanLII 6886 (ONCA) at 5 **[LEAF Record, Tab D-9]**

34. The Ontario Court of Appeal recognized the value of LEAF's expertise in gender and equality issues in granting it intervenor status in *R v Seaboyer*:

> Counsel for LEAF contended that women were most frequently the victims of sexual assault and that LEAF had a special knowledge and perspective of their rights and of the adverse effect women would suffer if the sections were held to be unconstitutional.
>
> ...While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the court.
>
> *Rothmans*, *supra* at para. 16 citing *R. v Seaboyer* (1986), 50 C.R. (3d) 395 (Ont. C.A.) at 397-398 **[LEAF Record, Tab D-3]**

35. While the decision of Mactavish J. mentions the evidence of midwife Manavi Handa that some refugee women experienced difficulties obtaining obstetrical care, there was no female applicant in the case and the gendered impacts of the IFHP cuts were not canvassed in any detail. LEAF will present the Court with an understanding of the unique circumstances faced by refugee women, which results in the IFHP cuts having a particularly egregious impact upon them. This is particularly so for pregnant refugee women and refugee women who are the primary caregivers to children or other family members.

> *Canadian Doctors for Refugee Care*, *supra* at paras. 146-147 and 248-249 **[LEAF Record, Tab D-1]**

36. LEAF would argue that women bear a disproportionate burden of extreme poverty and hunger. Humanitarian crises, violence and conflict exacerbate economic and gender inequalities. The majority of those who are injured, displaced, traumatized or killed in conflict situations are women and children. Further, refugee women are especially vulnerable to abusive relationships. They also face challenges in finding housing and securing access to justice and health care services, due to economic, cultural and language barriers.

37. LEAF proposes to bring attention to women from designated "safe" countries of origin (DCOs) who essentially have no health care coverage due to the 2012 cuts to the IFHP.[4] Women

[4] Refugee claimants from DCOs and rejected refugee claimants only receive coverage if their health status poses a danger to public health or safety. Thus, they have no medication coverage and no coverage for treatment of any non-communicable disease or disorder, including diabetes, asthma, epilepsy, heart conditions, trauma, blood infections, non-violent psychoses, pregnancy, etc.

who are pregnant and (as many refugee women are) economically disadvantaged, have no meaningful access to prenatal, delivery,[5] and antenatal care in Canada. The gender-based nature of many women's refugee claims, as well as the gender-based violence they often experience in Canada, places DCO refugee women in situations where accessing health care for themselves and their children is difficult, if not impossible. In addition, in cases of domestic violence and sexual assault, refugee women face particular risks if they are unable to access health care services. And as noted above, given the pivotal role women play in the lives of their children, the impact of a denial of access to health care to them has a further detrimental impact on the children under their care.

38. While aspects of LEAF's intended arguments may be consistent with some of the positions of the parties to this appeal, it is submitted that LEAF's perspective and expertise are sufficiently different to provide assistance to this Court in determining the s. 15 issues before it, especially given that none of the applicants were women and none of the parties specifically addressed the impact of the IFHP cuts on refugee women. The serious impacts of the IFHP cuts are experienced differently by refugee women, and LEAF is well placed to represent their interests and to make a useful contribution in the appeal.

(e) Interests of Justice Better Served by LEAF Intervention

39. LEAF submits that the interests of justice are better served by its intervention in the present appeal, as it will provide the Court with its expertise and unique perspective on the constitutional issues before it. This will assist the Court and serve the interests of justice by ensuring full argument on a significant issue in *Charter* jurisprudence[6].

40. Further, LEAF's intervention will not cause any delay or otherwise prejudice the parties, as LEAF does not propose to augment the record, nor would it seek costs.

O'Reggio Affidavit **[LEAF Record, Tab B, p. 10 at para. 16]**

41. In summary, LEAF requests that it be granted leave to intervene based on the following:

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[5] Cross-Examination of Manavi Handa on her affidavit sworn 22 May 2013.

[6] It is noteworthy that the court below has already recognized that the unique nature of this case make is appropriate for the contribution of public interest litigants: *Canadian Doctors for Refugee Care, supra* at paras. 327-53.

(a) As a public interest organization and leader in the advancement of women's equality and the development of equality jurisprudence in Canada, LEAF has a genuine interest in the outcome of the appeal;

(b) The appeal raises a justiciable issue of veritable public interest. The issues raised by the appeal require this Court to consider whether the impact of the IFHP cuts on refugees are in breach of a number of *Charter* protections, including the right to equality. Thus, the issues raised by the appeal are of fundamental public interest;

(c) Granting LEAF leave to intervene in the appeal is a reasonable and efficient means to submit the question to the Court and consistent with the flexible and purposive approach set out in *Downtown Eastside* and *Pictou Landing*. Further, given the terms of the order requested, LEAF's intervention will not cause any delay or prejudice to the parties;

(d) The Section 15 *Charter* issues are not adequately represented by the parties. LEAF's perspective on, and expertise in, the advancement of equality rights is unique and grounded in its history of intervening in leading cases on Canadian equality law. In addition, LEAF's expertise and perspective as a leading voice for women's equality will be of assistance to the Court in considering the implications of the IFHP cuts on refugee women, who experience inequality because of their gender and on intersecting grounds of discrimination;

(e) In light of the above, the interests of justice will be better served by granting LEAF leave to intervene. LEAF's participation will ensure the Court has the benefit of full argument on the issues before it.

PART V: ORDER SOUGHT

42. LEAF seeks an order granting it leave to intervene on the following terms:

(a) LEAF will not lead evidence but will rely upon the evidence adduced by the parties and on the documents referred to in the reasons of the Federal Court, as well as any other documents of which this Court may take judicial notice;

(b) LEAF will be served with all materials of the parties;

(c) LEAF will file its memorandum of fact and law of no more than 25 pages within 21 days of the filing of the Respondents' memorandum of fact and law;

(d) LEAF will be consulted on hearing dates for the hearing of this matter;

(e) LEAF will have the right to make oral submissions before the Court; and

(f) LEAF will not seek costs, nor shall costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of December, 2014.

Kim Stanton (LSUC #61160H)
Legal Director

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LIST OF AUTHORITIES

1. *Canadian Doctors for Refugee Care et al v Canada (CIC)*, 2014 FC 651
2. *Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220
3. *Rothmans, Benson and Hedges Inc. v Canada (Attorney General)*, [1989] F.C.J. No. 446 (TD) [1990] 1 F.C. 74
4. *Sawridge Band v Canada,* [2000] F.C.J. No. 749 (TD)
5. *Canada (Attorney General) v United States Steel Corp.*, 2010 FC 1330
6. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524
7. *Canada (Attorney General) v Pictou Landing Band Council*, 2014 FCA 21
8. *Rudolph v Canada (Minister of Employment and Immigration),* [1992] F.C.J. No. 62 (CA)
9. *Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada Ltd.*, 1990 CanLII 6886 (ONCA)

Federal Court  Cour fédérale

Date: 20140704

Docket: T-356-13

Citation: 2014 FC 651

Ottawa, Ontario, July 4, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIQUES, HANIF AYUBI AND JUSTICE FOR CHILDREN AND YOUTH

Applicants

and

ATTORNEY GENERAL OF CANADA AND MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

[691] I am also satisfied that this treatment is "cruel and unusual", particularly, but not exclusively, as it affects children who have been brought to this country by their parents. The cuts to health insurance coverage effected through the 2012 modifications to the IFHP potentially jeopardize the health, and indeed the very lives, of these innocent and vulnerable children in a manner that shocks the conscience and outrages our standards of decency. They violate section 12 of the Charter.

XII. Do the 2012 Changes to the IFHP Violate Section 15 of the Charter?

[692] Subsection 15(1) of the Charter provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[693] Subsection 15(1) is, however, qualified by subsection 15(2), which provides that "[s]ubsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[694] The applicants assert that the 2012 changes to the IFHP create a health care hierarchy whereby the lives of some refugees and refugee claimants - a historically disadvantaged group whose presence is anticipated and authorized by Canadian law - are deemed less worthy of public protection. This, the applicants say, amounts to discrimination under section 15 of the Charter.

[695] The applicants assert that the 2012 changes to the IFHP violate section 15 of the Charter in two ways. First, the 2012 OICs draw a distinction between classes of refugee claimants based upon their country of origin. They provide a lower level of health insurance coverage to individuals coming from DCO countries than is provided to refugee claimants coming from non-DCO countries. According to the applicants, this constitutes discrimination on the basis of national or ethnic origin.

[696] The applicants also submit that the 2012 IFHP draws a distinction between individuals who are lawfully in Canada for the purpose of seeking protection, and other legal residents in Canada who are provided with health insurance benefits by the government. Under the 2012 IFHP, individuals legally in Canada such as Mr. Ayubi and Mr. Garcia Rodrigues are now prevented from obtaining the same level of health benefits as other legal residents in Canada.

[697] According to the applicants, this distinction in entitlement to health benefits is based upon the analogous ground of immigration status.

[698] The respondents deny that there has been any violation of section 15 of the Charter on the basis of either the national or ethnic origin or the immigration status of IFHP beneficiaries.

[699] According to the respondents, the 2012 changes to the IFHP do not create a distinction on the basis of the national origin of IFHP beneficiaries because any distinction that may be made arises out of the provisions of the *Immigration and Refugee Protection Act*. The respondents further note that a multitude of countries have been designated as Designated Countries of Origin, arguing that any distinction that may be made between foreign nationals of diverse origins does not constitute discrimination on the basis of "national or ethnic origin".

[700] If there is any unequal treatment in treating refugee claimants from DCO countries differently from others seeking the protection of Canada, the respondents say that the distinction creates an *advantage* in that it provides access to state-funded health insurance, and not a disadvantage.

[701] Further, by granting DCO claimants a level of state-funded health care benefits, the respondents submit that the Governor in Council is not "perpetuating prejudice or stereotyping". Rather, the executive branch is recognizing that even though refugee claimants from these countries are generally coming from safe, "non-refugee producing" nations with health care systems that are comparable to that of Canada, they are deserving of a minimum level of state-funded health care while they are in Canada making a refugee claim.

[702] Insofar as the applicants' arguments regarding alleged discrimination on the basis of immigration status are concerned, the respondents submit that "immigration status" has clearly been rejected by the Courts as an analogous ground for the purposes of section 15 of the Charter. As a consequence, the applicants have failed to establish that there is a "distinction" resulting from 2012 changes to the IFHP that would engage the provisions of subsection 15(1) of the Charter.

[703] The respondents also submit that the nature of the interest asserted by the applicants is a right to state-funded health care, which is a right that not even Canadian citizens possess. There are, moreover, shortcomings in the Canadian health care system, and not every Canadian can receive the health care that he or she needs in a timely fashion.

[704] In the alternative to the above arguments, the respondents submit that the 2012 IFHP is an "ameliorative program", with the result that any potential distinction it creates is thus protected by subsection 15(2) of the Charter. According to the respondents, it is unavoidable that in seeking to help one group, ameliorative programs necessarily exclude others.

[705] Finally, if there is any distinction in the 2012 IFHP that is not saved by subsection 15(2) of the Charter, the respondents submit that the applicants have failed to demonstrate that the distinction constitutes substantive discrimination, with the result that their section 15 arguments must fail.

A. *Legal Principles Governing Section 15 Claims*

[706] In *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6 [*Andrews*], the Supreme Court described the subsection 15(1) guarantee of equality as "the broadest of all guarantees", noting that it "applies to and supports all other rights guaranteed by the Charter": at para. 52.

[707] Subsection 15(1) of the Charter is aimed at preventing the drawing of discriminatory distinctions that impact adversely on members of groups identified by reference to the grounds enumerated in section 15 or to analogous grounds: *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 [*Kapp*].

[708] The focus of subsection 15(1) of the Charter is on "*preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping": *Kapp*, above at para. 25, emphasis in the original.

[709] The law governing section 15 claims is complex, and has undergone a number of iterations since the Supreme Court's seminal decision in *Andrews* "set the template" for the Court's approach to claims under section 15 of the Charter: see *Kapp*, above at para. 14.

[710] The majority in *Andrews* defined "discrimination" as "a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society": above at para. 37.

[711] It was also in *Andrews* that the Supreme Court first articulated its commitment to the principle of substantive, rather than formal, equality.

[712] "Formal equality" requires that everyone, regardless of their individual circumstances, be treated in an identical fashion. In contrast, "substantive equality" recognizes that in some circumstances it is necessary to treat different individuals differently, in order that true equality may be realized. In this regard, "substantive equality" is based upon the concept that "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, above at para. 34, per McIntyre J.

[713] As William Black and Lynn Smith explained in "The Equality Rights", in Gérald Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, Ontario: LexisNexis Butterworths, 2005), at p. 969:

> The term "substantive equality" indicates that one must take account of the outcomes of a challenged law or activity and of the

> social and economic context in which the claim of inequality arises. Assessing that context requires looking beyond the law that is being challenged and identifying external conditions of inequality that affect those outcomes. Substantive equality requires attention to the "harm" caused by unequal treatment.

[714] In 1999, the Supreme Court of Canada rendered its decision in *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12 [*Law*]. In *Law*, the Supreme Court observed that "[a] purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach": at para. 88.

[715] As the Court subsequently observed in *Gosselin*, above, the central lesson of *Law* was the need for a contextual inquiry in order to establish whether a governmental distinction conflicts with the purpose of subsection 15(1) of the Charter, such that "a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity": see *Gosselin*, above at para. 25, citing *Law* above at para. 60.

[716] In *Kapp*, the Supreme Court recognized that difficulties had arisen in using human dignity as a legal test. The Court observed that although human dignity is an essential value underlying the subsection 15(1) equality guarantee, "human dignity is an abstract and subjective notion that [...] cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be": *Kapp*, above at para. 22, emphasis in the original.

[717] The Supreme Court observed that the analysis "more usefully focusses on the factors that identify impact amounting to discrimination", recognizing that the "perpetuation of disadvantage

and stereotyping" are the "primary indicators of discrimination": *Kapp*, above at para. 23. Thus the "central concern" of section 15 is "combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping": at para. 24.

[718] For the purposes of a section 15 Charter analysis, "disadvantage ... connotes vulnerability, prejudice and negative social characterization": *Kapp*, above at para. 55. In determining whether a government action imposes disadvantage on the basis of "stereotyping", regard should be had to, amongst other things, "the degree of correspondence between the differential treatment and the claimant group's reality": *Kapp*, above at paras. 19 and 23.

[719] Since *Kapp*, the Supreme Court has reminded us of the importance of looking beyond the impugned government action in a section 15 Charter analysis, and of the need to examine the larger social, political and legal context of the legislative distinction in issue: see *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at paras. 193-194, [2009] 1 S.C.R. 222.

[720] Indeed, in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 [*Withler*], the Supreme Court stated that "[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the Charter?": above at para. 2.

[721] Most recently, in *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61 [*A.G. v. A.*], Justice Abella noted that "the main consideration must be *the impact* of the law on the individual or the group concerned". She also observed that the purpose of section 15 was "to eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups

in gaining meaningful access to what is generally available": at para. 319, citing *Andrews*, emphasis in the original.

[722] Thus the test to be used in identifying whether there has been a section 15 violation is whether an applicant can show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group creates a disadvantage by perpetuating prejudice or stereotyping: *A.G. v. A.*, above at para. 324. If the applicant discharges his or her burden in this regard, then the burden shifts to the government to justify the distinction under section 1 of the Charter.

[723] According to *A.G. v. A.*, while prejudice and stereotyping are *indicia* that may help identify discrimination, "they are not discrete elements of the test which the claimant is obliged to demonstrate": above at para. 325.

[724] 'Prejudice' has been described by the Supreme Court as "the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member". While 'stereotyping', like prejudice, "is a disadvantaging attitude", it is an attitude "that attributes characteristics to members of a group regardless of their actual capacities": both quotes from *A.G. v. A.*, above at para. 326.

[725] Citing its earlier decision in *Withler*, the Supreme Court held in *A.G. v. A.* that "where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered": above at para. 327.

[726] Caution must, however, be exercised so as to avoid improperly focusing on whether a discriminatory *attitude or conduct* exists, rather than on whether the impugned government action has a discriminatory *impact*. As a consequence, it is not necessary that claimants prove that a distinction perpetuates negative attitudes about them: *A.G. v. A.*, above at paras. 327-330.

[727] Ultimately, the question is whether "a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group": *A.G. v. A.*, above at para. 331. As a consequence, "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory": at para. 332.

[728] With this understanding of the relevant legal principles, I turn now to consider whether the applicants have demonstrated that the 2012 changes to the IFHP create a distinction between refugee claimants from DCO countries and refugee claimants from non-DCO countries in a way that violates section 15 of the Charter.

B. *Does the 2012 IFHP Draw a "Distinction" Between Refugee Claimants from DCO Countries and Non-DCO Countries on the Basis of an Enumerated or Analogous Ground?*

[729] As noted above, the first question that must be addressed is whether the government action in issue, in this case, the changes to the IFHP brought about by the 2012 OICs, creates a "distinction" based on an enumerated or analogous ground under subsection 15(1) of the Charter.

[730] As the Supreme Court observed in *Withler*, above, "inherent in the word 'distinction' is the idea that the claimant is treated differently than others": at para. 62.

[731] It will be recalled that unlike the pre-2012 IFHP (which provided the same level of coverage to all those eligible for benefits), the 2012 IFHP regime provides for different tiers of coverage: Expanded Health Care Coverage (EHCC), Health Care Coverage (HCC) and Public Health or Public Safety Health Care Coverage (PHPS).

[732] The tier of IFHP coverage that a person is entitled to receive under the 2012 IFHP depends upon a number of factors. Amongst others, these include where the individual is in the refugee determination process; *whether the individual is a national of a Designated Country of Origin*; if the individual is not a refugee claimant, the person's status in Canada; whether the individual receives federally-funded resettlement assistance; and whether the individual is being detained.

[733] EHCC is the highest level of health insurance benefits available under the 2012 IFHP. It is roughly equivalent to the level of IFHP benefits provided under the pre-2012 IFHP program, and is similar to the level of health insurance coverage available to low-income Canadians. Those entitled to EHCC benefits include most government-assisted refugees and some privately-sponsored refugees, as well as victims of human trafficking and some individuals admitted under a public policy or on humanitarian and compassionate grounds.

[734] HCC benefits are similar to the health insurance benefits received by working Canadians through their provincial or territorial health insurance plans, with the proviso that services and products are only covered "if they are of an urgent or essential nature" as defined in the IFHP. Those entitled to HCC benefits include *refugee claimants from non-DCO countries*, recognized refugees, successful PRRA applicants, most privately-sponsored refugees, and all refugee

claimants whose claims were filed before December 15, 2012, regardless of the claimant's country of origin.

[735] Refugee claimants *from DCO countries* and failed refugee claimants are only entitled to Public Health or Public Safety (PHPS) benefits. It will be recalled that PHPS coverage only insures those health care services and products that are necessary or required to diagnose, prevent or treat a disease posing a risk to public health, or to diagnose or treat a condition of public safety concern.

[736] With respect to refugee claimants from DCO countries, subsection 4(3) of the April 2012 OIC specifically provides that the Minister is not authorized to pay "the cost of health care coverage incurred for refugee claimants who are *nationals of a country* that is, when services or products are provided, designated under subsection 109.1(1) of the Act" [my emphasis].

[737] Thus, as a result of the changes brought about by the Governor in Council through the promulgation of the 2012 OICs, the 2012 IFHP now draws a distinction, on its face, as to the level of health insurance coverage that will be provided to those seeking the protection of Canada based, in part, on the nation from which the claimant comes.

[738] The 2012 IFHP provides a lesser level of health insurance coverage to refugee claimants from DCO countries than is afforded to refugee claimants from non-DCO countries, thereby singling out refugee claimants from DCO countries for adverse differential treatment. This situation is thus readily distinguishable from that which confronted the Federal Court of Appeal in *Toussaint*: above at paras. 104-105.

[739] It is also important to keep in mind that what is at issue in this case is not access to extraordinary or experimental treatment, or what the Supreme Court described in *Auton* as "recent and emergent" treatment: above at para. 56. The effect of the 2012 changes to the IFHP is to deny insurance coverage for basic, "core" medical care that is available to refugee claimants from non-DCO countries under the IFHP and to Canadians under provincial or territorial health insurance programs.

[740] The respondents say that the nature of the interest asserted by the applicants on behalf of refugee claimants from DCO countries is a right to state-funded healthcare - a right that not even Canadian citizens possess: *Chaoulli*, above.

[741] While I have already concluded in the context of my section 7 analysis that there is no free-standing constitutional right to state-funded health care, that does not provide the respondents with a defence to the applicants' section 15 claim.

[742] Although there may be no obligation on the Governor in Council to provide health insurance coverage to those seeking the protection of Canada, once it chooses to provide such a benefit, "it is obliged to do so in a non-discriminatory manner": *Eldridge*, above. The Supreme Court went on in *Eldridge* to observe that "[i]n many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons": both quotes at para. 73, citations omitted.

[743] It is, moreover, not open to government to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment: *Auton*, above at para. 41,

citing *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, [1999] S.C.J. No. 24 [*Corbière*].

[744] The respondents say that if there is any distinction in treating claimants from DCO countries differently from others seeking the protection of Canada, this distinction creates the *advantage* of providing access to state-funded health care to refugee claimants from DCO countries, and not a disadvantage. I do not agree.

[745] In this case, we have a government program that provides health insurance coverage to IFHP beneficiaries. However, the eligibility requirements established by the 2012 OICs result in unequal access to that benefit, providing an inferior level of benefits to some IFHP beneficiaries based on the claimant's nation of origin.

[746] The question, then, is whether this unequal access constitutes discrimination on the basis of the "national origin" of the claimants.

[747] The respondents say that there is no such discrimination, as numerous countries have been identified as "Designated Countries of Origin". According to the respondents, distinctions made between foreign nationals of diverse origins do not constitute discrimination on the basis of "national or ethnic origin".

[748] I do not accept this argument. The fact that a program may explicitly exclude Asians, Hispanics and Blacks does not make it any less discriminatory than a program that only excludes Asians.

[749] The respondents also argue that "national or ethnic origin is not the same as citizenship": Transcript, Vol. 2, at p. 175. In support of this contention, the respondents submit that one can be a citizen of one country, while having a national or ethnic origin that is quite different. The difficulty with this argument is that it equates national origin with ethnic origin, and fails to consider the distinction between the two.

[750] Subsection 15(1) of the Charter prohibits discrimination on the basis of national *or* ethnic origin. The use of the disjunctive "or" suggests that the two terms are not synonymous. It is, moreover, clear that an individual can have one national origin while having a different, or even several different ethnic origins.

[751] The 2012 OICs explicitly state that a lower level of health care benefits will be provided to refugee claimants from certain designated countries of origin. This is clearly discrimination on the basis of the nation that the claimant comes from: that is, their national origin.

[752] The respondents have cited several cases to support their claim that the IFHP does not draw a distinction on the basis of national origin. However, each of these cases is readily distinguishable from the situation that confronts the Court in this case.

[753] *Pawar v. Canada* (1999), 247 N.R. 271, [1999] FCJ No 1421 involved a challenge to the residency requirement of the *Old Age Security Act*, R.S.C. 1985, c. O-8 brought by individuals who were born abroad. In dismissing the action, the Federal Court of Appeal held that "being born abroad" was not embraced in the concept of "national and ethnic origin" and was neither an enumerated nor an analogous ground under section 15 of the Charter.

[754] The Court in *Pawar* also held that a distinction based upon prior residency in countries without reciprocal pension agreements with Canada had nothing directly to do with the plaintiffs' "national or ethnic origin". In other words, the distinction at issue in *Pawar* was not based on the particular country where the individual had previously resided, but rather on whether that country had entered into a reciprocal pension agreement with Canada: para. 2.

[755] In contrast, in this case, the distinction drawn by the 2012 OICs is based entirely on the country that the refugee claimant comes from.

[756] In *Tabingo v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 377, 431 F.T.R. 118, Justice Rennie had to consider whether the cancellation of applications for Federal Skilled Workers based on the date of application under subsection 87.4(1) of the *Immigration and Refugee Protection Act* resulted in a section 15 violation based upon the applicants' national origin.

[757] Although Justice Rennie observed at paragraph 120 of *Tabingo* that "the applicants were a diverse group, sharing no commonality of [...] national origin ...", that was *not* the basis for his finding that there had been no section 15 violation.

[758] Justice Rennie accepted that the impact of the decision to cancel visa applications had a differential impact, depending on the location of the visa office to which an applicant had applied as a result of variances in processing rates at different visa offices. However, in concluding that this did not constitute a distinction based on an enumerated or analogous ground for the purposes of section 15 of the Charter, he noted that visa applications were transferred between visa posts, with files from high demand posts being transferred to lower demand posts in order to facilitate

timelier processing. Consequently, the differences in clearance rates at various posts did not directly correspond to the applicants' countries of origin. As a consequence, there was no discrimination on the basis of national origin.

[759] It does not, however, follow from the decision in *Tabingo* that there could be no discrimination on the basis of national origin in the hypothetical event that the Government of Canada decided to process visa applications emanating from Great Britain at twice the rate of visa applications from, say, Cameroon, Pakistan and Vietnam (assuming for the sake of argument that visa applicants outside of Canada do in fact have rights under section 15 of the Charter).

[760] The last two cases relied upon by the respondents involved human rights complaints brought under two different human rights statutes, rather than under section 15 of the Charter. Both cases involved complaints with respect to higher tuition fees charged to foreign students in comparison to those charged to Canadians students: *Nova Scotia Confederation of University Faculty Assns. v. Nova Scotia (Human Rights Commission)* (1995), 143 N.S.R. (2d) 86, [1995] N.S.J. No. 296 [*Nova Scotia*] and *Simon Fraser University International Students v. Simon Fraser University*, [1996] B.C.C.H.R.D. No. 13 [*Simon Fraser*].

[761] The complaints alleged that the differential fee structures constituted discrimination on the basis of the students' race and national or ethnic origin in the *Nova Scotia* case, and on the basis of race and/or place of origin in the *Simon Fraser* case. Both complaints were dismissed.

[762] In *Nova Scotia*, the Court observed that the higher fee did not apply to Canadian citizens and landed immigrants, who may come from many different racial backgrounds and

national/ethnic origins. The extra fee was based on the students' citizenship or place of residence, and not on their race or national or ethnic origin. Neither citizenship nor place of residence was a proscribed ground of discrimination under the applicable human rights legislation, with the result that the complaint had to be dismissed.

[763] Similarly, in *Simon Fraser*, international students were charged much higher tuition fees than were charged to Canadians students. In rejecting the complaint, the British Columbia Council of Human Rights observed that the affected students came "from over fifty different countries" and could not "be characterized by race or place of origin". The Tribunal further observed that Canadian students may also come from a variety of other countries: at para. 17.

[764] As a result, the Tribunal in *Simon Fraser* concluded that the University's fee policy was based on the citizenship or place of residence of the affected students and their legal status in Canada, and not their race or place of origin. Given that these were not statutorily prohibited grounds of discrimination, it followed that this complaint was also dismissed.

[765] These decisions do not, however, lead to the conclusion that there would be no discrimination on the basis of national origin if higher tuition fees were only charged to students coming from, for example, Hungary, Mexico and the United States, which would be the more apt analogy to the current case.

[766] As was noted earlier, the April 2012 OIC specifically provides that the Minister is not authorized to pay "the cost of health care coverage incurred for refugee claimants who are *nationals of a country* that is, when services or products are provided, *designated under subsection 109.1(1) of the Act*" [my emphasis]. The ordinary meaning of this phrase is to deny a

benefit to individuals seeking the protection of Canada from specified countries based upon their national origin, thereby creating a distinction for the purposes of subsection 15(1) of the *Charter*.

[767] The plain meaning of the term "national origin" is broad enough to include people who are not only born in a particular country, but who come from that country. Indeed, such an interpretation is consistent with the term used in *IRPA*, namely "Designated *Country of Origin*" [my emphasis].

[768] Before leaving this issue, I would also note that my interpretation of "national origin" for the purposes of subsection 15(1) of the Charter as encompassing a prohibition on discrimination between classes of non-citizens based upon their country of origin is one that is also consistent with the provisions of the *Refugee Convention*, article 3 of which prohibits discrimination against refugees based upon their country of origin.

[769] Although not raised in their memorandum of fact and law, the respondents argued at the hearing that the distinction drawn in the 2012 OICs between refugee claimants from DCO countries and non-DCO countries is one based upon *citizenship*, rather than national origin. As a result, they say there can be no section 15 violation.

[770] As I have already explained, I am satisfied that the 2012 IFHP does indeed make a distinction based upon the national origin of claimants. As a consequence, it is not strictly necessary to address the respondents' citizenship argument, and I will do so only briefly, particularly given that citizenship was not identified as a basis for the applicants' constitutional challenge in their Notice of Constitutional Question.

[771] I would simply note that to the extent that the respondents submit that any distinction contained in the 2012 OICs was based upon citizenship rather than national origin, it would still be discriminatory, as citizenship has expressly been recognized as an analogous ground for the purposes of section 15 of the Charter: see *Andrews*, above, and *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769.

[772] Indeed, as Justice La Forest observed in *Andrews*, "[d]iscrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin, which are listed in s. 15": at para. 68.

[773] While I recognize that both *Andrews* and *Lavoie* involved distinctions being drawn between Canadian citizens and non-Canadians, as the Supreme Court observed in *Lavoie*, "[o]nce identified, an analogous ground stands as 'a constant marker of potential legislative discrimination' and need not be established again in subsequent cases": at para. 41, citing *Corbière*, above at paras. 7-10, and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 119, 2000 SCC 69.

[774] Finally, the respondents submit that the distinction in the 2012 OIC is not discriminatory, as the distinction between DCO and non-DCO countries arises out of the provisions of the *Immigration and Refugee Protection Act*, noting that the applicants have not challenged the statutory DCO designation process in this proceeding.

[775] It is true that the concept of a "Designated Country of Origin" is one that is created by subsection 109.1(1) of *IRPA*, which allows the Minister of Citizenship and Immigration to

designate countries for certain purposes under the Act. That does not, however, serve to insulate the 2012 changes to the IFHP from scrutiny under section 15 of the Charter.

[776] What is at issue in this case is not the inclusion of subsection 109.1(1) in *IRPA*, but rather the decision of the Governor in Council to import the concept of "Designated Countries of Origin" into the 2012 OICs, using it as a criterion for determining who will be eligible for health insurance coverage, and at what level. This decision is clearly reviewable under section 15 of the Charter.

[777] Having concluded that the 2012 OICs create a distinction based on the enumerated ground of national origin, the next issue that must be addressed is the respondents' assertion that the IFHP is an ameliorative program and that this distinction is thus saved by subsection 15(2) of the Charter.

C. *Is the Subsection 15(1) Breach Saved on the Basis that the IFHP is an Ameliorative Program?*

[778] Subsection 15(2) of the Charter provides that subsection 15(1) of the Charter "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[779] In the event that this Court were to find that the distinction drawn with respect to the level of IFHP benefits that are made available to refugee claimants from DCO countries relative to those available to refugee claimants from non-DCO countries constitutes a violation of subsection 15(1) of the Charter, the respondents assert that the IFHP is an ameliorative program

directed at improving the situation of groups that are in need of assistance in order to enhance substantive equality, as contemplated by subsection 15(2) of the Charter.

[780] That is, the respondents say that the IFHP is a government program that has as its object the amelioration of the health conditions of refugee claimants, refugees and failed claimants in particular circumstances of need in Canada: respondents' memorandum of fact and law, at para. 122. They submit that the distinction between the benefits provided to refugee claimants from DCO countries and others serves that purpose in allocating funds to persons from countries whose claims take longer to process, with the result that they are in Canada for a longer period of time.

[781] In *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670 [*Cunningham*], the Supreme Court explained that the purpose of subsection 15(2) of the Charter is to save ameliorative programs from claims of "reverse discrimination": at para. 41. It allows governments to implement programs or laws that are designed to improve the situation of members of historically disadvantaged groups to assist in the move towards substantive equality.

[782] The Supreme Court observed in *Cunningham* that subsection 15(2) achieves its purpose by "affirming the validity of ameliorative programs that target particular disadvantaged groups, which might otherwise run afoul of subsection 15(1) by excluding other groups". The Court further observed that in so doing, "[i]t is unavoidable that ameliorative programs, in seeking to help one group, necessarily exclude others": above at para. 40.

[783] Underlying subsection 15(2) is the notion that "governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others". The Court recognized that governments may have particular goals in relation to advancing or improving the situation of particular groups, and that they may not be in a position to help all of the members of a disadvantaged group at the same time. As a consequence, governments should be permitted to establish priorities, failing which "they may be precluded from using targeted programs to achieve specific goals relating to specific groups": both quotes from *Cunningham*, above at para. 41.

[784] The first detailed consideration of the scope of the subsection 15(2) exception appears in the Supreme Court's decision in *Kapp*, above. There, the Court explained that subsections 15(1) and 15(2) of the Charter "work together to promote the vision of substantive equality that underlies s. 15 as a whole". The Court stated that "subsection 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds", which was "one way of combating discrimination": *Kapp*, above at para. 16.

[785] That is not, however, the only way to combat discrimination. Governments may also attempt to address discrimination by developing measures that pro-actively combat discrimination through programs aimed at helping disadvantaged groups improve their situation: *Kapp*, at para. 25. Subsection 15(2) of the Charter preserves the right of governments to do so, without the program being struck down under subsection 15(1).

[786] In order to establish that a government program constitutes an ameliorative program for the purposes of subsection 15(2) of the Charter, the government must show "that the program is

a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality": *Kapp*, above at para. 41. A "naked declaration" that a program has an ameliorative purpose is not sufficient to attract the protection of subsection 15(2) against a claim of discrimination: *Kapp*, above at para. 46.

[787] There must also be a correlation between the program in question and the disadvantage suffered by the group that the program is intended to benefit: *Kapp*, above at para. 49.

[788] According to *Cunningham*, if the above conditions are met, subsection 15(2) of the Charter will protect "all distinctions drawn on enumerated or analogous grounds that 'serve and are necessary to' the ameliorative purpose". To show that a distinction is 'necessary' to this ameliorative purpose, it must be shown that "the impugned distinction in a general sense serves or advances the object of the program, thus supporting the overall s. 15 goal of substantive equality". That is, "distinctions that might otherwise be claimed to be discriminatory are permitted, *to the extent that they go no further than is justified by the object of the ameliorative program*", my emphasis. To come within the exception created by subsection 15(2) of the Charter, the distinction "must in a real sense serve or advance the ameliorative goal, consistent with s. 15's purpose of promoting substantive equality": all quotes from *Cunningham*, above at para. 45.

[789] The Supreme Court identified the "fundamental question" in subsection 15(2) cases as being "up to what point does s. 15(2) protect against a claim of discrimination?", noting that "[t]he tentative answer suggested by *Kapp* [...] is that the distinction must serve or advance the ameliorative goal": *Cunningham*, at para. 46.

[790] The Court went on in *Cunningham* to note that "[a]meliorative programs, by their nature, confer benefits on one group that are not conferred on others". Such distinctions will generally be protected "if they serve or advance the object of the program, thus promoting substantive equality", even if, for example, "the included and excluded groups are aboriginals who share a similar history of disadvantage and marginalization": above at para. 53, citing *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735 (Ont. C.A.) [*Lovelace – O.C.A.*], aff'd 2000 SCC 37, [2000] 1 S.C.R. 950 [*Lovelace*].

[791] Ameliorative programs are often challenged by those *outside* the group that the program is designed to assist. By way of example, in *Kapp*, a program that provided for the issuance of communal fishing licenses to three aboriginal bands was challenged by commercial fishers, most of whom were non-aboriginal.

[792] That is not the situation here: in this case, the changes to the IFHP brought about through the 2012 OICs are being challenged on behalf of some of the very individuals that the program was purportedly designed to benefit, namely refugee claimants from DCO countries and failed refugee claimants.

[793] As the Ontario Court of Appeal observed in *Lovelace – O.C.A.*, "[a] s. 15(2) program that excludes from its reach disadvantaged individuals or groups that the program is designed to benefit likely infringes s. 15(1)": at para. 67. The Supreme Court of Canada affirmed the Court of Appeal's decision without specific comment on this point.

[794] This also distinguishes this case from the situation that confronted the Federal Court of Appeal in *Toussaint*. There, the Court was faced with a challenge to the exclusion of illegal

immigrants from coverage under the IFHP: that is, a claim of under-inclusiveness brought by someone *outside* the group that the program was designed to assist. It was in this context that the Federal Court of Appeal observed that if Ms. Toussaint had succeeded in establishing a "distinction" under subsection 15(1), "subsection 15(2) of the Charter might become live": at para. 102.

[795] In contrast to the situation in *Toussaint*, the 2012 IFHP provides health insurance coverage for those seeking the protection of Canada, but specifically singles out certain refugee claimants for lesser treatment, based upon their country of origin, thus discriminating against refugee claimants from DCO countries, in both purpose and effect.

[796] The respondents say that the IFHP has as its object the amelioration of the health conditions of refugee claimants, refugees and failed claimants in particular circumstances of need in Canada. Given that this is the goal of the program, it is unclear how the exclusion of refugee claimants from DCO countries from eligibility for basic, "core" health care benefits serves or is necessary to the ameliorative object of the program or how it advances a goal of enhancing substantive equality.

[797] Indeed, as the Supreme Court observed in *A.G. v. A*, above, "if the state conduct widens the gap between the historically disadvantaged group and the rest of society, rather than narrowing it, then it is discriminatory": at para. 332.

[798] It also bears recalling that the government action at issue in this case is the decision of the Governor in Council to modify the IFHP to *take away* the health insurance coverage that was previously available to refugee claimants from DCO countries. Indeed, it is difficult to

understand how the DCO/non-DCO distinction in the IFHP can be characterized as ameliorative when one of the stated goals of the 2012 modifications to the program was to make things harder for refugees from DCO countries in order to deter other so-called "bogus" claimants from coming to Canada and abusing the generosity of Canadians.

[799] In determining whether the IFHP qualifies as an "ameliorative program" for the purposes of subsection 15(2) of the Charter, regard must also be had to whether it was "rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose". The Supreme Court explained that for a distinction to be rational, "there must be a correlation between the program and the disadvantage suffered by the target group". While this standard "permits significant deference to the legislature", it allows for judicial review "where a program nominally seeks to serve the disadvantaged but in practice serves other non-remedial objectives": all quotes from *Kapp*, above at para. 49.

[800] As was noted earlier, distinctions that might otherwise be claimed to be discriminatory are permitted under subsection 15(2) of the Charter, but only "to the extent that they go no further than is justified by the object of the ameliorative program": *Cunningham*, at para. 45.

[801] The respondents have described the object of the IFHP as being "the amelioration of the health conditions of refugee claimants, refugees and failed claimants in particular circumstances of need in Canada". They say that "[t]he distinction between DCOs and others serves that purpose in allocating funds to persons from countries whose claims take longer to process such that they are in Canada for a longer period of time": both quotes from respondents' memorandum of fact and law at para. 122.

[802] The question is thus whether there is a correlation between the provisions of the IFHP and the disadvantage suffered by the target group.

[803] The respondents argued at the hearing that any distinctions were tailored to meet the specific needs of subgroups of beneficiaries who get benefits under the IFHP. These "needs" were initially identified by the respondents as being health needs: Transcript, Vol. 2, p. 188, see also the respondents' memorandum of fact and law at para. 122.

[804] However, the fact that some refugee claimants from DCO countries may be in Canada for less time than claimants from non-DCO countries does not mean that their health conditions and health care needs will be any less acute while they are here than the needs of non-DCO claimants. It does not follow that a refugee claimant from Mexico (a DCO country) who arrives in Canada about to give birth necessarily requires less health care than does a pregnant refugee claimant who has come to Canada from Sri Lanka (a non-DCO country).

[805] Indeed, Ms. Le Bris acknowledged in her cross-examination that the respondents have no data that would suggest that the health needs of refugee claimants from DCO countries are any less than those of refugee claimants from non-DCO countries, nor do they have any evidence to suggest refugee claimants from DCO countries are any more able to pay for their health care than are refugee claimants from non-DCO countries: Transcript, questions 105-106.

[806] There is thus no evidence to show that the tiered coverage structure of the IFHP corresponds to the reality of refugee claimants from DCO countries, or to use the language from *Kapp*, that there is a correlation between the distinction drawn in the IFHP and the disadvantage suffered by refugee claimants from DCO countries.

[807] As a consequence, it cannot be said that the distinction between refugee claimants from DCO countries and refugee claimants from non-DCO countries contributes to the stated purpose of "amelioration of the health conditions of refugee claimants, refugees and failed claimants in particular circumstances of need in Canada".

[808] Having failed to demonstrate that the 2012 changes to the IFHP can be saved as an ameliorative program under subsection 15(2) of the Charter insofar as refugee claimants from DCO countries are concerned, the focus of the analysis returns to subsection 15(1).

[809] The next question for consideration is thus whether the distinction drawn in the IFHP as to the health insurance benefits that are available to refugee claimants from DCO countries relative to those provided to refugee claimants from non-DCO countries creates a disadvantage by perpetuating prejudice or stereotyping, thus violating subsection 15(1) of the Charter.

D. *Do the 2012 OICs Create a Disadvantage by Perpetuating Prejudice or Stereotyping?*

[810] The respondents say that by granting refugee claimants from DCO countries a level of state-funded health insurance coverage, the Governor in Council is not "perpetuating prejudice or stereotyping." Rather, it is simply recognizing that even though these refugee claimants are from countries that are generally safe, "non-refugee producing" nations with health care systems that are comparable to Canada's own, they are deserving of a minimum level of state-funded health care while they are in Canada making a refugee claim.

[811] There are several problems with this argument.

[812] The first problem is with the respondents' starting premise that DCO countries have health care systems that are comparable to that in Canada. The quality or availability of health

care is *not* a criterion that is used in designating countries as "Designated Countries of Origin" under *IRPA*, and I have not been directed to any evidence that would demonstrate that the level of health care that is available in, say, Mexico, is comparable to that which is available in Canada.

[813] The second problem with the respondents' argument is that it assumes that a refugee claimant in Canada from a DCO country who develops a serious health condition can simply return home and get the health care that he or she needs in his or her country of origin.

[814] Implicit in this argument is the assumption that there is no merit to the individual's refugee claim and that they are indeed "bogus" refugees (to quote the Minister's spokesperson), with the result that they can safely return home to access the health care that they need.

[815] While this may be true of some claimants from DCO countries, the respondents themselves concede that it is not true of all of them. As was mentioned earlier, the respondents have expressly acknowledged that some claimants from DCO countries do indeed face real persecution in their countries of origin and are in fact genuine refugees.

[816] Indeed, as I have previously noted, the irony of the respondents' argument is that it demonstrates that it is the DCO claimants who cannot return home - those who really are genuine refugees - who are the ones most severely hurt by the cuts to their insurance coverage resulting from the 2012 changes to the IFHP.

[817] The Supreme Court of Canada held in *Auton*, above, that in considering whether a benefit has been conferred in a discriminatory manner where stereotyping of members of the group is at

issue, regard must be had to "the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet": at para. 42.

[818] The Court observed that "[i]f a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an arbitrary exclusion of a particular group". On the other hand, if "the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory": *Auton*, above at para. 42.

[819] More recently, *Kapp* taught us that in considering the issue of stereotyping, regard had to be had to the degree of correspondence between the differential treatment and the claimant group's reality: above at para. 23.

[820] Finally, as the Supreme Court observed in *Gosselin*, government action that is "closely tailored to the reality of the affected group" is unlikely to discriminate within the meaning of subsection 15(1): above at para. 37.

[821] As was noted earlier, the respondents described the object of the IFHP as being "the amelioration of the health conditions of refugee claimants, refugees and failed claimants in particular circumstances of need in Canada": respondents' memorandum of fact and law at para. 122.

[822] However, the respondents have also conceded that the 2012 IFHP program does not in fact respond to the health needs of the affected individuals. Thus it cannot be said that the changes to the IFHP brought about by the 2012 OICs were "closely tailored to the reality of the affected group". Indeed, the changes to the program *limit* access to core health care services to

genuine refugee claimants from DCO countries in a manner that undercuts the stated objective of the program.

[823] The respondents also say that abuse of the IFHP was not the issue, in and of itself, that guided or motivated the 2012 reforms to the program. The changes to the IFHP were, however, made to support the government's overall goal of reforming the refugee process and curtailing abuse of the system. According to the respondents, making changes to the IFHP was but one way in which the government could deter unfounded claims and possibly discourage failed refugee claimants from remaining in Canada when they ought to be leaving the country: Transcript, Vol. 3, at p. 38.

[824] As Ms. Le Bris explained in her affidavit, "the previous IFHP *was perceived by some* as constituting a reason why some foreign nationals came to Canada to assert unfounded claims and also a reason why they sought to remain in Canada for as long as possible after their claims were rejected by the IRB and often the Federal Court": at para. 73 [my emphasis].

[825] There does not, however, appear to have been any attempt by the government to determine whether the subjective perception on the part of certain unidentified individuals referred to by Ms. Le Bris was in fact justified. Nor has there been any attempt to determine the extent to which, if at all, the availability of state-funded health care operates as a "pull factor" for non-meritorious refugee claimants.

[826] Indeed, it is hard to reconcile the respondents' argument that the availability of health care in Canada operates as a "pull factor" for refugee claimants from DCO countries with their

claim that refugee claimants from DCO countries do not need health insurance coverage while they are in Canada because they can get comparable health care back home.

[827] As was noted earlier, and as will be explained in greater detail in the context of my section 1 analysis, there is also no persuasive evidence before me to show that the changes to the IFHP have themselves served to deter unmeritorious claims, or encouraged anyone to leave Canada more quickly.

[828] What is apparent, however, is that the decision was made by the executive branch of the Canadian government to reduce the level of IFHP benefits for refugee claimants from DCO countries relative to those available to refugee claimants from non-DCO claimants as a result of a belief that refugee claimants from DCO countries are not real refugees at all, but are simply in Canada seeking to "game the system" and abuse the generosity of Canadians.

[829] This was made very clear by the statement made on behalf of the then-Minister of Citizenship and Immigration at the time that the changes to the IFHP were introduced. It will be recalled that the Minister's spokesperson explained the changes in the following terms:

> Canadians have been clear that they do not want *illegal immigrants and bogus refugee claimants* receiving gold-plated health care benefits that are better than those Canadian taxpayers receive. Our Government has listened and acted. We have taken steps to ensure that protected persons and asylum seekers from non-safe countries receive health care coverage that is on the same level as Canadian taxpayers receive through their provincial health coverage, no better. *Bogus claimants from safe countries, and failed asylum seekers, will not receive access to health care coverage unless it is to protect public health and safety...* [my emphasis]

[830] As was noted earlier in my review of the legal principles applicable to section 15 claims, the Court's focus should be on whether the impugned government action has a discriminatory

impact. It is not necessary that claimants prove that a distinction perpetuates negative attitudes about them.

[831] That said, both have been established in this case.

[832] Insofar as the discriminatory impact of the 2012 changes to the IFHP are concerned, funding for potentially life-saving medical treatments is made available to refugee claimants from non-DCO countries but is denied to refugee claimants from DCO countries. The 2012 changes to the IFHP have erected additional barriers to accessing basic health care for refugee claimants from DCO countries, clearly perpetuating the hardship suffered by what the respondents have accepted are a vulnerable, poor and disadvantaged group.

[833] Indeed, even though refugee claimants from DCO countries may come from wealthier countries, I do not understand the respondents to dispute that most individual refugee claimants from these countries will nevertheless themselves be vulnerable, poor and disadvantaged. Indeed, as was previously noted, Ms. Le Bris acknowledged in her cross-examination that the respondents have no evidence suggesting that refugee claimants from DCO countries are any more able to pay for their health care than are refugee claimants from non-DCO countries.

[834] The disadvantage suffered by refugee claimants from DCO countries is, moreover, exacerbated by the fact that recent changes to the *Immigration and Refugee Protection Act* and *Regulations* prohibit them from working for the first 180 days that they are in Canada, further limiting their ability to pay for their own medical treatment: *Immigration and Refugee Protection Regulations*, subsection 206(2).

[835] The interests at stake in this case are significant. I have found as a fact that the distinction drawn between the health insurance benefits available to refugee claimants from non-DCO countries and to refugee claimants from DCO countries puts the lives of claimants in this latter group at risk. Moreover, it sends the clear message that refugee claimants from DCO countries are undesirable, and that their well-being, and indeed their very lives, are worth less than those of refugee claimants from non-DCO countries.

[836] The respondents have acknowledged that in cutting the health insurance benefits for refugee claimants from DCO countries, it is trying to use the hardship that will be suffered by claimants in Canada as a means to an end in deterring others from coming to Canada. Indeed, this is one of the stated objectives of the 2012 changes to the IFHP. This demonstrates a lack of regard for the inherent dignity of these claimants.

[837] The distinction drawn between the health insurance benefits accorded to refugee claimants from DCO and non-DCO countries also serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries. In particular, it perpetuates the stereotype that refugee claimants from DCO countries are queue-jumpers, "bogus" claimants and cheats who are only here to take advantage of Canada's social benefits and its generosity.

[838] As described by Dr. Anderson in his affidavit, this attitude reflects historical stereotypes that have been ascribed to groups of immigrants identified as "undesirable": stereotypes that have their origins in racism, fear of "others", fear of economic competition, and more recently, fear of criminality and terrorism. By limiting the health insurance benefits that are provided to refugee claimants from DCO countries, the executive branch of the Canadian government is

perpetuating the stereotypical view that refugee claimants from these countries are undesirable, thereby reinforcing existing prejudice and disadvantage.

[839] As was noted earlier, the fact is that some refugee claimants from DCO countries are indeed genuine refugees. By way of example, in 2011, the Immigration and Refugee Board accepted 155 refugee claims from Hungary. In 2013, the Board accepted 183 such claims. Having been accepted by the Board as being legitimately in need of refugee protection, these claimants were clearly not queue-jumpers, bogus claimants or cheats.

[840] It is also true that a substantial percentage of refugee claims from DCO countries do not succeed. Does it necessarily follow that these claims were all "bogus", brought by queue jumpers and cheats seeking to abuse the generosity of Canadians? To suggest that this is the case is to have a grossly simplistic understanding of the refugee process.

[841] Amongst all of the people who come to Canada each year seeking refugee protection there will undoubtedly be some who are in reality economic migrants and those who are using the refugee process in an effort to achieve family reunification. It is, however, both unfair and inaccurate to characterize all failed refugee claimants from DCO countries as "bogus" refugees.

[842] Refugee claims are often brought on the basis of real hardship and genuine suffering. Amongst those whose claims do not succeed will be individuals who may well have come to Canada because of a real fear of persecution in their country of origin, but who were unable to meet the strict legal requirements of the refugee definition.

[843] By way of example, a Roma from Hungary may have experienced a lifetime of discrimination, abuse and marginalization in her country. She may truly dread returning home as

a result of her past experiences. The Immigration and Refugee Board may well accept the claimant's story as true, but may conclude that the treatment experienced by the claimant, while discriminatory, did not rise to the level of "persecution". Alternatively, the Board may accept that the claimant had experienced "persecution", but may also find that adequate state protection is available to her in Hungary. Under either scenario, the fact that the refugee claim did not ultimately succeed does not mean that there was anything "bogus" about it.

[844] Similarly, a family targeted for kidnapping and extortion by a drug cartel in Mexico may flee their country, seeking to put as much distance between themselves and their persecutors as possible. The Immigration and Refugee Board may well believe that the family had been targeted by a powerful cartel, and that their terror is indeed genuine. The Board may nevertheless conclude, however, that by the time of the hearing, the family had been away from Mexico for long enough that their persecutors may have lost interest in them, or that the family could live safely in another part of Mexico.

[845] While our hypothetical family's refugee claim may not have succeeded, it does not follow that the claim was necessarily "bogus", that it was made in bad faith, or that it had been brought for an ulterior motive such as a desire to access so-called "gold-plated" health care in Canada.

[846] There are other reasons why a refugee claim may not succeed that have nothing to do with the *bona fides* of the claimant. Using a hypothetical example from a non-DCO country to illustrate the point, a young Tamil man from northern Sri Lanka may have fled his country in 2009, at the height of the civil war, and come to Canada in order to make a refugee claim.

[847] In 2009, a person with the profile of our hypothetical claimant was presumptively a genuine refugee. However, by the time that the refugee claim is heard a couple of years later, the Immigration and Refugee Board could conclude that conditions in Sri Lanka had changed enough that it would now be safe for our claimant to return home. As a result, the claimant would no longer have a well-founded forward-looking fear of persecution, and his refugee claim would fail. [8]

[848] Once again, the fact that such a refugee claim does not succeed would not mean that it was necessarily a "bogus" claim. Indeed, some failed refugee claimants do in fact go on to gain status in Canada through other processes such as Pre-removal Risk Assessments, or they may be granted humanitarian relief because of the unusual, undeserved and disproportionate hardships that they would face if returned to their countries of origin.

E. *Conclusion on the Subsection 15(1) Issue Relating to DCO Claimants*

[849] For these reasons, I have concluded that the changes made to the IFHP through the promulgation of the 2012 OICs violate subsection 15(1) of the Charter, both in their purpose and in their effect.

[850] The 2012 IFHP draws a distinction between refugee claimants from DCO-countries and those from non-DCO countries, providing a lesser level of health insurance coverage to refugee claimants from DCO countries based upon the national original of these claimants. This distinction cannot be saved as an "ameliorative program" contemplated by subsection 15(2) of the Charter.

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[8] This is not a far-fetched example. It will be recalled that the Immigration and Refugee Board found Mr. Wijenaike's allegations of past persecution to be credible but concluded that conditions within Sri Lanka had changed enough in the months since Mr. Wijenaike had left the country that he was not currently in need of protection in Canada

[851] The DCO/non-DCO distinction drawn in the IFHP has an adverse differential effect on refugee claimants from DCO countries. It puts their lives at risk and perpetuates the stereotypical view that they are cheats, that their refugee claims are "bogus", and that they have come to Canada to abuse the generosity of Canadians. This aspect of the applicants' section 15 claim thus succeeds.

F. *Does the 2012 IFHP also Violate Subsection 15(1) of the Charter on the Basis of Immigration Status?*

[852] The applicants further submit that the 2012 IFHP also discriminates between asylum seekers generally and other similarly-situated individuals accessing health care in Canada, specifically low-income Canadians. Under the 2012 IFHP, individuals who are legally in Canada for the purpose of seeking protection are now prevented from obtaining the same level of health benefits as are provided to other lawful residents of Canada.

[853] The applicants point out that the extent to which lawful residents who are not seeking the protection of Canada receive state-funded health insurance coverage is determined on the basis of income, which is used as a proxy for need. Low-income residents thus receive a higher level of health insurance benefits than ordinary working Canadians.

[854] In some instances, where additional need is demonstrated, individuals who exceed the income threshold required for social assistance may also be provided with additional support, above and beyond the regular health insurance coverage they would otherwise receive.

[855] In contrast, under the 2012 IFHP, most low-income individuals who are lawfully in Canada seeking its protection no longer receive the same base level of health insurance benefits that are accorded to other low-income legal residents of Canada. According to the applicants, a

clear distinction is drawn between individuals legally in Canada seeking its protection and other legal residents of Canada who receive health care. The applicants submit that the 2012 IFHP thus creates a distinction in an individual's entitlement to health insurance coverage based upon their immigration status, which should be recognized as an analogous ground for the purpose of subsection 15(1) of the Charter.

[856] The applicants acknowledge that the jurisprudence relating to immigration status as an analogous ground for the purpose of subsection 15(1) of the Charter is "mixed", but submit that whether or not a person's immigration status constitutes an analogous ground should depend on the nature of the particular immigration status in issue. According to the applicants, being an asylum seeker is not a situation that is marked by choice. As a result, the status of being an asylum seeker should be considered to be an immutable characteristic that qualifies as an analogous ground.

[857] In support of their argument the applicants point out that immigration status was treated as an analogous ground in *Jaballah (Re)*, 2006 FC 115, [2006] F.C.J. No. 110. In that case, this Court concluded that a provision of the *Immigration and Refugee Protection Act* infringed Mr. Jaballah's rights under subsection 15(1) of the Charter on the basis of his immigration status.

[858] The legislation at issue provided that foreign nationals detained under the provisions of a security certificate had no right to a detention review until a determination was made as to the reasonableness of the certificate, whereas permanent residents detained under security certificates had the right to a detention review every six months. As a consequence, the Court ordered that Mr. Jaballah be provided with a detention review on the same basis as a permanent resident similarly detained.

[859] While recognizing that there are other decisions that have rejected immigration status as an analogous ground, the applicants suggest that the issue should be approached on a case-by-case basis, having regard to the particular immigration status at issue. They point out that the Courts have not yet decided whether the status of "individuals legally seeking protection in Canada" constitutes an analogous ground for the purposes of section 15 of the Charter. As will be explained below, I cannot accept the applicants' argument.

[860] First of all, the individuals described collectively in these reasons as "those seeking the protection of Canada" are not merely refugee claimants, but have a range of different immigration statuses. These include protected persons, (including resettled refugees, recognized refugees and positive PRRA recipients), refugee claimants, rejected refugee claimants, victims of human trafficking with temporary resident permits, persons granted permanent residency as part of a public policy or for humanitarian and compassionate reasons by the Minister, and who receive income support through the resettlement assistance program or the equivalent in Québec, foreign nationals and permanent residents detained under the provisions of the *Immigration and Refugee Protection Act*.

[861] Moreover, the Federal Court of Appeal held in *Toussaint* that "immigration status" does not qualify as an analogous ground under section 15 of the Charter on the basis that it "is not a '[characteristic] that we cannot change'. It is not 'immutable or changeable only at unacceptable cost to personal identity": at para. 99, citing *Corbière*, above at para. 13. See also *Forrest v. Canada (Attorney General)*, 2006 FCA 400 at para. 16, 357 N.R. 168.

[862] It is true that the Court then went on in *Toussaint* to consider the specific context of the claim being advanced, noting that the "immigration status" at issue in that case - presence in

Canada illegally - was "a characteristic that the government has a 'legitimate interest in expecting [the person] to change'": at para. 99.

[863] As I read the decision, however, this statement appears to be a *further* reason for the Court's overall conclusion that "immigration status" does not constitute an analogous ground for the purposes of section 15 of the Charter, and not a basis for limiting the Court's finding to cases where the immigration status in question was illegal presence in Canada.

[864] The Ontario Court of Appeal came to a similar conclusion with respect to immigration status as an analogous ground in *Irshad (Litigation guardian of) v. Ontario (Minister of Health)*, [2001] O.J. No. 648 at paras. 133-136, 55 O.R. (3d) 43 [*Irshad*].

[865] In *Irshad*, the Court was called upon to consider changes made to the *Ontario Health Insurance Plan* which tied the eligibility of some claimants to their status under the *Immigration Act*, R.S.C. 1985, c. I-2.

[866] In concluding that status as a permanent or non-permanent resident of a province was not an analogous ground for the purposes of section 15 of the Charter, the Court observed that "[a] person's status as a non-permanent resident for the purposes of OHIP eligibility is not immutable". In support of this conclusion, the Court noted that "[i]n the course of this litigation, four of the five appellants who were non-permanent residents for the purposes of OHIP eligibility became permanent residents by virtue of changes in their immigration status": *Irshad*, above at para. 136.

[867] For the Ontario Court of Appeal, the fact that an individual's immigration status may be beyond the individual's effective control and may require the intervention of another party

before it could be changed did not render that status immutable. The Court noted that the residency status of one appellant would change "if his immigration status changes, *either because he is reclassified or because the Minister grants him landed immigrant status*": *Irshad*, above at para. 136 [my emphasis]. That need for the intervention of a government actor did not, however, serve to render the individual's immigration status immutable.

[868] As was noted earlier, in *Lavoie*, the Supreme Court rejected a context-dependent approach to the identification of analogous grounds. It held that "[o]nce identified, an analogous ground stands as 'a constant marker of potential legislative discrimination' and need not be established again in subsequent cases": above at para. 2, citing *Corbière*, above at paras. 7-10.

[869] If the recognition of an analogous ground stands for all situations and does not have to be re-litigated in every case, it follows that the *refusal* to recognize a particular ground as an analogous ground for the purpose of section 15 of the Charter should also stand for all cases and should not be judicially revisited whenever the issue arises in a different context.

[870] The Federal Court of Appeal has already held that "immigration status" does not qualify as an analogous ground under section 15 of the Charter. That finding is binding on me, and is dispositive of the applicants' argument. Consequently, this aspect of the applicants' section 15 claim will be dismissed.

G. *Conclusions on the Section 15 Issues*

[871] For these reasons, I have concluded that the 2012 IFHP violates section 15 of the Charter inasmuch as it provides a lesser level of health insurance coverage to refugee claimants from DCO countries in comparison to that provided to refugee claimants from non-DCO countries.

This distinction is based upon the national origin of the refugee claimants and does not form part of an ameliorative program. It is, moreover, based upon stereotyping, and serves to perpetuate the disadvantage suffered by members of an admittedly vulnerable, poor and disadvantaged group.

[872] I have not, however, been persuaded that the 2012 IFHP violates subsection 15(1) of the Charter based upon the immigration status of those seeking the protection of Canada. Consequently, this aspect of the applicants' section 15 claim will be dismissed.

XIII. Have the Breaches of Sections 12 and 15 been Justified by the Respondents under Section 1 of the Charter?

[873] Section 1 of the Charter provides that "[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[874] Unlike the other provisions of the Charter, where the onus is on Charter claimants to establish a breach of the right in issue, the onus is on the respondents to establish a justification for the breaches of sections 12 and 15 that have been established by the applicants: *Bedford*, above at para. 126.

[875] The respondents say that the changes to the IFHP created pursuant to the 2012 OICs are reasonable limits prescribed by law which are demonstrably justified in Canada's free and democratic society. In support of this contention, the respondents cite the Supreme Court's decision in *Chaoulli*, where it observed that "[a]s we enter the 21st century, health care is a constant concern…[t]he demand for health care is constantly increasing…no one questions the need to preserve a sound public health system": above at paras. 2, 14 and 104.

Indexed as:

Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.

Between
Canadian Airlines International Limited and Air Canada, appellants, and
Canadian Human Rights Commission, Canadian Union of Public Employees (Airline Division) and Public Service Alliance of Canada, respondents

[2000] F.C.J. No. 220

[2000] A.C.F. no 220

[2010] 1 F.C.R. 226

[2010] 1 R.C.F. 226

95 A.C.W.S. (3d) 249

2000 CanLII 14938

2010EXP-3562

Court File No. A-346-99

Federal Court of Appeal
Montréal, Québec

Richard C.J., Létourneau and Noël JJ.

Heard: February 15, 2000.
Oral judgment: February 15, 2000.

(13 paras.)

Civil rights -- Federal or provincial legislation -- Practice -- Judicial review -- Parties -- Intervenors.

Appeal by Canadian Airlines from an interlocutory decision granting the Public Service Alliance of Canada leave to intervene in judicial review applications brought by the Canadian Human Rights Commission and the Canadian Union of Public Employees Airline Division. The judicial review

applications pertained to a decision by the Canadian Human Rights Tribunal rejecting a complaint by the Union that Canadian paid discriminatory wages to their flight attendants, pilots and technical operations personnel. The Tribunal held that the employees of Air Canada and Canadian worked in separate establishments for the purposes of the Canadian Human Rights Act because they were subject to different wage and personnel policies.

HELD: Appeal allowed and the order granting leave to intervene was set aside. The Alliance's application for leave to intervene was dismissed. The Alliance failed to demonstrate how its expertise could be of assistance in the determination of the issues placed before the Court by the parties. There was no apparent basis upon which the Judge could have granted the intervention without falling into error.

Statutes, Regulations and Rules Cited:

Canadian Human Rights Act, s. 11.

Federal Court Rules, Rule 109.

Counsel:

Peter M. Blaikie, for the appellants.
Andrew Raven, for the respondent, Public Service Alliance of Canada.

The judgment of the Court was delivered orally by

1 **NOËL J.**:-- This is an appeal from an interlocutory decision of the Trial Division granting the Public Service Alliance of Canada ("PSAC") leave to intervene in the judicial review applications brought by the Canadian Human Rights commission (the "Commission") and the Canadian Union of Public Employees Airline Division ("CUPE"). These judicial review applications pertain to a decision of the Canadian Human Rights Tribunal (the "Tribunal") rejecting a complaint by CUPE, that the appellants paid discriminatory wages to their flight attendants, pilots and technical operations personnel.

2 By this decision, the Tribunal held inter alia that the above described employees of Air Canada and Canadian Airlines International Limited ("Canadian") work in separate "establishments" for the purposes of section 11 of the Canadian Human Rights Act since they are subject to different wage and personnel policies.

3 PSAC did not seek to intervene in the proceedings before the Tribunal.

4 The Tribunal's decision was released on December 15, 1998. The Commission and CUPE filed judicial review applications on January 15, 1999, and PSAC's application for leave to intervene was filed on May 6, 1999. The sole issue with respect to which leave to intervene was sought is wether the pilots, flight attendants and technical operations personnel employed by Air Canada and Canadian respectively are in the same "establishment" for the purposes of section 11 of the Act.

5 The Order allowing PSAC's intervention was granted on terms but without Reasons. The Order reads:

> The Public Service Alliance of Canada (the Alliance) is granted leave to intervene on the following basis:
>
> (a) the Alliance shall be served with all materials of the other parties;
> (b) the Alliance may file its own memorandum of fact and law by June 14, 1999, being within 14 days of the date for serving and filing the Respondent Canadian Airlines International Limited and the Respondent Air Canada's memoranda of fact and law as set out in the order of Mr. Justice Lemieux, dated March 9, 1999;
> (c) the Applicant Canadian Union of Public Employees (Airline Division) and the Applicant Canadian Human Rights Commission and the Respondents Canadian Airlines International Limited and Air Canada may file a reply to the Alliance's memorandum of fact and law by June 28, 1999, being 14 days from the date of service of the Alliance's memorandum of fact and law;
> (d) the parties' right to file a requisition for trial shall not be delayed as a result of the Alliance's intervention in this proceeding;
> (e) the Alliance shall be consulted on hearing dates for the hearing of this matter;
> (f) the Alliance shall have the right to make oral submissions before the Court.

6 In order to succeed, the appellants must demonstrate that the motions Judge misapprehended the facts or committed an error of principle in granting the intervention. An Appellate Court will not disturb a discretionary order of a motions Judge simply because it might have exercised its discretion differently.

7 In this respect, counsel for PSAC correctly points out that the fact that the motions Judge did not provide reasons for her Order is no indication that she failed to have regard to the relevant considerations. It means however that this Court does not have the benefit of her reasoning and hence no deference can be given to the thought process which led her to exercise her discretion the way she did.

8 **It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:**

> 1) **Is the proposed intervener 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 of the Court?**
> 4) **Is the position of the proposed intervener 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 intervener?

9 She also must have had in mind rule 109 of the Federal Court Rules, 1998, and specifically paragraph 2 thereof which required PSAC to show in the application before her how the proposed intervention "... will assist the determination of a factual or legal issue related to the proceeding".

10 Accepting that PSAC has acquired an expertise in the area of pay equity, the record reveals that:

1. PSAC represents no one employed by either of the appellant airlines;
2. the Tribunal's decision makes no reference to any litigation in which PSAC was or is engaged;
3. the grounds on which PSAC has been granted leave to intervene are precisely those which both the Commission and CUPE intend to address;
4. nothing in the materials filed by PSAC indicates that it will put or place before the Court any case law, authorities or viewpoint which the Commission or CUPE are unable or unwilling to present.

11 It seems clear that at its highest PSAC's interest is "jurisprudential" in nature; it is concerned that the decision of the Tribunal, if allowed to stand, may have repercussions on litigation involving pay equity issues in the future. It is well established that this kind of interest alone cannot justify an application to intervene.[2]

12 Beyond asserting its expertise in the area of pay equity, it was incumbent upon PSAC to show in its application for leave what it would bring to the debate over and beyond what was already available to the Court through the parties. Specifically, it had to demonstrate how its expertise would be of assistance in the determination of the issues placed before the Court by the parties. This has not been done. Without the benefit of the motion Judge's reasoning, we can see no basis on which she could have granted the intervention without falling into error.

13 The appeal will be allowed, the order of the motions Judge granting leave to intervene will be set aside, PSAC's application for leave to intervene will be dismissed and its memorandum of Fact and Law filed on June 14, 1999 will be removed from the record. The appellants will be entitled to their costs on this appeal.

NOËL J.

1 Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (No.1) (1989), [1990] 1 F.C. 74 (T.D.) at 79-83; Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (No.2) (1989), [1990] 1 F.C. 84 (T.D.) at 88; Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (No.3) (1989), [1990] 1 F.C. 90 (C.A.).

2 See R v. Bolton [1976] 1 F.C. 252, (per Jackett C.J.); Tioxide Canada Inc. v. Ministre du Revenu national [1994], 174 N.R. 212, (per Hugessen J.A.)

Indexed as:

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (T.D.)

Rothmans, Benson & Hedges Inc. (Plaintiff)

v.

Attorney General of Canada (Defendant)

[1990] 1 F.C. 74

[1989] F.C.J. No. 446

Court File No. T-1416-88

Federal Court of Canada - Trial Division

Rouleau J.

Heard: Toronto, April 7, 1989.
Judgment: Ottawa, May 19, 1989.

Practice -- Parties -- Intervention -- Canadian Cancer Society seeking to intervene in action attacking constitutionality of legislation prohibiting advertising of tobacco products -- As no express provision in Federal Court Rules for intervention, necessary to look to practice in provincial courts -- Ontario Rules permitting intervention of nonparty claiming interest in subject-matter of proceeding, provided no delay or prejudice -- "Interest" broadly interpreted in constitutional matters -- Criteria justifying intervention -- Objection that addition of party lengthening proceeding rejected -- Intervention of party with special knowledge and expertise permitted to give courts different perspective on issue, particularly where first-time Charter arguments involved -- Nature of issue and likelihood of useful contribution by applicant to resolution of action without prejudice to parties key considerations -- Application allowed.

This was an application by the Canadian Cancer Society to intervene in an action attacking the constitutionality of the Tobacco Products Control Act, which prohibits the advertising of tobacco products in Canada. The Society's primary object is cancer research and education of the public. It contended that it had special knowledge and expertise relating cancer to the consumption of tobacco products and that it had sources of information which may not have been available to the other parties. It also argued that it had a special interest with respect to the issues, and that its overall capacity to collect, comment upon and analyze all the data related to cancer, tobacco products and the advertising of those products would be helpful to the Court. The plaintiff opposed the application on the grounds that extensive hearings had been held prior to passage of the legislation, and that any information which the Society may have is in the public domain. Finally, it was argued that the applicant would be

putting forward the same evidence and arguments as the Attorney General, thus unnecessarily protracting the proceedings.

Held, the application should be allowed.

[page75]

As there is no Federal Court Rule expressly permitting intervention, Rule 5 allows the Court to determine its practice and procedure by analogy to other provisions of the Federal Court Rules or to the practice and procedure for similar proceedings in provincial courts. The Ontario Rules of Civil Procedure permit the intervention of a nonparty who claims an interest in the subject-matter of the proceeding, provided this will not delay or prejudice the proceedings. The "interest" required has been widely interpreted, particularly where Charter and other constitutional issues have been raised. Recent cases have outlined several criteria to be considered in an application for intervention, but generally the interest required to intervene in public interest litigation has been recognized in an organization which is genuinely interested in, and possesses special knowledge and expertise related to, the issues. The objection that the addition of a party would lengthen the proceedings was rejected in that courts are familiar with lengthy and complex litigation including a multiplicity of parties. Also, even though one of the parties may be able to adequately defend a certain public interest, the intervention of parties with special knowledge and expertise has been permitted to place the issue in a slightly different perspective which would assist the court, particularly when first-time Charter arguments are involved. Interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues have also been allowed. The key considerations are the nature of the issue, and the likelihood of the applicant being able to make a useful contribution to the resolution of the action without causing injustice to the immediate parties.

Applying the above principles, the applicant should be allowed to intervene as it has a genuine interest in the issues and could assist the Court by putting the issues in a different perspective as it has special knowledge and expertise relating to the public interest questions. The application should also be allowed to offset any public perception that the interests of justice are not being served because of possible political influence being asserted by the tobacco industry.

Statutes and Regulations Judicially Considered

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.).
Criminal Code, R.S.C. 1970, c. C-34, ss. 246.6 (as enacted by S.C. 1980-81-82-83, c. 125, s. 19), 246.7 (as enacted idem).
Federal Court Rules, C.R.C., c. 663, R. 5.
Rules of Civil Procedure, O. Reg. 560/84, RR. 13.01, 13.02 [page76] (as am. by O. Reg. 221/86, s. 1).
Tobacco Products Control Act, S.C. 1988, c. 20.

Cases Judicially Considered

Applied:
R. v. Seaboyer (1986), 50 C.R. (3d) 395 (Ont. C.A.).
Re Schofield and Minister of Consumer and Commercial Relations (1980), 112 D.L.R. (3d) 132; 28 O.R. (2d) 764; 19 C.P.C. 245 (C.A.).
G.T.V. Limousine Inc. v. Service de Limousine Murray Hill Ltée, [1988] R.J.Q. 1615 (C.A.).

Counsel:

Edward P. Belobaba and P. Lukasiewicz, for the plaintiff.
Karl Delwaide and Andre T. Mecs, for the proposed intervenor.
Paul J. Evraire, Q.C., for the defendant.

Solicitors:

Gowling & Henderson, Toronto, for the plaintiff.
Deputy Attorney General of Canada, for the defendant.

The following are the reasons for order rendered in English by

1 ROULEAU J.:-- This is an application brought by the Canadian Cancer Society ("Society") seeking an order allowing it to intervene and participate in the action. The issue relates to an attack by the plaintiff on the constitutional validity of the Tobacco Products Control Act, S.C. 1988, c. 20 which prohibits the advertising of tobacco products in Canada.

2 The plaintiff, Rothmans, Benson & Hedges Inc., initiated this action by way of statement of claim filed on July 20, 1988 and amended on October 24, 1988.

3 The Canadian Cancer Society is described as the largest charitable organization dedicated to public health in Canada. As recently as 1987 it was made up of approximately 350,000 active volunteer members who were responsible for the raising of some $50,000,000 annually, which money was primarily directed to health and related fields. The Society's primary object is cancer research; it is also involved in the distribution of [page77] scientific papers as well as pamphlets for the purpose of enlightening the general public of the dangers of the disease. For more than 50 years this organization has been the driving force investigating causes as well as cures. In the pursuit of its objectives, and, with the endorsement of the medical scientific community, it has been instrumental in establishing a correlation between the use of tobacco products and the incidence of cancer; its persistence has been the vehicle that generated public awareness of the danger of tobacco products. As a result of the Society's leadership and inspiration, the research results and the assembling of scientific data gathered from throughout the world, it has provided the authorities and its public health officials with the necessary or required evidence to press the government into adopting the legislation which is complained of in this action.

4 The applicant maintains that the constitutional facts underlying the plaintiff's amended statement of claim that will be adduced in evidence, analyzed and discussed before the Court are essentially related to health issues. It has special knowledge and expertise relating cancer to the consumption of tobacco products. It further contends that it has sources of information in this matter to which the other parties in the litigation may not have access.

5 The Canadian Cancer Society urges upon this Court that it has a "special interest" with respect to the issues raised in the litigation. That knowledge and expertise and the overall capacity of the applicant to collect, comment upon and analyze all the data related to cancer, tobacco products and the advertising of those products, would be helpful to this Court in the resolution of the litigation now

before it. It is their opinion that it meets all the criteria set out in the jurisprudence which apply in cases where parties seek to be allowed to intervene.

6 The plaintiff, Rothmans, Benson & Hedges Inc., opposes the application for standing. It argues that prior to the promulgation of the Tobacco Products Control Act, the Legislative Committee of the [page78] House of Commons and the Standing Senate Committee on Social Affairs and Technology held extensive hearings into all aspects of the proposed legislation. In the course of those hearings, the committees received written representations and heard evidence from numerous groups both in favour of and opposed to the legislation, including the applicant; that studies commissioned by the Cancer Society relevant to the advertising of tobacco products are all in the public domain; that no new studies relating directly to tobacco consumption and advertising have been initiated nor is it in possession of any document, report or study relating to the alleged relationship between the consumption of tobacco products and advertising that is not either in the public domain or accessible to anyone who might require it.

7 Finally, the plaintiff argues that the applicant's motion should be denied on the grounds that it is seeking to uphold the constitutionality of the Tobacco Products Control Act by means of the same evidence and arguments as those which will be put forward by the defendant, the Attorney General of Canada. Their intervention would unnecessarily lengthen the proceeding and it is open to the applicant to cooperate fully with the defendant by providing viva voce as well as documentary evidence in order to assist in providing the courts with full disclosure of all facts which may be necessary to decide the ultimate issue.

8 There is no Federal Court Rule explicitly permitting intervention in proceedings in the Trial Division. In the absence of a rule or provision providing for a particular matter, Rule 5 allows the Court to determine its practice and procedure by analogy to other provisions of the Federal Court Rules [C.R.C., c. 663] or to the practice and procedure for similar proceedings in the courts of "that province to which the subject matter of the proceedings most particularly relates".

9 Rule 13.01 of the Ontario Rules of Civil Procedure [O. Reg. 560/84] permits a person not a party to the proceedings who claims "an interest in [page79] the subject matter of the proceeding" to move for leave to intervene as an added party. The rule requires of the Court to consider "whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding". Rule 13.02 [as am. by O. Reg. 221/86, s. 1] permits the Court to grant leave to a person to intervene as a friend of the Court without becoming a party to the proceeding. Such intervention is only permitted "for the purpose of rendering assistance to the court by way of argument".

10 In addition to the gap rule, one must be cognizant of the principles of law which have been established by the jurisprudence in applications of this nature. In constitutional matters, and more particularly, in Charter [Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.)] issues, the "interest" required of a third party in order to be granted intervenor status has been widely interpreted in order to permit interventions on public interest issues. Generally speaking, the interest required to intervene in public interest litigation has been recognized by the courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised.

11 There can be no doubt as to the evolution of the jurisprudence in "public interest litigation" in this country since the advent of the Charter. The Supreme Court appears to be requiring somewhat

less by way of connection to consider "public interest" intervention once they have been persuaded as to the seriousness of the question.

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?

[page80]

(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?

13 The plaintiff has argued that adding a party would lengthen the proceedings and burden the courts unnecessarily, perhaps in some instances leading to chaos. In G.T.V. Limousine Inc. v. Service de Limousine Murray Hill Ltée, [1988] R.J.Q. 1615 (C.A.), the Court noted that it was quite familiar with lengthy and complex litigation including a multiplicity of parties. This did not lead to injustice and would certainly provide the presiding judge with additional points of view which may assist in enlightening it to determine the ultimate issue. Such an objection is really of very little merit.

14 I do not choose at this time to discuss in detail each of the criteria that I have outlined since they have all been thoroughly analyzed either individually or collectively in recent jurisprudence.

15 The courts have been satisfied that though a certain "public interest" may be adequately defended by one of the parties, because of special knowledge and expertise, they nevertheless allowed the intervention.

16 As an example, in R. v. Seaboyer (1986), 50 C.R. (3d) 395 (Ont. C.A.), the Legal Education and Action Fund ("LEAF") applied to intervene in the appeal from a decision quashing the committal for trial on a charge of sexual assault on the grounds that sections 246.6 and 246.7 of the Criminal Code [R.S.C. 1970, c. C-34 (as enacted by S.C. 1980-81-82-83, c. 125, s. 19)] were inoperative because they infringed section 7 and paragraph 11(d) of the Charter. LEAF is a federally [page81] incorporated body with an objective to secure women's rights to equal protection and equal benefit of the law as guaranteed in the Charter through litigation, education and research. The respondents opposed the application on the grounds that the interests represented by LEAF were the same as those represented by the Attorney General for Ontario, namely, the rights of victims of sexual assault, and that the intervention of LEAF would place a further and unnecessary burden on the respondents. The Court concluded that it should exercise its discretion and grant LEAF the right of intervention. In giving the Court's reasons for that decision, Howland C.J.O. stated as follows, at pages 397-398:

> Counsel for LEAF contended that women were most frequently the victims of sexual assault and that LEAF had a special knowledge and perspective of their rights and of the adverse effect women would suffer if the sections were held to be unconstitutional.
>
> The right to intervene in criminal proceedings where the liberty of the subject is involved is one which should be granted sparingly. Here no new issue will be raised if intervention is permitted. It is a question of granting the applicant a right to intervene to illuminate a pending issue before the court. While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the court.

17 Other courts have been even more emphatic in pointing out that when it comes to first-time Charter arguments, the Court should be willing to allow intervenors in order to avail itself of their assistance. This is especially true where those proposed intervenors are in a position to put certain aspects of an action into a new perspective which might not otherwise be considered by the Court or which might not receive the attention they deserve. In Re Schofield and Minister of Consumer and Commercial Relations (1980), 112 D.L.R. (3d) 132; 28 O.R. (2d) 764; 19 C.P.C. 245 (C.A.), Thorson J.A. made the following comments in this regard, at pages 141 D.L.R.; 773 O.R.; 255-256 C.P.C.:

[page82]

> It seems to me that there are circumstances in which an applicant can properly be granted leave to intervene in an appeal between other parties, without his necessarily having any interest in that appeal which may be prejudicially affected in any "direct sense", within the meaning of that expression as used by LeDain, J., in Rothmans of Pall Mall et al. v. Minister of National Revenue et al. (1976), 67 D.L.R. (3d) 505, [1976] 2 F.C. 500, [1976] C.T.C. 339, and repeated with approval by Heald, J., in the passage in the Solosky case [infra] quoted by my colleague. As an example of one such situation, one can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the Court in reaching its decision but which, but for the applicant's intervention, might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal.
>
> The fact that such situations may not arise with any great frequency or that, when they do, the Court's discretion may have to be exercised on terms and conditions such as to confine the intervener to certain defined issues so as to avoid getting into the merits of the lis inter partes, does not persuade me that the door should be closed on them by a test which insists on the

demonstration of an interest which is affected in the "direct sense" earlier discussed, to the exclusion of any interest which is not affected in that sense.

18 Certainly, not every application for intervenor status by a private or public interest group which can bring different perspective to the issue before the Court should be allowed. However, other courts, and notably the Supreme Court of Canada, have permitted interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues. In some cases, the ability of a proposed intervenor to assist the court in a unique way in making its decision will overcome the absence of a direct interest in the outcome. What the Court must consider in applications such as the one now before it is the nature of the issue involved and the likelihood of the applicant being able to make a useful contribution to the resolution of the action, with no injustice being imposed on the immediate parties.

19 Applying these principles to the case now before me, I am of the opinion that the applicant should be granted intervenor status. Certainly, the Canadian Cancer Society has a genuine interest in the issues before the Court. Furthermore, the applicant has the capacity to assist the Court in its decision making in that it possesses special knowledge [page83] and expertise relating to the public interest questions raised, and in my view it is in an excellent position to put some of these issues in a different perspective from that taken by the Attorney General. The applicant has, after all, invested significant time and money researching the issue of advertising and its effects on tobacco consumption and I am of the opinion that it will be a most useful intervenor from the Court's point of view.

20 The jurisprudence has clearly established that in public interest litigation, the Attorney General does not have a monopoly to represent all aspects of public interest. In this particular case, I think it is important that the applicant be allowed to intervene in order to offset any perception held by the public that the interests of justice are not being served because of possible political influence being asserted on the Government by those involved in the tobacco industry.

21 Finally, allowing the application by the Canadian Cancer Society will not unduly lengthen or delay the action nor will it impose an injustice or excessive burden on the parties involved. The participation by the applicant may well expand the evidence before the Court which could be of invaluable assistance.

22 Referring back to my criteria, I am convinced that the Canadian Cancer Society possesses special knowledge and expertise and has general interest in the issues before the Court. It represents a certain aspect of various interests in society which will be of assistance. It is a question of extreme importance to certain segments of the population which can be best represented in this debate.

23 For the foregoing reasons, the application by the Canadian Cancer Society for leave to be joined in the action by way of intervention as a defendant is granted. Costs to the applicant.

Indexed as:

Sawridge Band v. Canada

Between
Bertha L'Hirondelle suing on her own behalf and on behalf of all other members of the Sawridge Band, plaintiffs, and Her Majesty the Queen, defendant, and Native Council of Canada, Native Council of Canada (Alberta) and Non-Status Indian Association of Alberta, interveners
And between
Bruce Starlight suing on his own behalf and on behalf of all other members of the Sarcee Band, plaintiffs, and Her Majesty the Queen, defendant, and Native Council of Canada, Native Council of Canada (Alberta) and Non-Status Indian Association of Alberta, interveners

[2000] F.C.J. No. 749

[2000] A.C.F. no 749

97 A.C.W.S. (3d) 884

Court File Nos. T-66-86A, T-66-86B

Federal Court of Canada - Trial Division
Toronto, Ontario

Hugessen J.

Heard: May 25 and 26, 2000.
Oral judgment: May 26, 2000.
Reasons dated: May 31, 2000.

(17 paras.)

Practice -- Parties -- Adding or substituting parties -- Intervenors -- Persons who may apply -- Interest in subject matter.

Motions by members of the Sawridge Band and by members of the Sarcee Band seeking to terminate or restrict the participation of the interveners, Native Council for Canada, Native Council for Alberta, and Non-Status Indian Association of Alberta. The Native Women's Association of Canada moved for leave to intervene in each of the actions. The action was commenced in 1986 with three representative plaintiffs. It was an attack upon Bill C-31, the amendments to the Indian Act. In 1989, the present

interveners obtained their leave to intervene. The plaintiffs unsuccessfully opposed that application and their appeal was dismissed. The case went to trial. A new trial was ordered on the ground that the trial judge had demonstrated grounds for a reasonable apprehension of bias. No reference was made in the Court of Appeal's order to the role which should be played by the interveners in the new trial.

HELD: Motions dismissed. It was not appropriate to overrule the order granting leave to intervene, as the order was not purely procedural. It was an order which granted status or standing to the interveners and as such, went far beyond a mere matter of procedure. There had been no substantive change in the factual situation such as would justify interfering with the order. The motion by the Native Women's Association of Canada for leave to intervene was allowed. The case raised serious issues with regard to the rights of aboriginal women. The Association was in a position to bring a perspective to the trial which would assist the court and would be different from the perspective which was already brought by the other interveners. The interests of aboriginal women could not be as adequately represented by men as by women.

Counsel:

Philip Healey and Martin Henderson, for the plaintiff.
Catherine Twinn, for the plaintiff.
Patrick Hodgkinson and Maria Mendola-Dow, for the defendant.
Jacqueline Loignon, for the Native Council of Canada.
Michael Donaldson and David Haigh, for the Non-Status Indian Association of Alberta.
Jon Faulds, for the Native Council of Canada (Alberta).
Mary Eberts and Lucy McSweeney, for the Native Women's Association of Canada.

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1 **HUGESSEN J.** (Reasons for Order, orally):-- I have before me two motions in each of these two cases. The first motions, one in each case, in identical terms, are brought by plaintiffs and seek to terminate or restrict the participation of the interveners herein. The second motions, likewise in identical terms, are brought by the Native Women's Association of Canada (NWAC) and seek leave to intervene in each of the actions, each of the motions is opposed.

2 A brief history of the matter is appropriate. The action which started off as a single action with three representative plaintiffs was launched in 1986. It is an attack upon the legislation known popularly as Bill C-31, the amendments to the Indian Act. In 1989, Mr. Justice McNair on a very full record consisting of materials, cross-examinations on affidavits and after a hearing of approximately a day gave an order giving leave to the present interveners to intervene in the action. The plaintiffs opposed that application and when it went against them, they appealed the order of Mr. Justice McNair to the Court of Appeal. That appeal was in due course dismissed for want of prosecution.

3 The case went to trial, a very long trial was held in which the interveners participated, subject to the direction and control and in accordance with the orders of the trial judge. The trial judge's judgment on the merits was carried by the plaintiffs to the Court of Appeal which, without disposing of many of the grounds of appeal, allowed the appeal on the limited basis that the trial judge had demonstrated good grounds for a reasonable apprehension of bias and a new trial was ordered. No reference was made in the order of the Court of Appeal to the role which should be played by the interveners in the new trial.

4 Shortly after the order for a new trial, I was appointed as case management judge and have acted as such since that time. It is perhaps relevant to note that since my appointment, I have made a number of orders, the effect of which has been to change the litigation in some respects. In particular, I note an order permitting the amendment of the statement of claim, an order striking out one of the representative plaintiffs and an order separating the other two representative plaintiffs, one from the other, so that where there was previously one action, there are now two.

5 That brings me to the motions. Dealing first with the plaintiffs' motion seeking to terminate or limit the rights of the interveners, without being unduly simplistic, I think it is proper to characterize that motion as asking me in some way to overrule the order that was made by Mr. Justice McNair. In my view, it is not appropriate that I should do so. That order which was in effect confirmed by the Court of Appeal is in place. It constitutes res judicata. While it is, I think, trite law that certain types of interlocutory procedural orders may be subject to review, I do not think that the order of Mr. Justice McNair is such an order. It is not purely procedural. Indeed, it seems to me that it is an order which grants status or standing to the interveners and as such goes far beyond a mere matter of procedure.

6 There is no doubt in my mind that by some combination of Rules 299 and 385, I would have, as case management judge, the power in some circumstances to vary Mr. Justice McNair's order. But I do not think that the circumstances exist in the present case. In particular, I do not think that there has been any substantive change in the factual situation such as would justify my interfering with the discretion which was then exercised by that learned judge. The only change which plaintiffs suggest has taken place is, in fact, the amendment to the statement of claim. But that amendment, while it expands the basis upon which the plaintiffs seek their relief, does not in any substantial way change the relief itself and does not, in particular, change the impact which that relief may reasonably be expected to have upon the groups who in 1989 were claimed and who are still claimed to be represented by the interveners. That said, I do not think that the door is opened to review Mr. Justice McNair's decision.

7 Much of plaintiffs' argument on these motions was devoted to a litany of complaints about the conduct of the first trial judge and the manner in which he permitted the interveners to participate in the trial which he was presiding. Those complaints were included in the grounds urged by the plaintiffs before the Court of Appeal, but as I indicated, the Court of Appeal placed its decision on a very limited footing. Be that as it may, and whether or not the complaints that the plaintiffs seek to assert about the first trial judge's conduct are well founded, it is not my part to decide those questions. Indeed, it would be most improper for me to comment on the conduct by a brother judge of a trial before him. To the extent , however, that the Court of Appeal did look at the matter of the trial judge's "general conduct of the trial," and I quote those words from the reasons of the Court of Appeal, it appeared to find no fault with them.

8 I conclude accordingly that I have not been persuaded that there is any ground upon which I could properly interfere with the standing order which has already been made by Mr. Justice McNair and I propose accordingly to dismiss the plaintiffs' motions. I would add that it is my present view without having heard argument on the subject that the interveners, as a result of the filing of the amended statements of claim and the amended statements of defense, would have the right, without seeking leave, to file, if they see fit, amended statements of intervention. If counsel differ as to that preliminary view which I have expressed, that is a matter which, of course, may be spoken to and if there is, on the part of either counsel, a desire to conduct further discoveries, that also is a matter, I think, which may properly be spoken to at a future case management conference. The order of Mr. Justice McNair already envisages that the conduct of the interveners at the trial, at the second trial, as

it was at the first, shall be subject to the orders and directions of the judge who will in due course be appointed to preside that trial.

9 Before leaving those motions, I note that I believe the interveners have sought costs on these applications and that is a matter on which I would like to hear from counsel and I shall invite submissions after I conclude these reasons.

10 I turn now to the second set of motions being the motions by NWAC for leave to intervene.

11 Counsel appear to be in agreement as to the law and that that law is correctly set out in the judgments of both the Trial Division and the Court of Appeal in the case of Rothmans[1]. I would add as well that, in my view, while I think that case is still good law, I think it must be read in the light of the Federal Court Rules, 1998 which came into effect subsequent to that decision and I think Rule 109 throws some light upon the criteria which a Court should apply when determining whether or not an intervention is appropriate. That rule lays particular emphasis upon the contribution which a proposed intervener is in a position to make to the resolution of the issues of law or fact, the extent to which the intervention is going to help the Court in the resolution of those issues.

12 Where counsel for the proposed intervener and for the plaintiffs appear to differ is not in the law with respect to interventions but in the characterization of the reach and scope of the present actions. Counsel for plaintiffs seem to take the view that these actions are essentially private matters between the plaintiffs and the government in which the plaintiffs seek to assert their own personal rights flowing to them from aboriginal treaty rights or perhaps the Royal Proclamation of 1763 (and by characterizing them as personal rights I do not mean that they are not group rights as all aboriginal rights are) but a matter of interest essentially only to, and personal actions by, themselves. In my view and with great respect, that is an unrealistic attitude. It is a head in the sand attitude. I think the Court of Appeal in its decision to which I referred a moment ago in this very case, very neatly summed up the nature and scope of this action when it said of the trial judge that the action before him:

> "... the dispute before him involved in reality conflicting claims among various segments of the Aboriginal community to control or to claim membership in Indian bands."[2]

13 Counsel for plaintiffs concedes, I think, that the actions involve in a very serious way issues of gender equality. I don't think that there can be any doubt as to that and what is more, I think that those issues raise not only questions relating to section 15 of the Charter but also as counsel for NWAC has ably submitted, questions relating to section 28 of the Charter and its impact on section 25 and questions relating to subsection 35(4) of the Constitution Act and its impact on the other subsections of that section.

14 Briefly then, the case raises serious issues with regard to the rights of aboriginal women. I am satisfied on the evidence before me and notwithstanding counsel for plaintiffs' able submissions with respect to his cross-examination of the president of NWAC that NWAC is a most appropriate spokesperson for the interest of aboriginal women and that those interests are very much in play in these actions. I think that NWAC is in a position to bring a perspective to bear on the trial of these actions which will be of help to the Court and which will be different from the perspective which is already brought by the other interveners. I do not pretend for a moment that the other interveners did not honestly and sincerely attempt to represent the interests of aboriginal women in the first trial, but that trial is now history and the new trial which will be held will be a new start. I do think, however, that counsel for plaintiffs is simply wrong to assert as he does that the interest of aboriginal women

which are different and, in my view, most seriously affected by Bill C-31 can be as adequately represented by men as by women. NWAC is an organization whose purpose is to represent the interest of aboriginal women and I think it can make a useful contribution to the trial of these cases.

15 Accordingly, NWAC will have leave to intervene and they can file a statement of intervention herein by June 30, 2000, its rights to conduct discoveries and to have discoveries of it conducted will be determined and may be spoken to at a future case management conference as will any other pre-trial matters affecting the participation of NWAC. To the extent that its rights at trial, and to participate at trial and to call witnesses and to cross-examine will not have already been determined by an order of the case management judge, those rights will be subject to the direction and control of the trial judge when the latter is named.

16 I, unless I am mistaken, do not think that the motions by NWAC raise any issue as to costs.

(LATER)

17 Having heard counsel for the present interveners and for the plaintiffs, it is my view on the question of costs, that this is a case where costs should be ordered payable forthwith and in any event of the cause by the plaintiffs. This is not the first time the plaintiffs have sought unsuccessfully to get rid of these interveners. In my view the motions were not properly brought, they should not have been brought, the order of Mr. Justice McNair was and is in place and I have given my reasons for dismissing the motions. Accordingly, the costs of the first motions made by the plaintiffs against the former or old interveners will be payable forthwith in any event of the cause, costs to be taxed including reasonable proper traveling expenses of counsel to attend the present hearing.

HUGESSEN J.

cp/d/qlndn/qlhcs/qlhbb

1 Rothmans, Benson & Hedges Inc. v. Attorney General of Canada, [1990] 1 F.C. 74 (Trial). Rothmans, Benson & Hedges Inc. v. Attorney General of Canada, [1990] 1 F.C. 90 (Appeal).

2 Sawridge Band v. Canada, [1997] 3 F.C. 580 (F.C.A.) at 590.

Federal Court  Cour fédérale

Date: 20101223

Docket: T-1162-09

Citation: 2010 FC 1330

Ottawa, Ontario, December 23, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

UNITED STATES STEEL CORPORATION AND U.S. STEEL CANADA INC.

Respondents

and

LAKESIDE STEEL INC. AND LAKESIDE STEEL CORP.

Interveners

and

THE UNITED STEEL WORKERS AND LOCAL 1005 AND LOCAL 8782 AND JOHN PITTMAN AND GORD ROLLO

Interveners

REASONS FOR ORDER AND ORDER

B. *The Order is Not Clearly Wrong: it is Not Based on a Wrong Principle of Law, or Upon a Misapprehension of the Facts*

[24] The Respondents submit that the Order was clearly wrong and based on wrong principles of law and a misapprehension of the facts. The Respondents allege that although Prothonotary Milczynski used the proper test, she nonetheless committed several errors when considering the motion to intervene against the factors outlined in *CUPE*, above.

[25] The *CUPE* test consists of six criteria that help the Court determine if, pursuant to Rule 109, granting a motion to intervene will "assist the determination of a factual or legal issue related to the proceeding". The Prothonotary listed these criteria on page 3 of the Order:

> (i) Is the proposed intervener directly affected by the outcome?
> (ii) Does there exist a justiciable issue and a veritable public interest?
> (iii) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
> (iv) Is the position of the proposed intervener adequately defended by one of the parties to the case?
> (v) Are the interests of justice better served by the intervention of the proposed third party?
> (vi) Can the Court hear and decide the cause on its merits without the proposed intervener?

[26] As the Prothonotary noted, the *CUPE* test is not conjunctive, all factors need not be present in order for leave to be granted. Rather, the Court must weigh the various interests involved. Additionally the Court has the inherent authority to impose terms and conditions appropriate in the circumstances (*Boutique Jacob Inc. v Paintainer Ltd.*, 2006 FCA 426, 357 NR 384 at para 21).

[27] The Respondents submit that there are five reviewable errors:

(1) Prothonotary Milczynski considered whether the Interveners were directly affected by the outcome of the Application, but erred in law in confounding the legal and factual tests;

(2) Prothonotary Milczynski failed to adequately consider the public interest in the proposed intervention;

(3) Prothonotary Milczynski failed to consider any of the other factors mandated by *CUPE*;

(4) Prothonotary Milczynski failed to adequately consider prejudice to the Moving Parties in her analysis of the "interests of justice" factor;

(5) Prothonotary Milczynski erred in considering whether alleged failure to perform the Undertakings would result in the absence of "net benefit" to Canada – an issue not before her on the intervention motion, and one on which no evidence was adduced.

[28] Additionally, the Respondents submit that the Prothonotary failed to consider all of the *CUPE* factors, and if she had, she should have concluded that the Interveners satisfy none of them.

[29] I will deal with each allegation in turn.

(1) <u>The Prothonotary Did Not Err in Law in Determining that the Interveners Have a Sufficient Interest in the Outcome of the Application</u>

[30] The Respondents submit that Prothonotary Milczynski, in finding that the Interveners would be affected by the outcome of the Application, has confounded the concept of being economically

affected with that of being legally affected. The Respondents argue that the only interest the Interveners have in the outcome of the Application is economic or pecuniary in nature. The Interveners have no contract or tort rights to exercise against the Respondents and as a result the Respondents allege that in intervening they seek only to secure for themselves benefits that are not the fruit of negotiation with the Respondents. No existing legal rights of the Interveners will be affected by the outcome of the Application.

[31] While it is true that the case law relied on by the Respondents requires would-be interveners to show that they have a direct legal interest distinct from an economic interest (*Apotex Inc. v Canada (Attorney General)*, [1986] 2 FC 233, [1986] FCJ No 159 (QL) at para 12 and *Genencor International, Inc. v Canada (Commissioner of Patents)*, 2007 FC 376, 55 CPR (4th) 395 at para 13), these cases relate specifically to "meddling competitors" in the context of patent litigation. In the present matter, given the uncontested impact that the Respondents' alleged failure to comply with the undertakings has on the Interveners and the purpose with which they were granted intervener status, I am persuaded by the Interveners' arguments that they have a sufficient interest in the proceedings to meet the test to intervene.

[32] For their part, the Union Interveners argue that interest in employment rights are distinct from purely commercial or economic interests. Lakeside meanwhile claims that the Respondents distort the *CUPE* test, and that the concept of being "directly affected" as required should be interpreted broadly, keeping in mind the objective of Rule 109.

[33] The Prothonotary found that the alleged failure of the Respondents to meet the employment undertakings directly impacted the employees and retirees of the Canadian business. Loss of union dues has also affected the bargaining agent's ability to represent their membership. Although, these interests are obviously in a way economic, in the same case relied upon by the Respondents, *Apotex [1986]*, above, the Court conceded that cited caselaw involving would-be intervener doctors who risked losing their employment had interests distinct from a pharmaceutical company experiencing a reduction in profits. The latter is solely an economic interest, while in the former situation, "from a practical point of view, they have an intense and somewhat special interest in the outcome of these proceedings" (see *Apotex [1986]*, above at paras 10 and 12).

[34] In the case of Lakeside, the Prothonotary found that as a customer of the Canadian Business Lakeside had been adversely affected by the Respondents' failure to meet the production levels undertaking. More importantly, the Prothonotary found that Lakeside filed evidence on the motion that established that divesture would be a viable option.

[35] Again, considering the matter contextually, and keeping in mind the central purpose of Rule 109, I am persuaded by Lakeside's position that they ought not to be denied intervener status simply because they are not pursuing a contract or tort remedy against the Respondents.

[36] Contrasting Rule 109 with Rule 303(1) which requires that applicants name as respondents every person who is "directly affected" by an application, Lakeside argues that interveners cannot be held to as stringent a test as actual parties to an application. I agree that one of the *CUPE*

considerations, interpreted narrowly, cannot and should not be used to undermine the intent of Rule 109.

(2) There is a Justiciable Issue and Public Interest in Granting Intervener Status to Lakeside and the Union Interveners

[37] Prothonotary Milczynski found that the remedies under the Act are a justiciable issue and that public interest would be served in ensuring that the Act is interpreted and applied in a manner consistent with its stated purpose, which is to encourage investment, economic growth and employment opportunities in Canada.

[38] The Respondents submit that the Prothonotary erred in failing to consider the absence of a justiciable issue between the parties, in stating that the subject matter of the Application is a matter of public interest even though public interest is not a dispositive factor under the *CUPE* test, in failing to recognize that the public interest aspect has been designated as the responsibility of the Minister alone and in incorrectly using the term public interest to refer to general public interest in the Application as opposed to public interest in a particular intervener's participation.

[39] Again, I find the arguments of the Interveners more persuasive on these points.

[40] The Respondents point to no case law to support their position. As Lakeside submits, nothing in *CUPE* suggests that a justiciable issue has to exist between the appellant and the interveners, nor is this reasoning supported by the purpose Rule 109. Rather the Court's ultimate obligation to fashion the appropriate remedy is a justiciable issue.

[41] The Prothonotary never suggested that the public interest in ensuring that the Act is applied consistently with its purpose was dispositive, rather it was one consideration among many as required by *CUPE*.

[42] The argument that public interest is solely to be defended by the Minister is absurd and countered by the wording of the statute. Subsection 40(2) of the Act specifically requires the Court to make such "order or orders as, in its opinion, the circumstances require". I take Lakeside's point that public interest in the interpretation and application of the Act is analogous with public interest in injunctions and stay proceedings, where the Court has established that "the government does not have a monopoly on the public interest" (*RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385 at para 65). Similarly, in the present matter the Minister cannot be said to be solely responsible for representing the entire landscape of Canadian commerce.

[43] As found by the Prothonotary, both Interveners are particularly well-positioned to advance specific arguments regarding appropriate remedial measures that would be of interest to Canadian workers and Canadians involved in the Steel industry.

[44] In *Benoit v. Canada*, 2001 FCA 71, 201 FTR 137 at para 18, the Federal Court of Appeal stated:

> [...] if in a case where important public interest issues are raised, an intervener wishes to raise a related public interest question which naturally arises out of the existing lis between the parties, and which none of the other parties has raised, it is appropriate to permit the intervention.

[45] As such, the Prothonotary was not clearly wrong in deciding that the remedy ordered by the Court under the Act is a justiciable issue of public interest, helpfully illuminated by the intervention of Lakeside and the Union Interveners.

(3) The Prothonotary Did Not Fail to Consider Any of the CUPE Factors

[46] The Respondents submit that the Prothonotary failed to consider the remaining factors under *CUPE*.

[47] In fact, Prothonotary Milczynski listed the *CUPE* factors and then either expressly or implicitly addressed them, as submitted by the Interveners. However, as already discussed above, not all of the *CUPE* criteria need to be met in order to grant intervener status (*International Assn. of Immigration Practitioners v Canada*, 2004 FC 630, 130 ACWS (3d) 1100 at para 20).

[48] Failing to expressly consider each factor is not an error of law. I am of the view that considering the circumstances, the nature of the order made and the evidence before the Prothonotary, the Order reasonably demonstrates the manner in which the Prothonotary exercised her discretion (*Anchor Brewing Co. v Sleeman Brewing & Malting Co.*, 2001 FCT 1066, 15 CPR (4th) 63 at paras 31-34).

[49] Considering each *CUPE* factor individually (except the first two, which were discussed above), I cannot say that the Prothonotary was clearly wrong in her analysis, or based any of her findings on a misapprehension of the facts or a wrong principle of law:

(iii) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?

[50] Prothonotary Milczynski was quite obviously referring to the point the Respondents allege she ignored, considering whether there are other means to submit the issues to the Court, when she stated:

> I am satisfied that on this first application under section 40 of the *Investment Canada Act*, it would be of assistance to the hearing judge to consider the evidence and argument relating to these possible remedies and that without the interveners, would not otherwise be before the Court in an effective or meaningful way.
>
> [Emphasis added]

[51] This is not a baseless assumption. As the Union Interveners submit, they have no standing in any other forum to raise the interests and concerns of the Canadian Business' employees regarding the effects of the Respondents' alleged failure to comply with the undertakings, and consequently, what the remedy should be.

[52] The Prothonotary clearly did not overlook this consideration, nor can I say that she based her conclusion on any kind of misapprehension.

(iv) Is the position of the proposed intervener adequately defended by one of the parties to the case?

[53] As the Respondents submit, the positions of the AGC and Interveners diverge on the question of remedy. The Respondents argue that by granting the Interveners leave to present evidence on the remedy, they are usurping the authority of the Minister and using the proceedings to obtain *in personam* remedies to which they are not legally entitled.

[54] The Interveners, for their part, argue that they advance a unique perspective on the interpretation and application of the Act, insofar as the remedies available but not sought by the Minister.

[55] As Lakeside submits, the thrust of the Respondents' argument rests on a misunderstanding of the legislative scheme – it is not the AGC's election that determines the scope of remedies to be ordered by the Court should the merits of the Application be proven. As subsection 40(2) makes clear, it is for the Court to make any Order that it considers the circumstances to require.

[56] The Interveners were granted leave to intervene in a limited capacity in order to help the Court determine the viability and appropriateness of various remedial options. Although the Union Interveners may support the AGC's position on the merits of the test under section 40, this is irrelevant as they have been limited to making submissions only on the remedy aspect of the Application. It is in this aspect that Lakeside's position on the divesture remedy and the Union

Intervener's position on compensation to be awarded to affected bargaining units are not being advanced by the AGC.

[57] As such, I cannot say that Prothonotary Milczynski ignored or was clearly wrong in her consideration of this component of the *CUPE* test.

(v) Are the interests of justice better served by the intervention of the proposed third party?

[58] The Respondents submit that the Prothonotary failed to consider this component, and if she had she would have determined that it is not in the interests of justice to grant intervener status and as a result undermine: the Minister's ability to choose the remedy; the Respondents' ability to defend themselves against potentially heavy monetary fines; and the Court's interest in efficient adjudication.

[59] With respect, these submissions only amount to a disagreement with the Prothonotary's conclusion that allowing the Interveners to provide input would ultimately be helpful to the Court. To my mind it is clear that the Prothonotary implicitly considered this factor in holding that it would be of assistance to the hearing judge on this first application under section 40 of the Act to hear evidence relating to the possible remedies (that would not be before the Court were it not for the presence of the Interveners).

[60] Although the Respondents wish to paint an application under the Act as a bilateral process, the purpose of the Act suggests that its enforcement requires engaging a broader public perspective. As Lakeside submits, if the Interveners were truly usurping the role of the Minister, surely he would have objected on the motion to intervene. The Interveners have an interest in the outcome of the proceedings and they have been granted status to intervene in the most efficient and helpful way by the Prothonotary.

(vi) Can the Court hear and decide the cause on its merits without the proposed intervener?

[61] The Respondents submit that the statutory scheme envisions that the Court would be in a position to decide the merits of the application without the assistance of the Interveners, and therefore should seek to avoid the delay and expense inherent in permitting the intervention.

[62] The Union Interveners submit that the Court should not attempt to fashion a remedy without hearing their submissions, as they are in a position to offer unique and particularly helpful evidence regarding the employment undertakings and what remedy might adequately address this issue.

[63] Likewise, Lakeside argues that its presence will be helpful in adducing evidence and argument in support of the divestiture remedy. For this proposition Lakeside relies on *United Grain Growers Limited v Commissioner of Competition*, 2005 Comp Trib 36, a decision of Justice Sandra J. Simpson, sitting as the judicial member of the Competition Tribunal. Justice Simpson granted

intervener status to Mission, a prospective buyer, reasoning that they had "a unique perspective on the alleged change of circumstances which lie at the heart of the Application".

[64] Realistically, the Court could hear and decide the Application on the merits without the interveners. However, the Court would have much less information and would have a more difficult time fashioning the appropriate remedy. Prothonotary Milczynski considered the purpose of Rule 109, and governed the use of her discretion under that Rule with a consideration of the *CUPE* factors. I cannot agree with the Respondents that she either ignored or wrongly applied any of the six factors. Rather it appears obvious to me, that she engaged in a balancing exercise and the conclusion that the Interveners would be of assistance to the Court weighed more heavily in the end.

(4) Prothonotary Milczynski Did Properly Consider Prejudice to the Respondents

[65] I find no merit in the Respondents' submission that the Prothonotary neglected to properly consider the issue of prejudice to the Respondents. At the outset of the Order, the Prothonotary listed it as a necessary consideration and then, on page 9 of the Order went on to find that the Respondents' concern about "multiple prosecutors" was unfounded. The Prothonotary found that the Respondents would not experience undue prejudice as a result of the Interveners' participation as potential delays and complexities could be managed through the case management process.

[66] The Union Interveners take the position, and I accept it as correct, that although the Respondents may now face a more challenging legal argument, this does not by itself constitute prejudice. As held in *Abbott v Canada*, [2000] 3 FC 482, 186 FTR 269 at para 21, having to deal

Attorney General of Canada *Appellant*

v.

Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach *Respondents*

and

Attorney General of Ontario, Community Legal Assistance Society, British Columbia Civil Liberties Association, Ecojustice Canada, Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth, ARCH Disability Law Centre, Conseil scolaire francophone de la Colombie-Britannique, David Asper Centre for Constitutional Rights, Canadian Civil Liberties Association, Canadian Association of Refugee Lawyers, Canadian Council for Refugees, Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario and Positive Living Society of British Columbia *Interveners*

Procureur général du Canada *Appelant*

c.

Downtown Eastside Sex Workers United Against Violence Society et Sheryl Kiselbach *Intimées*

et

Procureur général de l'Ontario, Community Legal Assistance Society, Association des libertés civiles de la Colombie-Britannique, Ecojustice Canada, Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth, ARCH Disability Law Centre, Conseil scolaire francophone de la Colombie-Britannique, David Asper Centre for Constitutional Rights, Association canadienne des libertés civiles, Association canadienne des avocats et avocates en droit des réfugiés, Conseil canadien pour les réfugiés, Réseau juridique canadien VIH/sida, HIV & AIDS Legal Clinic Ontario et Positive Living Society of British Columbia *Intervenants*

INDEXED AS: CANADA (ATTORNEY GENERAL) *v.* DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY

2012 SCC 45

File No.: 33981.

2012: January 19; 2012: September 21.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

RÉPERTORIÉ : CANADA (PROCUREUR GÉNÉRAL) *c.* DOWNTOWN EASTSIDE SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY

2012 CSC 45

N° du greffe : 33981.

2012 : 19 janvier; 2012 : 21 septembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Parties — Standing — Public interest standing — Public interest group and individual working on behalf of sex workers initiating constitutional

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Parties — Qualité pour agir — Qualité pour agir dans l'intérêt public — Groupe de défense de l'intérêt public et individu œuvrant pour

challenge to prostitution provisions of Criminal Code — Whether constitutional challenge constituting a reasonable and effective means to bring case to court — Whether public interest group and individual should be granted public interest standing.

A Society whose objects include improving conditions for female sex workers in the Downtown Eastside of Vancouver and K, who worked as such for 30 years, launched a *Charter* challenge to the prostitution provisions of the *Criminal Code*. The chambers judge found that they should not be granted either public or private interest standing to pursue their challenge; the British Columbia Court of Appeal, however, granted them both public interest standing.

Held: The appeal should be dismissed.

In determining whether to grant standing in a public law case, courts must consider three factors: whether the case raises a serious justiciable issue; whether the party bringing the case has a real stake in the proceedings or is engaged with the issues that it raises; and whether the proposed suit is, in all of the circumstances and in light of a number of considerations, a reasonable and effective means to bring the case to court. A party seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favor granting standing. All of the other relevant considerations being equal, a party with standing as of right will generally be preferred.

In this case, the issue that separates the parties relates to the formulation and application of the third factor. This factor has often been expressed as a strict requirement that a party seeking standing persuade the court that there is *no* other reasonable and effective manner in which the issue may be brought before the court. While this factor has often been expressed as a strict requirement, this Court has not done so consistently and in fact has rarely applied the factor restrictively. Thus, it would be better expressed as requiring that the proposed suit be, in all of the circumstances and in light of a number of considerations, *a* reasonable and effective means to bring the case to court.

les travailleuses du sexe à l'origine d'une contestation constitutionnelle des dispositions du Code criminel relatives à la prostitution — La contestation constitutionnelle constitue-t-elle une manière raisonnable et efficace de soumettre la cause à la cour? — Le groupe de défense de l'intérêt public et l'individu devraient-ils se voir reconnaître la qualité pour agir dans l'intérêt public?

Une Société dont l'objet consiste notamment à améliorer les conditions de travail des travailleuses du sexe dans le quartier Downtown Eastside de Vancouver et K, qui a exercé ce métier durant 30 ans, ont lancé une contestation fondée sur la *Charte* des dispositions du *Code criminel* relatives à la prostitution. Le juge en cabinet a conclu qu'elles ne devraient ni l'une ni l'autre se voir reconnaître la qualité pour agir que ce soit dans l'intérêt public ou privé afin de poursuivre leur action; la Cour d'appel de la Colombie-Britannique leur a toutefois reconnu à toutes les deux la qualité pour agir dans l'intérêt public.

Arrêt : Le pourvoi est rejeté.

Lorsqu'il s'agit de décider s'il est justifié de reconnaître la qualité pour agir dans une cause de droit public, les tribunaux doivent soupeser trois facteurs. Ils doivent se demander si l'affaire soulève une question justiciable sérieuse; si la partie qui a intenté la poursuite a un intérêt réel dans les procédures ou est engagée quant aux questions qu'elles soulèvent; et si la poursuite proposée, compte tenu de toutes les circonstances et à la lumière d'un grand nombre de considérations, constitue une manière raisonnable et efficace de soumettre la question à la cour. Le demandeur qui souhaite se voir reconnaître la qualité pour agir dans l'intérêt public doit convaincre la cour que ces facteurs, appliqués d'une manière souple et téléologique, militent en faveur de la reconnaissance de cette qualité. Toutes les autres considérations étant égales par ailleurs, un demandeur qui possède de plein droit la qualité pour agir sera généralement préféré.

La question qui oppose les parties en l'espèce a trait à la formulation et à l'application du troisième de ces facteurs. Ce facteur a longtemps été qualifié d'exigence stricte que la personne demandant la reconnaissance de sa qualité pour agir devait démontrer qu'il *n'*y a *pas* d'autre manière raisonnable et efficace de soumettre la question à la cour. Il n'empêche que la Cour ne l'a pas formulé systématiquement de cette façon et l'a même rarement appliqué restrictivement. Ainsi, il serait préférable de formuler ce facteur comme exigeant que la poursuite proposée, compte tenu de toutes les circonstances et à la lumière d'un grand nombre de considérations, constitue *une* manière raisonnable et efficace de soumettre la question à la cour.

By taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible. Whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

In this case, all three factors, applied purposively and flexibly, favour granting public interest standing to the respondents. In fact, there is no dispute that the first and second factors are met: the respondents' action raises serious justiciable issues and the respondents have an interest in the outcome of the action and are fully engaged with the issues that they seek to raise. Indeed, the constitutionality of the prostitution provisions of the *Criminal Code* constitutes a serious justiciable issue and the respondents, given their work, have a strong engagement with the issue.

In this case, the third factor is also met. The existence of a civil case in another province is certainly a highly relevant consideration that will often support denying standing. However, the existence of parallel litigation — even litigation that raises many of the same issues — is not necessarily a sufficient basis for denying standing. Given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. Further, the issues raised are not the same as those in the other case. The court must also examine not only the precise legal issue, but the perspective from which it is made. In the other case, the perspective is very different. The claimants in that case were not primarily involved in street-level sex work, whereas the main focus in this case is on those individuals. Finally, there may be other litigation management strategies, short of the blunt instrument of a denial of standing, to ensure the efficient and effective use of judicial resources. A stay of proceedings pending resolution of other litigation is

En abordant la question sous l'angle téléologique, les tribunaux doivent se demander si l'action envisagée constitue une utilisation efficiente des ressources judiciaires, si les questions sont justiciables dans un contexte accusatoire, et si le fait d'autoriser la poursuite de l'action envisagée favorise le respect du principe de la légalité. Une approche souple et discrétionnaire est de mise pour juger de l'effet de ces considérations sur la décision ultime de reconnaître ou non la qualité pour agir. Une analyse dichotomique répondant par un oui ou par un non n'est pas envisageable. Les questions visant à déterminer si une manière de procéder est raisonnable, si elle est efficace et si elle favorise le renforcement du principe de la légalité sont des questions de degré et elles doivent être analysées en fonction de solutions de rechange pratiques, compte tenu de toutes les circonstances.

En l'espèce, appliqués selon une approche téléologique et souple, les trois facteurs militent pour la reconnaissance de la qualité pour agir dans l'intérêt public des intimées. En fait, il n'y a guère de désaccord quant au fait qu'il a été satisfait aux deux premiers facteurs : la poursuite des intimées soulève des questions justiciables sérieuses et les intimées ont un intérêt dans l'issue de l'action et sont totalement engagées au regard des questions qu'elles souhaitent soulever. En effet, la constitutionnalité des dispositions du *Code criminel* relatives à la prostitution constitue une question justiciable sérieuse et les intimées, compte tenu de leur travail, ont un solide engagement à l'égard de l'enjeu en cause.

En l'espèce, il est également satisfait au troisième facteur. L'existence d'une cause civile dans une autre province constitue certainement un facteur hautement pertinent qui milite souvent contre la reconnaissance de la qualité pour agir. Toutefois, l'existence d'une instance parallèle, même si elle soulève beaucoup de questions identiques, n'est pas nécessairement un motif suffisant pour refuser de reconnaître la qualité pour agir. Compte tenu de l'organisation provinciale de nos cours supérieures, les décisions rendues par celles d'une province ne lient pas les cours des autres provinces. Ainsi, une instance dans une province n'apporte pas nécessairement une réponse complète au demandeur qui désire intenter une poursuite sur des questions semblables dans une autre province. En outre, les questions soulevées dans l'autre cause ne sont pas identiques à celles soulevées en l'espèce. Le tribunal doit examiner non seulement la question juridique précise posée, mais aussi le contexte dans lequel elle l'est. Or, les contextes qui sont à l'origine des contestations dans l'autre cause et dans la présente affaire sont très différents. Les demanderesses dans l'autre cause n'étaient pas principalement

one possibility that should be taken into account in exercising the discretion as to standing.

Taking these points into account here, the existence of other litigation, in the circumstances of this case, does not seem to weigh very heavily against the respondents in considering whether their suit is a reasonable and effective means of bringing the pleaded claims forward.

Moreover, the existence of other potential plaintiffs, while relevant, should be considered in light of practical realities, which are such that it is very unlikely that persons charged under the prostitution provisions would bring a claim similar to the respondents'. Further, the inherent unpredictability of criminal trials makes it more difficult for a party raising the type of challenge raised in this instance.

In this case, also, the record shows that there were no sex workers in the Downtown Eastside willing to bring a challenge forward. The willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge in their own names.

Other considerations should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim.

des travailleuses de l'industrie du sexe qui exercent leur métier dans la rue, tandis que, en l'espèce, ce sont elles qui sont au cœur du débat. Finalement, mise à part la mesure radicale qui consiste à ne pas reconnaître la qualité pour agir, il pourrait y avoir d'autres stratégies en matière de gestion des litiges visant à assurer l'utilisation efficiente et efficace des ressources judiciaires. La suspension des procédures jusqu'au règlement d'autres instances est, de fait, une possibilité qui devrait être prise en compte lors de l'exercice du pouvoir discrétionnaire de reconnaître ou non la qualité pour agir.

En tenant compte de ce qui précède, l'existence de l'autre instance, dans les circonstances de la présente affaire, ne semble pas peser très lourd contre les intimées lorsqu'il s'agit de déterminer si la poursuite qu'elles ont intentée constitue une manière raisonnable et efficace de soumettre les allégations formulées à l'intention de la cour.

De plus, l'existence de demandeurs potentiels, bien qu'il s'agisse d'un facteur pertinent, ne devrait être prise en compte qu'en fonction de considérations d'ordre pratique qui sont telles qu'il est très peu probable que des personnes accusées en application des dispositions relatives à la prostitution engageraient une action semblable à celle des intimées. De plus, le caractère imprévisible inhérent aux procès criminels rend les choses encore plus difficiles pour une partie soulevant une contestation de la nature de celle engagée en l'espèce.

En outre, en l'espèce, il appert du dossier qu'aucun travailleur de l'industrie du sexe du quartier Downtown Eastside de Vancouver n'était prêt à engager une contestation exhaustive. La volonté de bon nombre de ces personnes de souscrire des affidavits ou de comparaître pour témoigner n'affecte en rien la crédibilité de leur témoignage voulant qu'elles ne soient pas prêtes ou capables d'engager en leurs propres noms une contestation de cette nature.

D'autres considérations devraient être prises en compte lors de l'examen du facteur relatif aux manières plus raisonnables et efficaces. La présente affaire constitue un litige d'intérêt public : les intimées ont soulevé des questions d'importance pour le public, des questions qui transcendent leurs intérêts immédiats. Leur contestation est exhaustive en ce qu'elle vise la presque totalité du régime législatif. Elle fournit l'occasion d'évaluer, du point de vue du droit constitutionnel, l'effet global de ce régime sur les personnes les plus touchées par ses dispositions. Une contestation de cette nature est susceptible de prévenir une multiplicité de contestations individuelles engagées dans le cadre de poursuites criminelles. Il n'y a aucun risque de porter

It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of K, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

Having found that the respondents have public interest standing to pursue their action, it is not necessary to address the issue of whether K has private interest standing.

Cases Cited

Applied: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; **discussed:** *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; **referred to:** *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, rev'd in part 2012 ONCA 186, 109 O.R. (3d) 1; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331; *Baker v. Carr*, 369 U.S. 186 (1962); *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Skinner*, [1990] 1 S.C.R. 1235; *R. v. Stagnitta*, [1990] 1 S.C.R. 1226; *R. v. Smith* (1988), 44 C.C.C. (3d) 385; *R. v. Gagne*, [1988] O.J. No. 2518 (QL); *R. v. Jahelka* (1987), 43 D.L.R. (4th) 111; *R. v. Kazelman*, [1987] O.J. No. 1931 (QL); *R. v. Bavington*, [1987] O.J. No. 2728 (QL); *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223; *R. v. Bear* (1986), 47 Alta. L.R. (2d) 255; *R. v. McLean* (1986), 2 B.C.L.R. (2d) 232; *R. v. Bailey*, [1986] O.J. No. 2795 (QL); *R. v. Cheeseman*, Sask. Prov. Ct., June 19, 1986; *R. v. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464; *R. v. Downey*, [1992] 2 S.C.R. 10; *R. v. Boston*, [1988] B.C.J. No. 1185 (QL); *R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424.

atteinte aux droits d'autres individus ayant un intérêt plus personnel ou plus direct dans la question du fait d'une action trop générale ou mal présentée. Il est évident que la demande est plaidée avec rigueur et habileté. Rien ne laisse croire que d'autres personnes touchées de façon plus directe ou personnelle aient choisi de plein gré de ne pas contester ces dispositions. La présence de K, de même que celle de la Société, garantira que le litige aura une dimension à la fois individuelle et collective.

Ayant conclu que les intimées ont la qualité pour agir dans l'intérêt public afin de poursuivre leur action, il n'est pas nécessaire d'aborder la question de savoir si K a la qualité pour agir dans l'intérêt privé.

Jurisprudence

Arrêt appliqué : *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263; **arrêts analysés :** *Finlay c. Canada (Ministre des Finances)*, [1986] 2 R.C.S. 607; *Conseil canadien des Églises c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 236; *Ministre de la Justice du Canada c. Borowski*, [1981] 2 R.C.S. 575; *Hy and Zel's Inc. c. Ontario (Procureur général)*, [1993] 3 R.C.S. 675; *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138; *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265; **arrêts mentionnés :** *Bedford c. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52, inf. en partie par 2012 ONCA 186, 109 O.R. (3d) 1; *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, [2005] 1 R.C.S. 791; *Smith c. Attorney General of Ontario*, [1924] R.C.S. 331; *Baker c. Carr*, 369 U.S. 186 (1962); *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49; *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *R. c. Skinner*, [1990] 1 R.C.S. 1235; *R. c. Stagnitta*, [1990] 1 R.C.S. 1226; *R. c. Smith* (1988), 44 C.C.C. (3d) 385; *R. c. Gagne*, [1988] O.J. No. 2518 (QL); *R. c. Jahelka* (1987), 43 D.L.R. (4th) 111; *R. c. Kazelman*, [1987] O.J. No. 1931 (QL); *R. c. Bavington*, [1987] O.J. No. 2728 (QL); *R. c. Cunningham* (1986), 31 C.C.C. (3d) 223; *R. c. Bear* (1986), 47 Alta. L.R. (2d) 255; *R. c. McLean* (1986), 2 B.C.L.R. (2d) 232; *R. c. Bailey*, [1986] O.J. No. 2795 (QL); *R. c. Cheeseman*, C. prov. Sask., 19 juin 1986; *R. c. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464; *R. c. Downey*, [1992] 2 R.C.S. 10; *R. c. Boston*, [1988] B.C.J. No. 1185 (QL); *R. c. DiGiuseppe* (2002), 161 C.C.C. (3d) 424.

and 163; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, at pp. 269 and 271; *Borowski*, at p. 593; *Finlay*, at pp. 631-32 and 635. The decision to grant or refuse standing involves the careful exercise of judicial discretion through the weighing of the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner (pp. 256 and 253).

de l'exercice du pouvoir discrétionnaire des cours de justice, puisqu'elle se rapporte à l'efficacité du recours » (p. 161); voir aussi p. 147 et 163; *Nova Scotia Board of Censors c. McNeil*, [1976] 2 R.C.S. 265, p. 269 et 271; *Borowski*, p. 593; *Finlay*, p. 631-632 et 635. La décision de reconnaître ou non la qualité pour agir nécessite l'exercice minutieux du pouvoir discrétionnaire judiciaire par la mise en balance des trois facteurs (une question justiciable sérieuse, la nature de l'intérêt du demandeur et les autres manières raisonnables et efficaces). Le juge Cory a insisté sur ce point dans *Conseil canadien des Églises* où il a souligné que les facteurs à prendre en compte dans l'exercice de ce pouvoir discrétionnaire ne devaient pas être considérés comme des exigences techniques et que les principes qui s'y appliquent devraient être interprétés d'une façon libérale et souple (p. 256 et 253).

[36] It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

[36] En conséquence, les trois facteurs ne doivent pas être perçus comme des points figurant sur une liste de contrôle ou comme des exigences techniques. Ils doivent plutôt être vus comme des considérations connexes devant être appréciées ensemble, plutôt que séparément, et de manière téléologique.

(5) A Purposive and Flexible Approach to Applying the Three Factors

(5) L'application des trois facteurs par une approche téléologique et souple

[37] In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

[37] Lorsqu'ils exercent le pouvoir discrétionnaire de reconnaître ou non la qualité pour agir dans l'intérêt public, les tribunaux doivent prendre en compte trois facteurs : (1) une question justiciable sérieuse est-elle soulevée? (2) le demandeur a-t-il un intérêt réel ou véritable dans l'issue de cette question? et (3) compte tenu de toutes les circonstances, la poursuite proposée constitue-t-elle une manière raisonnable et efficace de soumettre la question aux tribunaux? : *Borowski*, p. 598; *Finlay*, p. 626; *Conseil canadien des Églises*, p. 253; *Hy and Zel's*, p. 690; *Chaoulli*, par. 35 et 188. Le demandeur qui souhaite se voir reconnaître la qualité pour agir doit convaincre la cour que ces facteurs, appliqués d'une manière souple et téléologique, militent en faveur de la reconnaissance de cette qualité. Toutes les autres considérations étant égales par ailleurs, un demandeur qui possède de plein droit la qualité pour agir sera généralement préféré.

[38] The main issue that separates the parties relates to the formulation and application of the third of these factors. However, as the factors are interrelated and there is some disagreement between the parties with respect to at least one other factor, I will briefly review some of the considerations relevant to each and then turn to my analysis of how the factors play out here.

(a) *Serious Justiciable Issue*

[39] This factor relates to two of the concerns underlying the traditional restrictions on standing. In *Finlay*, Le Dain J. linked the justiciability of an issue to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government" and the seriousness of the issue to the concern about allocation of scarce judicial resources (p. 631); see also L'Heureux-Dubé J., in dissent, in *Hy and Zel's*, at pp. 702-3.

[40] By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role (*Finlay*, at p. 632). Le Dain J. in *Finlay* referred to *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, and wrote that "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government": pp. 632-33; see also L. Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007), 40 *U.B.C. L. Rev.* 727, at pp. 733-34; Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, at p. 27.

[41] This factor also reflects the concern about overburdening the courts with the "unnecessary proliferation of marginal or redundant suits" and the need to screen out the mere busybody:

[38] La principale question qui oppose les parties en l'espèce a trait à la formulation et à l'application du troisième de ces facteurs. Cependant, comme ils sont tous les trois intimement liés et qu'il existe un différend entre les parties en ce qui concerne au moins un d'entre eux, je vais exposer brièvement certaines des considérations pertinentes quant à chacun de ces facteurs et j'analyserai, par la suite, le rôle qu'ils jouent en l'espèce.

a) *Question justiciable sérieuse*

[39] Ce facteur concerne deux des préoccupations qui sous-tendent les restrictions traditionnelles imposées à la qualité pour agir. Dans *Finlay*, le juge Le Dain a lié la justiciabilité d'une question à la « préoccupation relative au rôle propre des tribunaux et à leur relation constitutionnelle avec les autres branches du gouvernement » et son caractère sérieux à la préoccupation relative à l'utilisation des ressources judiciaires limitées (p. 631); voir aussi, la juge L'Heureux-Dubé, dissidente, dans *Hy and Zel's*, p. 702-703.

[40] En insistant sur l'existence d'une question justiciable, les tribunaux s'assurent d'exercer leur pouvoir discrétionnaire de reconnaître la qualité pour agir d'une façon qui est cohérente avec l'objectif de demeurer dans les limites du rôle constitutionnel qui leur est propre (*Finlay*, p. 632). Dans *Finlay*, le juge Le Dain a cité l'arrêt *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, et a écrit que « lorsqu'est en cause un litige que les tribunaux peuvent trancher, ceux-ci ne devraient pas refuser de statuer au motif qu'à cause de ses incidences ou de son contexte politiques, il vaudrait mieux en laisser l'examen et le règlement au législatif ou à l'exécutif » : p. 632-633; voir aussi L. Sossin, « The Justice of Access : Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid? » (2007), 40 *U.B.C. L. Rev.* 727, p. 733-734; Sossin, *Boundaries of Judicial Review : The Law of Justiciability in Canada*, p. 27.

[41] Ce facteur traduit aussi la préoccupation quant au risque que les tribunaux soient submergés en raison d'une « prolifération inutile de poursuites insignifiantes ou redondantes » et la nécessité

Canadian Council of Churches, at p. 252; *Finlay*, at pp. 631-33. As discussed earlier, these concerns can be overplayed and must be assessed practically in light of the particular circumstances rather than abstractly and hypothetically. Other possible means of guarding against these dangers should also be considered.

[42] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690). In *Canadian Council of Churches*, the Court had many reservations about the nature of the proposed action, but in the end accepted that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

(b) *The Nature of the Plaintiff's Interest*

[43] In *Finlay*, the Court wrote that this factor reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody (p. 633). In my view, this factor is concerned

d'écarter les simples trouble-fête : *Conseil canadien des Églises*, p. 252; *Finlay*, p. 631-633. Comme je l'ai exposé précédemment, ces préoccupations peuvent être exagérées et doivent être appréciées en pratique en fonction des circonstances de chaque affaire plutôt que dans l'abstrait ou de façon hypothétique. Il conviendrait aussi d'examiner d'autres façons possibles de se prémunir contre ces dangers.

[42] Pour être considérée comme une « question sérieuse », la question soulevée doit constituer un « point constitutionnel important » (*McNeil*, p. 268) ou constituer une « question [. . .] importante » (*Borowski*, p. 589). L'action doit être « loin d'être futil[e] » (*Finlay*, p. 633), bien que les tribunaux ne doivent pas examiner le bien-fondé d'une affaire autrement que de façon préliminaire. Par exemple, dans l'arrêt *Hy and Zel's*, le juge Major s'est appuyé sur la norme applicable aux cas où il est tellement peu probable que l'action soit accueillie qu'on pourrait considérer son issue comme une conclusion qui « soit [. . .] assurée » (p. 690). Il a adopté cette position en dépit du fait que la Cour avait déclaré sept ans auparavant que la même Loi était constitutionnelle : *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713. Le juge Major a statué qu'il était « prêt à tenir pour acquis que les nombreuses modifications apportées au cours des sept années qui ont suivi l'arrêt *Edwards Books* ont suffisamment changé la Loi pour que sa validité ne soit plus assurée » (*Hy and Zel's*, p. 690). Dans *Conseil canadien des Églises*, la Cour avait de nombreuses réserves quant à la nature de l'action envisagée, mais elle a ultimement accepté que « certains aspects de la déclaration soulev[aient] une question sérieuse quant à la validité de la loi » (p. 254). En outre, dès qu'il devient évident qu'une déclaration fait état d'au moins une question sérieuse, il ne sera généralement pas nécessaire d'examiner minutieusement chacun des arguments plaidés pour trancher la question de la qualité pour agir.

b) *La nature de l'intérêt du demandeur*

[43] Dans l'arrêt *Finlay*, la Cour a écrit que ce facteur traduisait la préoccupation de conserver les ressources judiciaires limitées et la nécessité d'écarter les simples trouble-fête (p. 633). À mon

with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise. The Court's case law illustrates this point. In *Finlay*, for example, although the plaintiff did not in the Court's view have standing as of right, he nonetheless had a direct, personal interest in the issues he sought to raise. In *Borowski*, the Court found that the plaintiff had a genuine interest in challenging the exculpatory provisions regarding abortion. He was a concerned citizen and taxpayer and he had sought unsuccessfully to have the issue determined by other means (p. 597). The Court thus assessed Mr. Borowski's engagement with the issue in assessing whether he had a genuine interest in the issue he advanced. Further, in *Canadian Council of Churches*, the Court held it was clear that the applicant had a "genuine interest", as it enjoyed "the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants" (p. 254). In examining the plaintiff's reputation, continuing interest, and link with the claim, the Court thus assessed its "engagement", so as to ensure an economical use of scarce judicial resources (see K. Roach, *Constitutional Remedies in Canada* (looseleaf), at ¶5.120).

(c) *Reasonable and Effective Means of Bringing the Issue Before the Court*

[44] This factor has often been expressed as a strict requirement. For example, in *Borowski*, the majority of the Court stated that the person seeking discretionary standing has "to show . . . that there is no other reasonable and effective manner in which the issue may be brought before the Court": p. 598 (emphasis added); see also *Finlay*, at p. 626; *Hy and Zel's*, at p. 690. However, this consideration has not always been expressed and rarely applied so restrictively. My view is that we should now make clear that it is one of the three factors which must be assessed and weighed in the exercise of judicial discretion. It would be better, in my respectful view, to refer to this third factor as requiring

avis, ce facteur concerne la question de savoir si le demandeur a un intérêt réel dans les procédures ou est engagé quant aux questions qu'elles soulèvent. Ce point est illustré dans la jurisprudence de la Cour. Dans *Finlay*, par exemple, même si, selon la Cour, le demandeur n'avait pas la qualité pour agir de plein droit, il avait néanmoins un intérêt direct et personnel quant aux questions qu'il souhaitait soulever. Dans *Borowski*, la Cour a conclu que le demandeur avait un intérêt véritable dans la contestation des dispositions disculpatoires concernant l'avortement. Il était un citoyen inquiet et un contribuable, et il avait tenté sans succès d'obtenir une décision sur la question par d'autres moyens (p. 597). La Cour a donc évalué l'engagement de M. Borowski relativement à l'objet du litige en examinant s'il avait un intérêt véritable quant à la question qu'il désirait soulever. En outre, dans l'arrêt *Conseil canadien des Églises*, il était évident pour la Cour que le demandeur avait un « intérêt véritable », vu qu'il jouissait « de la meilleure réputation possible et [qu']il a[vait] démontré un intérêt réel et constant dans les problèmes des réfugiés et des immigrants » (p. 254). En examinant la réputation du demandeur, son intérêt continu et son lien avec l'action, la Cour a ainsi évalué son « engagement », de façon à assurer une utilisation efficiente des ressources judiciaires limitées (voir K. Roach, *Constitutional Remedies in Canada* (feuilles mobiles), ¶5.120).

c) *Manières raisonnables et efficaces de soumettre la question à la Cour*

[44] Ce facteur a longtemps été qualifié d'exigence stricte. Par exemple, dans *Borowski*, les juges majoritaires de la Cour ont déclaré que la personne demandant l'exercice du pouvoir discrétionnaire pour se voir reconnaître la qualité pour agir doit « démontre[r] qu'il n'y a pas d'autre manière raisonnable et efficace de soumettre la question à la cour » : p. 598 (je souligne); voir aussi *Finlay*, p. 626; *Hy and Zel's*, p. 690. Ce facteur n'a cependant pas toujours été exprimé de façon aussi restrictive et a rarement été appliqué de la sorte. J'estime que nous devrions maintenant indiquer clairement qu'il s'agit d'un des trois facteurs qui doivent être analysés et soupesés par les tribunaux lors de l'exercice

consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area.

(i) The Court Has Not Always Expressed and Rarely Applied This Factor Rigidly

[45] A fair reading of the authorities from this Court demonstrates, in my view, that while this factor has often been expressed as a strict requirement, the Court has not done so consistently and in fact has not approached its application in a rigid fashion.

[46] The strict formulation of the third factor as it appeared in *Borowski* was not used in the two major cases on public interest standing: see *Thorson*, at p. 161; *McNeil*, at p. 271. Moreover, in *Canadian Council of Churches*, the third factor was expressed as whether "there [was] another reasonable and effective way to bring the issue before the court" (p. 253 (emphasis added)).

[47] A number of decisions show that this third factor, however formulated, has not been applied rigidly. For example, in *McNeil*, at issue was the constitutionality of the legislative scheme empowering a provincial board to permit or prohibit the showing of films to the public. It was clear that there were persons who were more directly affected by this regulatory scheme than was the plaintiff, notably the theatre owners and others who were the subject of that scheme. Nonetheless, the Court upheld granting discretionary public interest standing on the basis that the plaintiff, as a member of

de leur pouvoir discrétionnaire. À mon humble avis, il serait préférable de formuler ce troisième facteur comme étant celui exigeant l'examen de la question de savoir si la poursuite proposée, compte tenu de toutes les circonstances et à la lumière d'un grand nombre de considérations dont je vais traiter sous peu, constitue une manière raisonnable et efficace de soumettre la question à la cour. Cette approche quant au troisième facteur correspond davantage à l'interprétation souple, discrétionnaire et téléologique de la qualité pour agir dans l'intérêt public qui sous-tend toutes les décisions prononcées par la Cour dans ce domaine.

(i) La Cour n'a pas toujours exprimé ce facteur de façon rigide et l'a rarement appliqué de la sorte

[45] À mon avis, une lecture attentive des décisions rendues par la Cour permet de déceler que même si ce facteur a souvent été qualifié d'exigence stricte, la Cour ne l'a pas appliqué avec rigidité de façon constante et, en fait, n'a pas non plus examiné son application de cette manière.

[46] La formulation rigide du troisième facteur telle qu'elle a été énoncée dans l'arrêt *Borowski* n'a pas été retenue dans les deux principales affaires concernant la qualité pour agir dans l'intérêt public : voir *Thorson*, p. 161, et *McNeil*, p. 271. En outre, dans l'arrêt *Conseil canadien des Églises*, le troisième facteur a été formulé comme étant la question de savoir s'« il [y avait] une autre manière raisonnable et efficace de soumettre la question à la cour » (p. 253 (je souligne)).

[47] En outre, un grand nombre de décisions illustre que ce troisième facteur n'a pas été appliqué de façon rigide, quelle qu'ait été sa formulation. Par exemple, dans l'arrêt *McNeil*, la question en litige concernait la constitutionnalité de dispositions législatives conférant à une commission provinciale le pouvoir d'autoriser ou d'interdire la projection de films pour le public. Il était évident qu'il y avait des personnes touchées plus directement par ce régime réglementaire que ne l'était le demandeur, notamment les propriétaires de cinémas et d'autres personnes visées par ces dispositions législatives. La

the public, had a different interest than the theatre owners and that there was no other way "practically speaking" to get a challenge of that nature before the court (pp. 270-71). Similarly in *Borowski*, although there were many people who were more directly affected by the legislation in question, they were unlikely in practical terms to bring the type of challenge brought by the plaintiff (pp. 597-98). In both cases, the consideration of whether there were no other reasonable and effective means to bring the matter before the court was addressed from a practical and pragmatic point of view and in light of the particular nature of the challenge which the plaintiffs proposed to bring.

[48] Even when standing was denied because of this factor, the Court emphasized the need to approach discretionary standing generously and not by applying the factors mechanically. The best example is *Canadian Council of Churches*. On one hand, the Court stated that granting discretionary public interest standing "is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant" (p. 252). However, on the other hand, the Court emphasized that public interest standing is discretionary, that the applicable principles should be interpreted "in a liberal and generous manner" and that the other reasonable and effective means aspect must not be interpreted mechanically as a "technical requirement" (pp. 253 and 256).

(ii) This Factor Must Be Applied Purposively

[49] This third factor should be applied in light of the need to ensure full and complete adversarial

Cour, au terme de l'exercice de son pouvoir discrétionnaire, a tout de même confirmé la reconnaissance de la qualité pour agir dans l'intérêt public aux motifs que le demandeur, en tant que membre du public, avait un intérêt différent de celui des propriétaires de cinémas et qu'il n'y avait « pratiquement » aucune autre manière de saisir la cour d'une contestation de cette nature (p. 270-271). De même, dans l'arrêt *Borowski*, bien que plusieurs personnes fussent davantage touchées par la loi en cause, il était peu probable en pratique que ces gens puissent soumettre au tribunal une contestation de la nature de celle engagée par le demandeur (p. 597-598). Dans les deux cas, la question de savoir s'il n'y avait pas d'autres manières raisonnables et efficaces de soumettre la question à la cour a été traitée d'un point de vue pratique et pragmatique, et en fonction de la nature précise de la contestation que le demandeur avait l'intention d'engager.

[48] Même dans les cas où la qualité pour agir n'a pas été reconnue par suite de l'application de ce facteur, la Cour a insisté sur la nécessité d'exercer le pouvoir discrétionnaire de reconnaître ou non la qualité pour agir plutôt qu'en appliquant les facteurs de façon mécanique. Le meilleur exemple de cette approche se trouve dans l'arrêt *Conseil canadien des Églises*. La Cour a déclaré d'une part que l'exercice par le tribunal de son pouvoir discrétionnaire pour reconnaître la qualité pour agir dans l'intérêt public « n'est pas nécessaire [. . .] lorsque, selon une prépondérance des probabilités, on peut établir qu'un particulier contestera la mesure » (p. 252). Toutefois, la Cour a souligné d'autre part que la décision de reconnaître ou non la qualité pour agir dans l'intérêt public relève d'un pouvoir discrétionnaire, que les principes applicables devraient être interprétés « d'une façon libérale et souple » et que le facteur relatif aux autres manières raisonnables et efficaces ne doit pas être interprété comme le résultat d'une application mécaniste d'une « exigence technique » (p. 253 et 256).

(ii) Ce facteur doit être appliqué de manière téléologique

[49] Ce troisième facteur doit être appliqué au regard de la nécessité d'assurer un exposé complet

presentation and to conserve judicial resources. In *Finlay*, the Court linked this factor to the concern that the "court should have the benefit of the contending views of the persons most directly affected by the issue" (p. 633); see also Roach, at ¶5.120. In *Hy and Zel's*, Major J. linked this factor to the concern about needlessly overburdening the courts, noting that "[i]f there are other means to bring the matter before the court, scarce judicial resources may be put to better use" (p. 692). The factor is also closely linked to the principle of legality, since courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors. Applying this factor purposively thus requires the court to consider these underlying concerns.

(iii) A Flexible Approach Is Required to Consider the "Reasonable and Effective" Means Factor

[50] The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

des positions contradictoires des parties et de ménager les ressources judiciaires. Dans l'arrêt *Finlay*, la Cour a associé ce facteur à la préoccupation du « tribunal [. . .] d'entendre les principaux intéressés faire valoir contradictoirement leurs points de vue » (p. 633); voir aussi Roach, ¶5.120. Dans l'arrêt *Hy and Zel's*, le juge Major a lié ce facteur à la préoccupation de ne pas surcharger inutilement les tribunaux, soulignant que « [s]'il existe d'autres manières de soumettre la question aux tribunaux, les ressources judiciaires limitées peuvent être mieux utilisées » (p. 692). Ce facteur est aussi étroitement lié au principe de la légalité, puisque les tribunaux doivent déterminer s'il est souhaitable de reconnaître la qualité pour agir en fonction de la nécessité d'assurer la légalité des mesures prises par les acteurs gouvernementaux. Pour appliquer ce facteur de manière téléologique, il est donc nécessaire que le tribunal prenne en compte ces préoccupations sous-jacentes.

(iii) Il est nécessaire d'adopter une approche souple pour évaluer le facteur relatif aux manières « raisonnables et efficaces »

[50] La jurisprudence de la Cour n'est pas très riche en enseignement sur la façon de juger du caractère « raisonnable et efficace » ou non d'une manière donnée de soumettre une question à la cour. Toutefois, en abordant la question sous l'angle téléologique, les tribunaux doivent se demander si l'action envisagée constitue une utilisation efficiente des ressources judiciaires, si les questions sont justiciables dans un contexte accusatoire, et si le fait d'autoriser la poursuite de l'action envisagée favorise le respect du principe de la légalité. Une approche souple et discrétionnaire est de mise pour juger de l'effet de ces considérations sur la décision ultime de reconnaître ou non la qualité pour agir. Par ailleurs, une analyse dichotomique répondant par un oui ou par un non à la question à l'étude n'est pas envisageable : les questions visant à déterminer si une façon de procéder est raisonnable, si elle est efficace et si elle favorise le renforcement du principe de la légalité sont des questions de degré et elles doivent être analysées en fonction de solutions de rechange pratiques, compte tenu de toutes les circonstances.

[51] It may be helpful to give some examples of the types of interrelated matters that courts may find useful to take into account when assessing the third discretionary factor. This list, of course, is not exhaustive but illustrative.

- The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.

- The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

- The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained

[51] Il pourrait être utile de donner des exemples de certaines questions interdépendantes que les tribunaux pourraient trouver utile de prendre en compte au moment de se pencher sur le troisième facteur discrétionnaire. La liste qui suit n'est naturellement pas exhaustive et ne comprend que quelques exemples.

- Le tribunal devrait tenir compte de la capacité du demandeur d'engager une poursuite. Ce faisant, il devrait examiner notamment ses ressources et son expertise ainsi que la question de savoir si l'objet du litige sera présenté dans un contexte factuel suffisamment concret et élaboré.

- Le tribunal devrait déterminer si la cause est d'intérêt public en ce sens qu'elle transcende les intérêts des parties qui sont le plus directement touchées par les dispositions législatives ou par les mesures contestées. Les tribunaux devraient tenir compte du fait qu'une des idées associées aux poursuites d'intérêt public est que ces poursuites peuvent assurer un accès à la justice aux personnes défavorisées de la société dont les droits reconnus par la loi sont touchés. Ceci ne devrait naturellement pas être assimilé à une permission de reconnaître la qualité pour agir à quiconque décide de s'afficher comme le représentant des personnes pauvres et marginalisées.

- Le tribunal devrait se pencher sur la question de savoir s'il y a d'autres manières réalistes de trancher la question qui favoriseraient une utilisation plus efficace et efficiente des ressources judiciaires et qui offriraient un contexte plus favorable à ce qu'une décision soit rendue dans le cadre du système contradictoire. Les tribunaux devraient adopter une approche pratique et pragmatique. L'existence d'autres demandeurs potentiels, notamment ceux qui possèdent de plein droit la qualité pour agir, est pertinente, mais les chances en pratique qu'ils soumettent la question aux tribunaux ou que des manières aussi ou plus raisonnables et efficaces soient utilisées pour le faire devraient être prises en compte en fonction des réalités pratiques et non des possibilités théoriques. Lorsqu'il y a

by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.

- The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.

(iv) Conclusion

[52] I conclude that the third factor in the public interest standing analysis should be expressed as: whether the proposed suit is, in all of the circumstances, a reasonable and effective means of

d'autres demandeurs, en ce sens que d'autres actions ont été engagées relativement à la question, le tribunal devrait évaluer d'un point de vue pratique les avantages, le cas échéant, d'avoir des recours parallèles et se demander si ces autres actions vont résoudre les questions de manière aussi ou plus raisonnable et efficace. En procédant ainsi, le tribunal ne devrait pas uniquement prendre en compte les questions juridiques précises ou les points soulevés, mais plutôt chercher à savoir si le demandeur apporte une perspective particulièrement utile ou distincte en vue de régler ces points. À la lecture de l'arrêt *McNeil* par exemple, on voit que même lorsque des personnes peuvent avoir un intérêt plus direct dans la question, le demandeur peut avoir un intérêt distinct et important qui diffère de celui des autres, ce qui peut justifier que le tribunal exerce son pouvoir discrétionnaire pour lui reconnaître la qualité pour agir.

- L'incidence éventuelle des procédures sur les droits d'autres personnes dont les intérêts sont aussi, sinon plus touchés devrait être prise en compte. En effet, les tribunaux devraient porter une attention particulière aux situations où les intérêts privés et publics seraient susceptibles d'entrer en conflit. Comme il est indiqué dans l'arrêt *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086, p. 1093, le tribunal devrait se demander, par exemple, si « l'échec d'une contestation trop diffuse pourrait faire obstacle à des contestations ultérieures des règles en question, par certaines parties qui auraient des plaintes précises fondées sur des faits ». L'inverse est également vrai. Ainsi, que les personnes ayant des intérêts plus directs et personnels dans la cause se soient abstenues volontairement d'engager une poursuite pourrait militer pour le refus par la cour d'exercer son pouvoir discrétionnaire de reconnaître la qualité pour agir.

(iv) Conclusion

[52] Je conclus que le troisième facteur de l'analyse de la qualité pour agir dans l'intérêt public devrait être formulé comme ceci : la poursuite proposée constitue-t-elle, compte tenu de toutes les

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140129

Docket: A-158-13

Citation: 2014 FCA 21

Present: STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 29, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Two motions to intervene in this appeal have been brought: one by the First Nations Child and Family Caring Society and another by Amnesty International.

[2] The appellant Attorney General opposes the motions, arguing that the moving parties have not satisfied the test for intervention under Rule 109 of the *Federal Courts Rules*, SOR/98-106. The respondents consent to the motions.

[3] Rule 109 provides as follows:

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 intervener and of any solicitor acting for the proposed intervener; 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 intervener 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) In granting a motion under subsection (1), the Court shall give directions regarding	(3) La Cour assortit l'autorisation d'intervenir de directives concernant :
(*a*) the service of documents; and	*a*) la signification de documents;
(*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	*b*) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[4] Below, I describe the nature of this appeal and the moving parties' proposed interventions in this appeal. At the outset, however, I wish to address the test for intervention to be applied in these motions.

[5] The Attorney General submits, as do the moving parties, that in deciding the motions for intervention I should have regard to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.), an oft-applied authority: see, *e.g.*, *CCH Canadian Ltd. v. Law Society of Upper Canada* (2000), 189 D.L.R. (4th) 125 (F.C.A.). *Rothmans, Benson & Hedges* instructs me that on these motions a list of six factors should guide my discretion. All of the factors need not be present in order to grant the motions.

[6] In my view, this common law list of factors, developed over two decades ago in *Rothmans, Benson & Hedges*, requires modification in light of today's litigation environment: *R. v. Salituro*, [1991] 3 S.C.R. 654. For the reasons developed below, a number of the *Rothmans, Benson & Hedges* factors seem divorced from the real issues at stake in intervention motions that are brought today. *Rothmans, Benson & Hedges* also leaves out other considerations that, over time, have assumed greater prominence in the Federal Courts' decisions on practice and procedure. Indeed, a case can be made that the *Rothmans, Benson & Hedges* factors, when devised, failed to recognize the then-existing understandings of the value of certain interventions: Philip L. Bryden, "Public Intervention in the Courts" (1987) 66 Can. Bar Rev. 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U. T. Fac. L. Rev. 151. Now is the time to tweak the *Rothmans, Benson & Hedges* list of factors.

[7] In these reasons, I could purport to apply the *Rothmans, Benson & Hedges* factors, ascribing little or no weight to individual factors that make no sense to me, and ascribing more weight to

others. That would be intellectually dishonest. I prefer to deal directly and openly with the *Rothmans, Benson & Hedges* factors themselves.

[8] In doing this, I observe that I am a single motions judge and my reasons do not bind my colleagues on this Court. It will be for them to assess the merit of these reasons.

[9] The *Rothmans, Benson & Hedges* factors, and my observations concerning each, are as follows:

- ***Is the proposed intervener directly affected by the outcome?*** "Directly affected" is a requirement for full party status in an application for judicial review – *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236. All other jurisdictions in Canada set the requirements for intervener status at a lower but still meaningful level. **In my view, a proposed intervener need only have a genuine interest in the precise issue(s) upon which the case is likely to turn. This is sufficient to give the Court an assurance that the proposed intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding.**

- ***Does there exist a justiciable issue and a veritable public interest?*** **Whether there is a justiciable issue is irrelevant to whether intervention should be granted.** Rather, it is relevant to whether the application for judicial review should survive in the first place. If there is no justiciable issue in the application for judicial review, the issue is

not whether a party should be permitted to intervene but whether the application should be struck because there is no viable administrative law cause of action: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250.

- ***Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?*** This is irrelevant. If an intervener can help and improve the Court's consideration of the issues in a judicial review or an appeal therefrom, why would the Court turn the intervener aside just because the intervener can go elsewhere? If the concern underlying this factor is that the intervener is raising a new question that could be raised elsewhere, generally interveners – and others – are not allowed to raise new questions on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paragraphs 22-29.

- ***Is the position of the proposed intervener adequately defended by one of the parties to the case?*** This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.

- ***Are the interests of justice better served by the intervention of the proposed third party?*** Again, this is relevant and important. Sometimes the issues before the Court

assume such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties who happen to be before the Court. Sometimes that broader exposure is necessary to appear to be doing – and to do – justice in the case.

- *Can the Court hear and decide the case on its merits without the proposed intervener?* Almost always, the Court can hear and decide a case without the proposed intervener. The more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter.

[10] To this, I would add two other considerations, not mentioned in the list of factors in *Rothmans, Benson & Hedges*:

- *Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"?* For example, some motions to intervene will be too late and will disrupt the orderly progress of a matter. Others, even if not too late, by their nature may unduly complicate or protract the proceedings. Considerations such as these should now pervade the interpretation and application of procedural rules: *Hryniak v. Mauldin*, 2014 SCC 7.

- *Have the specific procedural requirements of Rules 109(2) and 359-369 been met?* Rule 109(2) requires the moving party to list its name, address and solicitor, describe how it intends to participate in the proceeding, and explain how its participation "will assist the determination of a factual or legal issue related to the proceeding." Further, in a motion such as this, brought under Rules 359-369, moving parties should file detailed and well-particularized supporting affidavits to satisfy the Court that intervention is warranted. Compliance with the Rules is mandatory and must form part of the test on intervention motions.

[11] To summarize, in my view, the following considerations should guide whether intervener status should be granted:

I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

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. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, 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 proposed intervener been involved in earlier proceedings in the matter?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

[12] In my view, these considerations faithfully implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts.

[13] I shall now apply these considerations to the motions before me.

Indexed as

Rudolph v. Canada (Minister of Employment and Immigration) (F.C.A.)

Between
Louis Arthur H. Rudolph, Applicant, and
The Minister of Employment and Immigration, Respondent

[1992] F.C.J. No. 62

[1992] A.C.F. No 62

139 N.R. 233

16 Imm. L.R. (2d) 110

31 A.C.W.S. (3d) 1042

Appeal No. A-403-91

Federal Court of Appeal
Toronto, Ontario

Stone J.A.

Heard: January 30, 1992
Judgment: January 31, 1992

(7 pp.)

Practice -- Intervenor status -- Rule 1405(1) -- Immigration -- Nazi war crime -- Ground for denying immigration -- Human rights organization granted standing to intervene.

Application to intervene in a section 28 proceeding. The applicant was refused permission to visit Canada because of his alleged involvement in the use of forced labour to produce the German V-2 rocket during World War Two. A section 28 proceeding had been set down for hearing and the League for Human Rights of B'nai Brith Canada applied to intervene under Rule 1405(1).

HELD: Application granted. The applicant had shown that it would make a useful contribution without duplicating the efforts of the Minister.

STATUTES, REGULATIONS AND RULES CITED:

Canadian Charter of Rights and Freedoms, 1982, s. 15(1). Federal Court Act, R.S.C. 1985, c. F-7, s. 28. Federal Court Rules, Rule 1405(1).
Immigration Act, R.S.C. 1985, c. I-2, s. 19(1), 19(1)(j).

Barbara Kulaszka, for the Applicant.
Marvin Kurz, for the Moving Party League for Human Rights of B'nai Brith Canada.
Kevin Lunney, for the Respondent.

STONE J.A. (Reasons for Order):-- This is an application pursuant to Rule 1405(1) for leave to intervene in a section 28 proceeding which has been set down for hearing on February 26, 1992. That proceeding attacks a decision dated January 11, 1991, of an adjudicator made pursuant to the Immigration Act, R.S.C. 1985, c.I-2, as amended. By that decision, the Applicant in the pending section 28 proceeding was found to be a person described in paragraph 19(1)(j) of that Act, which reads:

> 19(1) No person shall be granted admission who is a member of any of the following classes:
>
> (j) persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 6(1.96) of the Criminal Code and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission.

While the adjudicator's decision grew out of a desire of the Applicant to enter Canada as a visitor, it is evident that the section 28 proceeding raises public issues of considerable importance. It was the alleged involvement of the Applicant in the use of forced labour for the production of the German V-2 rocket during World War II that led to the decision to bar his entry. The adjudicator's findings are summarized at pages 841-842 of the Case, where he stated:

> I have determined however that there are reasonable grounds to believe that in carrying out the normal functions of his job as operations director of the V-2 plant he did aid and abet his superiors who ordered the use of forced labour in connection with the military operations of the enemy and employment of prisoners of war in unauthorized work.
>
> Section 7(3.76) of the Criminal Code defines the terms crime against humanity and war crime and Section 7(3.77) indicates that the act or omission referred to in each includes aiding and abetting any person in the commission of an act or omission.
>
> My finding is that detention of prisoners from the countries against which the V-2 was, or was going to be, targeted for the purpose of

> forced labour in the production of the V-2 missile was a crime against humanity and a war crime and that Arthur Rudolph aided and abetted the offence by successfully managing and supervising the production of the V-2 with forced labourers he knew to include such persons and by requesting additional forced labour for the production.

The moving party was permitted to attend and did attend many of the sittings of the inquiry before the adjudicator.

The supporting affidavit shows that the moving party is a non-profit corporation whose mandate is to expose racism and bigotry and to preserve and enhance human rights. It also shows that the moving party has had a continuing involvement in legal proceedings, legislative initiatives, educational programs and community action bearing directly on its mandate. It was granted standing as a party before the Commission of Inquiry on Nazi War Criminals whose recommendations, I was told, led to the enactment of the statutory provisions which are in issue in the section 28 proceeding. That Commission, which was headed by Mr. Justice Jules Deschênes, was established by an order in council the operative provisions of which were set forth by Mr. Justice Mahoney in League of Human Rights of B'nai Brith v. Commission of Inquiry on War Criminals, (1986) 69 N.R. 110 (F.C.A.), at page 111.

Rule 1405(1) confers a wide discretion upon this Court in an application of this kind. It reads:

> 1405(1) The Court may, in its discretion, upon an application before the hearing or during the course of a hearing, decide what persons shall be heard on the argument of a section 28 application.

The moving party should not of course be granted leave to speak to questions which are not raised by the underlying proceeding. That said, it seems to me that the issues in paragraph 40 and paragraphs 72 to 78 of the Applicant's Memorandum of Points to be Argued do raise matters upon which the panel hearing the section 28 application may well be assisted by the moving party. Paragraph 40 asks the question:

> Did "crimes against humanity" exist during the relevant period of the alleged offences?

In paragraphs 72 to 78, the Applicant invokes section 15(1) of the Canadian Charter of Rights and Freedoms. Thus in paragraphs 76 and 78 we find the following submissions:

> 76. It is respectfully submitted that if para. 19(1)(j) of the Immigration Act, 1976, is interpreted in such a way as to deny the applicant the defences available to every Canadian for acts committed in Canada, particularly the defence of obedience to de facto law and the defence of superior orders, such denial violates the right to equal protection and benefit of the law based on grounds relating to personal characteristics of an individual, namely, the status of "enemy" of Canada during an armed conflict. The effect of such denial is to impose burdens and disadvantages on the applicant not imposed upon others and which withholds or limits access to benefits and advantages available to other members of society.

. . . . . .

78. It is respectfully submitted that Canada cannot strip former wartime enemies of Canada of the protection of Canada's domestic law with which it cloaks its own officials and people. This is a violation not only of the equality provisions of the Charter but the requirements of fundamental justice.

If, as may appear, reliance upon the Charter is for the purpose of using it as a tool in the interpretation of paragraph 19(1)(j), I do not see why the moving party should not be heard in that context.

In the Canadian Council of Churches v. Her Majesty the Queen (Case 21946, Judgment rendered January 23, 1992), Cory J., speaking for the Supreme Court of Canada, had the following to say, at page 23:

> It has been seen that a public interest litigant is more likely to be granted standing in Canada than in other common law jurisdictions. Indeed if the basis for granting status were significantly broadened, these public interest litigants would displace the private litigant. Yet the views of the public litigant who cannot obtain standing need not be lost. Public interests organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts. Yet that assistance is given against a background of established facts and in a time frame and context that is controlled by the courts. A proper balance between providing for the submissions of public interest groups and preserving judicial resources is maintained. (Emphasis added)

I am satisfied as well that the moving party is genuinely interested in the issues I have identified and that it does possess special knowledge and expertise related to these issues.

Counsel for the Respondent does not oppose the present application. While no doubt the Respondent will protect the interests of those who the moving party represents, I am not convinced that the order should be refused for that reason: cf. Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 74 O.R. (2d) 164 (Ont. C.A.)

The Respondent has yet to file its Memorandum of Points to be Argued but has indicated that this will be done not later than February 7, 1992. Counsel for the moving party has undertaken that neither his written or oral submissions will duplicate the submissions which the Respondent will present to the Court at the main hearing and that he intends to lend support to the Respondent's position.

In the circumstances, I would allow this application by joining the League for Human Rights of B'nai Brith Canada as an intervener, the style of cause to be amended accordingly. The intervention should be according to the following terms and conditions:

(a) The intervention shall be restricted to the issues raised in paragraphs 40, 72 to 78 of the Applicant's Memorandum of Points to be Argued;

(b)

The intervener may file and serve on all parties not later than February 14, 1992 a statement of intervention setting out its position on the aforesaid issues;

(c) At the hearing, the intervener may participate through oral submissions of legal argument addressed to the aforesaid issues;

The Respondent may file and serve, not later than February 21, 1992, a memorandum of argument in reply to the aforesaid statement of intervention.

STONE J.A.

Regional Municipality of Peel and Attorney General of Ontario
v. Great Atlantic & Pacific Co. of Canada Ltd.,
Loblaws Supermarkets Ltd., Steinberg Inc.
(c.o.b. Miracle Food Mart) and Oshawa Group Ltd.

Indexed as: Peel (Regional Municipality) v. Great Atlantic &
Pacific Co. of Canada Ltd.
(C.A.)

74 O.R. (2d) 164
[1990] O.J. No. 1378
Action No. 455/90

ONTARIO
Court of Appeal
Dubin C.J.O., in Chambers
August 3, 1990.

Civil procedure -- Parties -- Intervention -- Applicant seeking to be added as party or as friend of court in appeal of judgment that held statute unconstitutional and contrary to Canadian Charter of Rights and Freedoms -- Considerations -- Rules of Civil Procedure, O. Reg. 560/84, rules 13.01, 13.02.

The applicant was a non-profit corporation whose objects included preserving Sunday as a day of rest, monitoring all legislation bearing on Sunday labour or business and pressing for new legislation or amendment of existing law to minimize activity on Sunday. While, historically, members of the applicant were drawn from religious groups, the majority of its members now were representatives of trade unions, small retail businesses and trade associations. The applicant applied for leave to intervene as an added party or as a friend of the court in pending appeals of a judgment that held the Retail Business Holidays Act, as amended in February 1989, unconstitutional and in contravention of the Canadian Charter of Rights and Freedoms.

Held, subject to certain conditions, leave should be granted to the applicant to intervene as a friend of the court.

In determining whether an application for intervention should be granted the matters to be considered were the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties. In constitutional cases, including cases under the Charter, there has been a relaxation of the rules governing applications for leave to intervene and an increase in the desirability of permitting intervention because the judgments in these cases have a great impact on others who are not immediate parties. In this case, although the applicant's argument may overlap with the argument of the Attorney General in support of the legislation the applicant represented a very large number of individuals who had a direct interest in the outcome, had special knowledge and expertise of the subject-matter and was in a position to place the issues in a slightly different perspective from that of the Attorney General. Since the Retail Business Holidays Act does not affect the applicant corporation as such or its employees, it was not appropriate to grant leave as an added party under rule 13.01 of the Rules of Civil Procedure. Subject to certain conditions, it was appropriate to grant leave to intervene under rule 13.02 as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Canadian Charter of Rights and Freedoms
Retail Business Holidays Act, R.S.O. 1980, c. 453

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 13.01 [am. O. Reg. 221/86, s. 1], 13.02, 13.03(2) [am. O. Reg. 221/86, s. 1]

of applications for leave to intervene and has increased the desirability of permitting some such interventions.

The Attorney General for Ontario supports this application for intervention, but it is opposed by all the other respondents. The principal submission made by those who submit that leave to intervene should not be granted is that the interests of those whom the applicant represents are now fully protected by the position being taken on the appeals by the Attorney General for Ontario and, indeed, much of the evidence relied upon by the Attorney General in the proceedings before Mr. Justice Southey was drawn from sources that the applicant represents.

However, in my opinion, that is not a sufficient reason in this case to deny leave to intervene. The role of counsel for the Attorney General for Ontario is to support the constitutionality of the province's legislation. Although the argument may overlap, the applicant represents a very large number of individuals who have a direct interest in the outcome, has a special knowledge and expertise of the subject-matter and is in a position to place the issues in a slightly different perspective than that of the Attorney General.

It was also submitted that the applicant had considered seeking the right to intervene in the proceedings before Mr. Justice Southey and declined to do so and, therefore, should not be permitted to intervene now. However, I do not think that the failure to apply for intervention before Mr. Justice Southey should foreclose the applicant's opportunity for seeking intervention at this stage.

Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.