To intervene or not to intervene before the Federal Courts

October 06, 2023

Interveners are increasingly seeking standing in the Federal Courts. Recent case law confirms the standard for a successful intervention and demonstrates the stringency of the test at the federal level.

Historically, the Federal Courts ubiquitously applied the test in Rothmans, Benson & Hedges Inc to determine a motion to intervene. In recent years, there was discussion amongst the courts to modify and modernize this test, leading to differing outcomes in the determination of such motions.

In light of this, the Federal Court of Appeal (FCA) recently emphasized the focus interveners need to have on the usefulness of their proposed intervention to the issue before the judges. In Le-Vel Brands v Canada (Attorney General), the FCA stated that the test is not in conflict and is comprised of three elements:

i. The usefulness of the intervener's participation pertaining to the issues the Court has to decide;
ii. A genuine interest in the issues raised by the appeal on the part of the intervener, and;
iii. A consideration of the interests of justice (para 7).

The FCA also noted that the application of the 'interests of justice' factor should be a flexible, fact-responsive approach (para 9).

The FCA further provided guidance on the application of the test. In this case, the Canadian Health Food Association and the Direct Sellers Association of Canada moved for leave to intervene on an appeal concerning the reasonableness of a decision of the Minister of Health with respect to whether a natural health product was sold without a product licence (para 2). The FCA expressed that most often, proposed interveners either ignore the usefulness condition or do not offer sufficiently rigorous submissions with respect to this condition, and this is the most frequent reason intervention motions fail (para 13). The Federal Courts Rules set out the statutory requirements for usefulness, requiring the proposed intervener to "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."

The FCA then set out a comprehensive consolidation of questions for proposed interveners to consider when addressing the test for intervention in their motion:

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

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

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

- Is the intervention consistent with the imperative in Rule 3 that the proceeding be conducted "so as to secure the just, most expeditious and least expensive outcome"? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?
- Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?
- Has the first-instance court in this matter admitted the party as an intervener?
- Will the addition of multiple interveners create the reality or an appearance of an "inequality of arms" or imbalance on one side? (para 19)

Upon applying these questions to the proposed interveners, the FCA denied leave to intervene, holding that the interveners had not demonstrated usefulness as the crux of their submissions go to interpretation of the Regulations rather than whether the Minister's decision was reasonable, which was the issue before the FCA. Furthermore, the FCA held that it was not in the interests of justice to further delay the hearing on the merits.

The recent cases of Macciacchera (Smoothstreams.tv) v Bell Media Inc, and Chelsea (Municipality) v Canada (Attorney General) further demonstrate the stringency of the test in application.

In Macciacchera, the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic's (the Clinic) moved to intervene in an appeal concerning the lawfulness of the execution of an ex parte Anton Piller Order (the Order) (para 2). The Court denied the intervention, concluding that the Clinic's submissions were not of assistance for the specificmatters at issue (para 18). In particular, as the validity of the Order was not being challenged, the Clinic's submissions regarding, inter alia, the form of the order were not of assistance. Similarly, as there were no issues regarding a party's inability to

retain counsel during the execution of the Order, or to the independence of a solicitor in the execution of the Order, the Clinic's arguments regarding the adoption of a list of pre-approved solicitors or a roster were not of assistance.

In Chelsea (Municipality), the Union of Municipalities of Québec (UMQ) moved to intervene on an appeal concerning the reasonableness of the National Capital Commission's decision, which determined the payments in lieu of taxes payable to the municipality for federal properties located in Gatineau Park (para 1). The FCA noted that the UMQ had "nothing to contribute" that was different from the submissions of the appellant on the issues at hand (para 12). Additionally, it found that the UMQ did not have a real interest in the appeal as the appeal raises issues that are highly specific to Gatineau Park as opposed to municipalities in Québec generally.

Therefore, to be successful, proposed interveners must ensure that their submissions are tailored and useful to the issues defined by the litigants, and that their submissions provide a unique perspective that is not offered by the parties. As noted in Macciacchera, interveners have a defined role in proceedings and "are not given 'an open microphone'" to present on "whatever may be on their mind about a given case" (para 19).

Key takeaways

The test for intervention is now well-settled in the Federal Courts. It has become difficult for proposed interveners to obtain leave to intervene as the Federal Courts have taken a strict approach in the application of the test. Proposed interveners should demonstrate precisely how their intervention will serve to be useful and unique considering the specific issues before the court. Further, they must carefully tailor their submissions to the issues identified by the litigants without attempting to modify or add to them.

By

Beverley Moore, Nadia Effendi, Jiwan Sangha

Expertise

Disputes, Appellate Advocacy, Public Law Litigation

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.