File number: 35100

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

MICHEL THIBODEAU and LYNDA THIBODEAU

Appellant
(Respondent)

– and –

AIR CANADA

Respondent
(Appellant)

– and –

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Intervener
(Intervener)

AND BETWEEN:

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Appellant
(Intervener)

– and –

AIR CANADA

Respondent
(Appellant)

REPLY OF THE PROPOSED INTERVENERS, THE ONTARIO CIVIL LIBERTIES ASSOCIATION (OCLA) AND DR. GÁBOR LUKÁCS

Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*

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REPLY MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENERS, THE ONTARIO CIVIL LIBERTIES ASSOCIATION (OCLA) AND DR. GÁBOR LUKÁCS

Overview

1. The respondent, Air Canada, opposes the joint motion for leave to intervene of OCLA and Dr. Lukács on four grounds: (a) non-compliance with Rule 15 of the *Rules of the Supreme Court*; (b) lack of experience or relevant expertise; (c) taking a clear position as to the heart of the litigation; and (d) lack of usefulness of the proposed intervention. In what follows, each of these objections is shown to be unfounded.

A. Possible Procedural Irregularities

2. The heading of Rule 15 of the *Rules of the Supreme Court* is "Representation of Parties" (emphasis added). Rule 2 provides that:

> "party" means a person named in the style of cause in accordance with Rule 22 including any person added or substituted as a party under Rule 18, but where referring to the court appealed from, it means a person who was a party in that court.

According to Rule 22(3)(c)(ii), only a person who has already been granted leave to intervene pursuant to Rule 59 is to be named in the style of the cause. Thus, the scope of Rule 15 extends to appellants, respondents, and interveners, but does not entail proposed interveners, such as OCLA and Dr. Lukács are at the present time. Therefore, Air Canada's objection is premature. Once this Honourable Court grants leave to intervene to OCLA and Dr. Lukács, they will become interveners, and at that point in time, Rule 15 will apply to them.

3. In the alternative, if this Court finds that Rule 15 also applies to proposed interveners, OCLA and Dr. Lukács ask that the Honourable Court exercise its discretion under Rules 8(1) and 15(3)(b), and excuse this procedural irregularity, which causes no prejudice to the parties, and would not be the only one among the proposed interveners. Indeed, according to the docket, IATA's motion for leave to intervene is incomplete due to failure to pay filing fees. OCLA and Dr. Lukács submit that such and similar procedural irregularities, which cause no prejudice, ought to be excused in the interest of an informed debate on the important substantive questions of law that the appeal raises.

B. Experience and Relevant Expertise

4. Air Canada confuses OCLA's activities, which consist chiefly of promoting the observance of fundamental human rights and civil liberties,[1] with OCLA's special interest in freedom of expression. The experience and expertise of OCLA is by far not limited to freedom of expression.

5. In the case at bar, OCLA is seeking leave to intervene jointly with Dr. Lukács, and the proposed intervention is a collaborative effort of OCLA and Dr. Lukács.[2] Thus, it is not OCLA alone that has to demonstrate having experience and relevant expertise, but rather OCLA and Dr. Lukács collectively. Since Air Canada does not dispute the experience and relevant expertise of Dr. Lukács, Air Canada's objection based on lack of experience and relevant expertise must fail.

C. Taking a Clear Position as to the Heart of the Litigation

6. The proposed intervention of OCLA and Dr. Lukács invites the Court to adopt an interpretation of the *Montreal Convention* and its Article 29 that reconciles a need for uniformity in certain areas of aviation law with the principle of restitution stated in the preamble of the *Montreal Convention*. This approach is dictated by the common sense requirement of avoiding absurd results, consistent with the intent of Parliament in ratifying the *Montreal Convention*, and it is supported by a wealth of authorities from Europe and elsewhere. The proposed intervention also outlines, among other things, how the law applies to the case at bar.[3]

7. Air Canada cited no authority in support of the proposition that an intervener is precluded from addressing how its position with respect to the law applies to the specific facts of the case. On the contrary, in the absence of such submissions, the intervention reduces to a mere impractical and academic discussion that bears no relevance to the case, and is of no assistance to the Court.

8. Air Canada's objection that OCLA and Dr. Lukács are taking a clear position with respect to the heart of the litigation underscores the relevance of the proposed intervention to the case at bar, amounts to an admission by Air Canada of same, and is a feature that distinguishes the proposed intervention of OCLA and Dr. Lukács from the proposed intervention of IATA.

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1 Hickey Affidavit, ¶6.
2 Lukács Affidavit, ¶4.
3 Memorandum of Argument of the Proposed Interveners, ¶¶26-27.

D. Usefulness of the Proposed Intervention

9. Air Canada questions the usefulness of the proposed intervention on the basis that, in its opinion, the position taken by OCLA and Dr. Lukács was rejected in the jurisprudence, and there is an overlap between the authorities cited by the appellants and the proposed interveners. These contentions, however, are unfounded.

10. Unsurprisingly, Air Canada wishes to confine the attention to outdated jurisprudence from courts in the United States, the United Kingdom, and Canada that support the "full preemption" interpretation of the *Warsaw Convention*, and authorities that fail to distinguish between the 84-year-old *Warsaw Convention* and the *Montreal Convention*. These jurisdictions, however, are but three of the 104 parties to the *Montreal Convention*. A substantial portion of the parties to the *Montreal Convention* reject the "full preemption" doctrine, because it leads to absurd results, and it is inconsistent with the principle of restitution enshrined in the preamble of the *Montreal Convention*. Thus, there is a wealth of authorities to support the position of OCLA and Dr. Lukács.

11. Since there are authorities both for and against the "full preemption" doctrine, the question cannot be determined by a mere review of the jurisprudence. It is for this reason that OCLA and Dr. Lukács invite this Court to conduct a fresh and original analysis of Article 29 of the *Montreal Convention* based on the principles of the *Vienna Convention*.[4]

12. It is not uncommon for parties to have an overlapping list of authorities even if they advocate for opposite positions. Thus, the mere fact that a few authorities cited by the appellants are also mentioned by OCLA and Dr. Lukács does not diminish the substantial differences between the perspective and submissions of the proposed interveners and the appellants:

(a) The appellants represent the interests of francophone travellers. The outcome of the appeal, however, may have a profound impact on the rights of all air passengers on international itineraries, whose interests are currently unrepresented. OCLA and Dr. Lukács propose to intervene in order to remedy this state of affairs, inform the Court about the significant implications of the appeal beyond the scope of the *Official Languages Act*, and to advocate for an interpretation of the *Montreal Convention* that strikes a balance between the interests of passengers and airlines, and harmonizes with the principle of restitution.

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[4] *Id.*, ¶21.

(b) The appellants rule out any interaction between the *Montreal Convention* and the *Official Languages Act*. OCLA and Dr. Lukács, however, submit that a limited interaction is possible in the context of the exclusion of punitive, exemplary or any other non-compensatory damages (Article 29, second sentence).[5]

(c) The Commissioner of Official Languages heavily relies on the quasi-constitutional nature of the *Official Languages Act*, and contends that the appeal must be resolved within Canadian law.[6] OCLA and Dr. Lukács, however, propose to resort to the *Vienna Convention on the Law of Treaties* as a primary tool, and invite the Court to conduct a *de novo* analysis of Article 29 of the *Montreal Convention* to reject the "full preemption" doctrine.

(d) The appellants seek to distinguish the present case from the cases *Sidhu* and *Tseng*, and seem to have argued before the Federal Court of Appeal that *Sidhu* supported their position.[7] OCLA and Dr. Lukács, however, submit that *Sidhu* was effectively reversed by the European Court of Justice, and that *Sidhu* and *Tseng* are both inapplicable to the *Montreal Convention*, because the *Montreal Convention* substantially differs from the *Warsaw Convention*, which was considered in both *Sidhu* and *Tseng*.[8]

(e) Finally, OCLA and Dr. Lukács propose to closely examine the intent of Parliament in ratifying the *Montreal Convention*,[9] including the statement made by the Parliamentary Secretary to the Minister of Transport, the sponsor of the bill. This argument was put forward only by OCLA and Dr. Lukács.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 7th day of October, 2013.

JOSEPH HICKEY

Executive Director of the Proposed Intervener,
the Ontario Civil Liberties Association

DR. GÁBOR LUKÁCS

Proposed Intervener

[5] *Id.*, ¶¶23, 26-27.
[6] Response of the Commissioner to the motion for leave to intervene, dated October 3, 2013, p. 2.
[7] *Air Canada v. Thibodeau*, 2012 FCA 246, ¶31.
[8] Memorandum of Argument of the Proposed Interveners, ¶¶20(a), 21.
[9] *Id.*, ¶24.