

Court File No. T107333/5405 and T1074/5505

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N :

RICHARD WARMAN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

- and -

MARC LEMIRE

Respondent

**REPLY SUBMISSIONS OF THE APPLICANTS FOR INTERESTED PARTY
STATUS, THE LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA,
CANADIAN JEWISH CONGRESS and FRIENDS OF SIMON WIESENTHAL
CENTRE FOR HOLOCAUST STUDIES**

1. The League for Human Rights of B'nai Brith Canada, Canadian Jewish Congress and Friends of Simon Wiesenthal Centre for Holocaust Studies (the "Applicants"), make these submissions by way of reply to the submissions of the respondent, Marc Lemire, on their application for Interested Party Status.

2. Mr. Lemire offers two reasons for opposing the Applicants' intervention application. First, he says that the Applicants "offer nothing to the proceedings that cannot and will not be provided by the Attorney General of Canada and the Canadian Human Rights Commission" (p. 1 of Mr. Lemire's submissions). Second, he says that if the Applicants intervene, it will cost him more money because the hearing will be extended and he will have additional photocopying, faxing, and courier costs. The Applicants submit that the first argument is untrue on the facts, and that the second is not a reason to deny their application for interested party status.

3. On the first point, Mr. Lemire appears to suggest that because the Applicants, the Attorney General of Canada, and the Canadian Human Rights Commission, share the ultimate view that section 13 of the *Canadian Human Rights Act* is constitutional, the Applicants have nothing unique to add. However, the Human Rights Tribunal will determine the constitutionality or unconstitutionality of section 13 based on the evidence and argument put before it relevant to section 1 of the *Charter*, not on the basis of the number of parties in favour of a particular outcome. Thus, the relevant question is whether the Applicants are in a position to offer unique section 1 evidence and argument.

4. The Applicants represent a group that is a frequent target of hate propaganda. Members of minority groups including the Canadian Jewish community rely heavily on anti hate-speech legislation, such as section 13 of the *Canadian Human Rights Act*, for their physical and psychological security. As representatives of the Canadian Jewish community, and as groups that have consistently worked to combat hate-speech, the Applicants have a unique expertise and perspective to offer to the Tribunal.

5. Although Mr. Lemire correctly points out that the Applicants all have a long-standing interest and expertise in the laws and policies relating to hate speech, and that both courts and legislatures have heard submissions from them, the Attorney General of Canada and the Human Rights Commission Human Rights do not represent the views of the Applicants, or of the Canadian Jewish community.

6. A number of court decisions suggest that the fact that a proposed intervener may make submissions similar to those of a party is not a sufficient reason to deny leave to intervene. An intervener's submissions need only place the issues in a "slightly different perspective" than that of the parties. (See, for example, *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.))

7. Furthermore, the Applicants have undertaken not to duplicate the positions of the complainant and of the Commission, and to work with the complainant and counsel to the Commission to ensure that there is no duplication of evidence.

8. Mr. Lemire also opposes the Applicants' application for interested party status on the basis that he will incur additional costs. With respect, this is not a reason to deny the Applicants interested party status. The Ontario Court of Appeal has said, in the context of motions to intervene in the courts, that the mere fact that an intervention will expand the number of submissions to which the responding party will be obliged to reply to is for the benefit of the court, and should not be viewed as an injustice. (See, for example, *Louie v. Lastman* (2001), 208 D.L.R. (4th) 380 (C.A.)) The Applicants submit that the same principle should apply before this Tribunal. The Applicants have undertaken not to duplicate the positions or evidence provided by the other parties. Any evidence or argument that they present will therefore be for the potential benefit of the Tribunal, and not an injustice. The Tribunal can, if it sees fit, make whatever costs award it deems fair and appropriate after the hearing, based upon its views as to the merits and value to the Tribunal of the evidence adduced and arguments made by the proposed interveners.

9. Mr. Lemire also requests that the Tribunal order that the Applicants be required to pay the costs incurred by Mr. Lemire because of additional photocopying and courier costs, and the possibility of additional hearing time. The Applicants submit that such an order would be inappropriate. The Applicants are public interest organisations. They represent a vulnerable group that relies heavily on an anti-hate speech provision that Mr. Lemire is trying to have declared unconstitutional. Should the Tribunal be of the view that the Applicants can make a useful contribution to what is ultimately a public interest issue, they should not be penalised for so doing. Indeed, the Applicants submit that this is precisely the kind of case in which parties ought to bear their own costs.

10. The Applicants agree that, if they are granted interested party status, Mr. Lemire may serve only Mr. Kurz as representative of the Applicants, thereby minimising his photocopying, faxing and courier costs.

February 20, 2006

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Louie et al. v. Lastman

[Indexed as: Louie v. Lastman]

Court File No. M27810/C36567

Ontario Court of Appeal
*Morden J.A.***Judgment rendered: December 14, 2001*

Appeal — Intervention — Adults bringing action against putative father for damages — Alleging failure to provide adequate support during dependency — Basing claims on breach of fiduciary duty, unjust enrichment and torts — Motions judge striking out statement of claim as disclosing no reasonable cause of action — Foundation with experience representing young people in family law matters seeking leave to intervene in appeal — Leave granted — Foundation able to make useful contribution without causing injustice to parties — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 13.03(2).

Two adult males brought an action against a man whom they had recently learned was likely their biological father. A motions judge struck out their claims, except the request for a declaration of paternity, on the basis that the claims were certain to fail at trial. The men appealed and a Foundation with considerable experience representing young people in family law matters moved for leave to intervene. It wished to argue that the legislation dealing with child support did not constitute a complete code and that biological parents always had fiduciary obligations to their children.

Held, the motion should be granted.

The Foundation would be able to make a useful contribution to the appeal without causing injustice to the parties. It would place the issues in a slightly different perspective and provide arguments regarding the potential impact of the decision on children generally.

Cases referred to

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 46 Admin. L.R. 1, 45 C.P.C. (2d) 1, 2 C.R.R. (2d) 327, 74 O.R. (2d) 164, 22 A.C.W.S. (3d) 292 — *consd*

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 5(3) [am. 1996, c. 25, s. 9]
Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Family Law Act, R.S.O. 1990, c. F.3

* Designated by the Chief Justice of Ontario under s. 5(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to hear this motion.

Rules referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
rule 13.03(2)

Conventions referred to

Convention on the Rights of the Child, November 20, 1989, 28 I.L.M. 1456

art. 3
art. 4
art. 5
art. 9
art. 12

MOTION for leave to intervene in an appeal from a judgment of Benotto J., 199 D.L.R. (4th) 726, 7 C.C.L.T. (3d) 96, 54 O.R. (3d) 286, 105 A.C.W.S. (3d) 375, granting a motion to strike out a statement of claim for failure to disclose a reasonable cause of action.

Martha Mackinnon, for moving party, Canadian Foundation for Children, Youth and the Law (written submissions only).

Sheila Block and *Alexandra Clark*, for responding party, defendant in appeal, Melvin Douglas Lastman (written submissions only).

No one appearing for appellants, Kim Nathan Louie and Todd Sheldon Louie.

The judgment of the court endorsed on the appeal record was as follows:

[1] The Canadian Foundation for Children, Youth and the Law moves for an order under rule 13.03(2) granting it leave to intervene as a friend of the court in this appeal by the plaintiffs from a judgment of Benotto J., the reasons for which are reported at 54 O.R. (3d) 286, 199 D.L.R. (4th) 726 (S.C.J.). The motion has been argued in writing by the moving party and the respondent in the appeal. The appellants have not filed a factum but have notified the court that they support the motion.

[2] I am satisfied that sufficient has been shown to grant the order sought subject to the conditions set forth at the conclusion of this endorsement.

[3] The basic matters to be considered on a motion such as this are set forth in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.) at 167, particularly "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".

[4] As far as the issues in this appeal are concerned, it may be noted from the appellants' factum that the number of matters now in issue is reduced from the number argued before, and decided by, the motions judge. They now all relate to the submitted fiduciary obligations of the defendant to the plaintiffs and no longer include claims based on unjust enrichment or tort.

[5] The moving party has been granted intervener status in many previous cases at all levels of tribunal and court. In family law matters it has represented youth who seek access to their siblings and it has significant experience representing youth in support applications against their parents. I refer now to some of the basic submissions it would make on the appeal.

[6] The moving party submits that the *Family Law Act*, R.S.O. 1990, c. F.3, and the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), are not "complete codes" with respect to support owed by parents to their children. In making these submissions, it would refer to rights contained in the United Nations *Convention on the Rights of the Child* as they inform and complement the concept of "best interests" and to the effect of the ratification of the *Convention* on domestic law.

[7] Article 4 of the *Convention* requires state parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the *Convention*. Article 3 provides that in all actions concerning children, public and private institutions, courts and administrative bodies and legislative bodies shall make the best interest of the child a primary consideration. Articles 5 and 12 outline the responsibilities of parents with respect to their children and the right of the child to be heard in proceedings affecting him or her. Article 9 provides that children have a right of access to their parents.

[8] The affidavit of Paul Wollaston, Chair of the moving party, concludes: "If granted leave to intervene, the proposed intervenors will rely on relevant domestic and international human rights obligations and will make reference to relevant statutes and common law principles relating to fiduciary duties, the best interests of children and the standing of children in processes which affect them."

[9] The moving party intends to submit that biological parents, as such, without it being necessary to show they have assumed power (as held by the motions judge), have the power or discretion of a

fiduciary. It intends to rely on international documents to inform its argument on the nature and scope of the relevant fiduciary obligations. On the same basis, it will submit that children have the right to know the identity of their biological parents unless it can be shown that it is not in their best interests that the identify be disclosed. In addition, once the identity of the parent is known, the child should be allowed to seek support in a timely way. Support entitlement should be retroactive to at least the date on which the parent knows that he or she is a parent, or reasonably ought to have known.

[10] The moving party submits that the resolution of the issues in this case, or, at least some of them, will have far-reaching consequences to a number of children in Ontario. In particular, all children are affected by a decision as to whether parents owe a fiduciary obligation to their children that exists independently of, and in addition to, any statutory duties with respect to child support. All children whose parents have separated are affected by a custodial parent's decision to waive child support. Many children will be deeply affected by any decision with respect to a parent's obligation to disclose his or her status as biological parent, if known. Children cannot (or can only with extreme difficulty) exercise their rights to support and access to their parents if their parents do not disclose their status as parent to the children.

[11] The general position of the responding party is that the moving party's proposed submissions would be of no assistance in resolving the issues on the appeal. With respect, it appears to me that the thrust of the responding party's submissions in this regard is that the proposed submissions of the moving party are not valid or are of little weight. I wish to make it clear that in granting intervener status I do not express any view on the ultimate merit of the moving party's position. I merely recognize that the moving party has considerable experience in the subject matter of the appeal, or certain aspects of it, which enable it "to place the issues in a slightly different perspective" (*Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*, *supra*, at 167) from that of the appellants.

[12] While it may be that the actual decision of the court in this appeal will have impact only on persons in exactly the same position as the plaintiffs, I do not exclude the possibility that aspects of, or

steps in, the court's reasoning could bear on the rights of other children and claims they may have against their biological parents. At the end of the day, the court may not consider the moving party's submissions to be of assistance. As I have just said, I express no opinion on the merits of its position. What is important is that the court, before making its decision on the correct result and on the appropriate reasons that support this result, should have all of the relevant possibilities brought to its attention, including submissions on the impact of its judgment, not only on the parties, but on those not before the court whose positions may be similar to but not the same as the parties.

[13] I am satisfied that the intervention order can be made without causing any injustice to the responding party. It is true that the intervention will expand the number of submissions to which the responding party will be obliged to reply but this, which is for the potential benefit of the court, is not an injustice. Further, having regard to the conditions I attach to the intervention order, the responding party may be compensated for any increased costs resulting from the intervention but will not be liable for costs in connection with it.

[14] The conditions I impose are substantially those in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*, *supra*.

[15] I grant leave to the moving party to intervene as a friend of the court on the following conditions:

- 1) that it takes the record as it is and will not be permitted to adduce further material;
- 2) that it will not seek costs on the appeal, but that costs may be awarded against it;
- 3) that it deliver its factum on or before January 15, 2002;
- 4) that the time for delivery of the respondent's factum both in the appeal and in response to the moving party's factum, is extended to February 22, 2002; and
- 5) that the time allocated for its oral submissions be fixed by the court hearing the appeal.

[16] The costs of this motion will be costs in the appeal.

Motion granted.

Further, if s. 144(2) is applicable to this situation, the reasoning process would necessarily include a balancing of the hardships to the respective parties if the order sought is granted or refused. Accepting that the Attorney General represents the public interest, we are not persuaded that the considerations involved in this process preponderate in favour of the moving party.

It is the position of counsel for the Attorney General that "[a] stay would serve to send a clear message to all retailers and retail employees that charges may continue to be laid under the Act pending appeal and that convictions may ultimately result if the appeal is successful". Assuming that counsel's proposition is correct, we do not think that this is a consideration which carries significant weight or reflects an appropriate purpose for exercising the power to stay. Catzman J.A. expressed himself to the same effect with respect to the interpretation and application of Rule 63. What must also be weighed in the balance is that, if the appeal is unsuccessful, those whose constitutional rights have been infringed by the legislation will have been deprived of the benefit of a judgment so declaring.

In the result, this motion is dismissed, with costs to the responding parties in the appeal.

Motion dismissed.

**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.]

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. 458

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]

APPLICATION for leave to intervene as added party or friend of the court.

David A. McKee, for People for Sunday Association of Canada, applicant for leave to intervene.

Elizabeth C. Goldberg and *Hart Schwartz*, for Attorney General of Ontario.

Robert S. Russell and *Freya J. Kristjanson*, for Loblaws Supermarkets Ltd.

Julian N. Falconer, for Great Atlantic & Pacific Co. of Canada Ltd.

John B. Laskin and *Kent E. Thomson*, for Oshawa Group Ltd.

Robert J. Arcand and *Sharon M. Addison*, for Steinberg Inc. (c.o.b. Miracle Food Mart).

Angus T. McKinnon, for Hudson's Bay Co.

DUBIN C.J.O.:—This is an application by the People for Sunday

Association of Canada for leave to intervene as an added party or as a friend of the court in the appeals now pending from the judgment [in the High Court of Justice on June 22, 1990] of Mr. Justice Southey [reported 73 O.R. (2d) 289, 90 C.L.L.C. ¶14,023], who held that the *Retail Business Holidays Act*, R.S.O. 1980, c. 453 (the Act), as amended in February 1989, is in contravention of the *Canadian Charter of Rights and Freedoms* and is thereby unconstitutional.

This is the first time that the constitutionality of the *Retail Business Holidays Act*, as amended, has come before this court, although it has twice before considered the constitutionality of its predecessor.

The applicant is a non-profit organization incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. The current objects of the corporation include:

- (a) To affirm Sunday as a unique weekly opportunity, for as many people as possible, to enjoy spiritual, physical, moral and cultural renewal;
- (b) To cultivate the conviction of Canadian people that the preservation of Sunday as the national, weekly day of rest is necessary for the well-being of the individual, the family and the community;
- (c) To monitor carefully the drafting and enactment of all legislation bearing on Sunday labour or business and to press for new legislation or amendment of existing law where deemed necessary to minimize activity on Sunday;
- (d) To encourage active enforcement of laws protecting the special status of Sunday.

Historically, the membership of the Association was drawn from religious groups. While certain of such groups are still members of the Association, the majority of its members are representatives of trade unions, small retail businesses and trade associations. Included in its membership is a trade union, the majority of whose members work in the retail food sector. The membership also includes retail associations which represent small retail businesses, often owned and operated by single families.

Over the years the Association has taken an active role on issues arising under the present statute, as well as its predecessor, and, in particular, has addressed the role that municipalities play in the present Act, a core factor in the reasons for judgment of Mr. Justice Southey.

a In constitutional cases, including cases under the *Canadian Charter of Rights and Freedoms*, which is the case here, the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions.

b 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.

c
d 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.

e
f 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.

g 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.

h The relevant provisions of our rules of practice relating to intervention [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]] are as follows:

18.01(1) Where a person who is not a party to a proceeding claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that he or she may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding,

the person may move for leave to intervene as an added party.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

18.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

18.03(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

It is apparent that the *Retail Business Holidays Act* does not affect the applicant corporation as such or its employees, and I do not think that leave to intervene as an added party pursuant to rule 18.01 would be appropriate.

However, in my opinion, it is appropriate to grant leave to intervene under rule 18.02, as a friend of the court, for the purpose of rendering assistance to the court by way of argument.

In the result, I would grant leave to the applicant to intervene on such a basis subject to the following conditions:

- (1) that the applicant takes the record as it is and will not be permitted to adduce further evidence;
- (2) that it will not seek costs on the appeals, but that costs may be awarded against it;
- (3) that it file its factums within seven days of having been served with the factums of the Attorney General for Ontario;
- (4) that the costs of this application will be costs in the appeal.

Order accordingly.