

CANADA / JUDGMENT

Beaudoin v. British Columbia (Attorney General)

2022 BCCA 66

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 66 Beaudoin v. British Columbia (Attorney General)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Beaudoin v. British Columbia (Attorney General),

2022 BCCA 66

Date: 20220211

Docket: CA47363

Between:

Alain Beaudoin, Brent Smith, John Koopman, John Van Muyen, Riverside Calvary Chapel,
Immanuel Covenant Reformed Church and Free Reformed Church of Chilliwack, B.C.

Appellants

(Petitioners)

And

The Attorney General of British Columbia and Dr. Bonnie Henry

in her capacity as Provincial Health Officer for the Province of British Columbia

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Marchand

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated March 18, 2021 (Beaudoin v. British Columbia, 2021 BCSC 512, Vancouver Docket S210209).

Oral Reasons for Judgment

Counsel for the Appellants (via videoconference):

M. Moore

Counsel for the Respondents (via videoconference):

E.C. Lapper

S.A. Davis

Counsel for the Proposed Intervenor, The Association for Reformed Political Action (ARPA) Canada (via videoconference):

G. Trotter

Place and Date of Hearing:

Vancouver, British Columbia

February 4, 2022

Place and Date of Judgment:

Vancouver, British Columbia

February 11, 2022

Summary:

The applicant seeks intervenor status in an appeal from a judgment dismissing the appellants' Charter challenge to certain public health orders made by the Provincial Health Officer to combat the COVID-19 pandemic. The orders aimed to reduce the transmission of COVID-19 by prohibiting, among other things, in-person religious gatherings. Held: Application allowed in part and with conditions. The applicant has a broad representative base and the case legitimately engages its interests in the public law issues raised on appeal. Though the applicant shares a common theological conviction and mission with a number of the appellants, certain of its proposed arguments provide a unique and different perspective that will assist the Court without seeking to expand the scope of the appeal beyond the issues raised by the parties.

MARCHAND J.A.:

Introduction

[1] This is an application for intervenor status in an appeal from a judgment of Chief Justice Hinkson indexed at 2021 BCSC 512.

- [2] The appellants are churches and their pastors. Two of the three churches identify as Reformed Churches. They appeal the dismissal of their Charter challenge to certain public health orders made by the Provincial Health Officer ("PHO") to combat the COVID-19 pandemic. The orders aimed to reduce the transmission of COVID-19 by prohibiting, among other things, in-person religious gatherings.
- [3] The Chief Justice concluded that the appellants had not exhausted an available statutory reconsideration process and so were not entitled to pursue relief under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241. The Chief Justice went on to find that the orders infringed s. 2 of the Charter but were justified under s. 1. In view of these findings and the fact that the appellants addressed their ss. 7 and 15 Charter issues in a summary way, the Chief Justice considered it was unnecessary to expand the jurisprudence relating to ss. 7 and 15. He therefore made no finding with respect to those sections.
- [4] The applicant, the Association for Reformed Political Action (ARPA) Canada ("ARPA Canada"), seeks leave to intervene on public interest grounds. Although ARPA Canada and a number of the appellants belong to the same faith group, ARPA Canada says they bring a different and useful perspective to the issues raised on appeal that will be of assistance to the Court.
- [5] The Chief Justice granted ARPA Canada leave to intervene on specified issues in the proceedings before him. Trial courts in Ontario and Manitoba have also granted ARPA Canada leave to intervene in similar proceedings in those jurisdictions.
- [6] The respondents oppose ARPA Canada's application. They argue ARPA Canada's perspective is "entirely aligned with, and duplicative of, that of the appellants." They characterize ARPA Canada's proposed intervention as a prohibited form of "me too" intervention.
- [7] The appellants take no position on ARPA Canada's application, but, if ARPA Canada is granted leave to intervene, the appellants seek an extension of time so that their reply factum can address the issues raised by ARPA Canada.

Legal Framework

- [8] The legal principles on ARPA Canada's application are not in dispute.
- [9] Rule 36 of the Court of Appeal Rules governs applications for intervenor status. It provides, in part, as follows:

36(1) Any person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine.

...

- (3) In any order granting leave to intervene, the justice
- (a) is to specify the date by which the factum of the intervenor must be filed, and

- (b) may make provisions as to additional disbursements incurred by the appellant or any respondent as a result of the intervention.

...

- (5) Unless a justice otherwise orders, an intervenor

- (a) must not file a factum that exceeds 20 pages,
- (b) must include in the factum only those submissions that pertain to the facts and issues included in the factums of the parties, and
- (c) is not to present oral argument.

[10] There are two routes to intervenor status: (1) the applicant has a direct interest in the matter; or (2) the applicant has a public interest in the public law issue in question and brings a different and useful perspective to the issue that will be of assistance to the Court: *R. v. Watson and Spratt*, 2006 BCCA 234 at para. 3 (Chambers); *Carter v. Canada*, 2012 BCCA 502 at paras. 12-13 (Chambers). ARPA Canada seeks leave only on the public interest ground.

[11] In *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCCA 282 at para. 14 (Chambers), Justice Garson summarized the factors to consider when an applicant seeks intervenor status on the public interest ground:

- a) Does the proposed intervenor have a broad representative base?
- b) Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?
- c) Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?
- d) Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?

[12] When hearing an application to intervene on the public interest ground, courts are not concerned with the fairness to or the interests of the intervenor, but rather with ensuring important points are not overlooked: *A.B. v. C.D.*, 2019 BCCA 297 at para. 33 (Chambers); *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 at para. 8 (Chambers). Intervenors must therefore show that it is in the public interest (or the Court's interest) that they be heard: *Equustek* at para. 8.

[13] When Charter issues are raised for the first time, the courts are permitted to take a more generous approach in order to gain "the assistance of argument from all segments of the community": *Canadian Labour Congress v. Bhindi and London* (1985), 61 B.C.L.R. 85 at 97, 1985 CanLII 384 (C.A.); *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 3 at para. 10 (Chambers).

- [14] However, an intervenor in a Charter application is prohibited from raising entirely new issues, including making submissions on Charter grounds not raised by the parties: *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270 at para. 83, *aff'd* 2013 BCCA 147, *rev'd* in part on other grounds 2015 SCC 7.
- [15] The role of intervenors is not to support the position of a party, but rather to make principled submissions on pertinent points of law. Although an intervenor's submissions may ultimately support one party's position, that is not their purpose: *Friedmann v. MacGarvie*, 2012 BCCA 109 at para. 28 (Chambers).
- [16] An intervenor whose interests appear to align with one of the parties may still be granted intervenor status where the intervenor provides a unique perspective that might assist the court in resolving the appeal: *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 402 at para. 18 (Chambers). In such cases, the concern for partiality may be mitigated by a clear order limiting the scope of the intervenor's participation on appeal: *Araya* at para. 18.
- [17] Typically, a court grants the right to intervene on discrete issues only: *Janzen v. British Columbia (Attorney General)* (1993), 38 B.C.A.C. 268 at 272, 1993 CanLII 1332 (Chambers), *aff'd* (1994), 45 B.C.A.C. 242, 1994 CanLII 2662, leave to appeal to SCC *ref'd*, 24213 (3 November 1994).
- [18] Finally, an intervenor before the Supreme Court of British Columbia does not automatically gain intervenor status before this Court. Rather, the test must be met at each level: *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14 at paras. 11-12, leave to appeal to SCC *ref'd*, 35236 (19 September 2013); *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2021 BCCA 138 at para. 4 (Chambers).

Who is ARPA Canada?

- [19] ARPA Canada is a federally incorporated not-for-profit organization that advocates for Reformed Christians in legal and political spheres. It has been active in Canada since the 1970s. None of its members are appellants and none of the appellants has any power to direct ARPA Canada in this or any other legal proceeding.
- [20] ARPA Canada says it has two missions: (a) educating, equipping, and assisting members of Canada's Reformed churches and the broader Christian community as they seek to winsomely participate in politics and public life; and (b) bringing a Reformed Christian perspective to civil authorities in Canada, including the courts.
- [21] ARPA Canada is an experienced intervenor. They have been granted intervenor status in 18 previous cases, including cases involving constitutional issues relating to religious matters: see, for example, *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423; *A.B. v. C.D.*, 2020 BCCA 11.

Proposed Submissions

[22] Broadly, ARPA Canada proposes to submit that:

1. Institutional pluralism is a foundational Charter principle that corresponds with the Reformed Christian concept of sphere sovereignty. Under both concepts, government authority is limited by other sources of authority in a citizen's life. State justification for limits on fundamental freedoms under s. 1 therefore requires consideration of the importance of, and deference to, non-state institutions.
2. Although the respondents have admitted infringements of s. 2 of the Charter, a full appraisal of the nature and severity of those infringements is necessary to ground the s. 1 analysis. The prohibitions of the public health orders strike at the core of the intersection of freedom of religion, freedom of expression and freedom of assembly. The s. 1 analysis must give due weight to the impact of each infringement as well as the intersectional impact of the infringements collectively.
3. Section 15 of the Charter protects religious equality. Under s. 15, the correct comparison is between particular activities performed for a religious purpose that were prohibited and activities of a similar functional nature performed for a non-religious purpose that were not. Contrary to s. 15, the prohibitions at issue discriminated against all religious believers as compared to non-believers on the basis of religion. If this Court finds the Chief Justice erred in failing to find the orders breached s. 15, ARPA Canada will restrict its submissions to the legal implications of the breach.
4. The orders cannot be saved under s. 1 of the Charter because they were neither minimally impairing nor proportionate. In particular, the orders prohibited constitutionally protected activities instead of restricting them as was done for non-constitutionally protected activities with a similar risk profile. Particularly in view of the broad principle of respect for institutional pluralism, the prohibition against constitutionally protected activities was overbroad and disproportionate to the risk of transmission.

Discussion

- [23] The respondents accept, and I agree, that ARPA Canada has a broad representative base and the case legitimately engages ARPA Canada's interests in the public law issues raised on appeal. I must decide only whether ARPA Canada has a unique and different perspective that will assist the Court and whether they seek to expand the scope of the appeal beyond the issues raised by the parties.
- [24] I have reviewed the appellants' factum. It is focused on the specifics of the orders, the record before the PHO, the impact of the orders on the appellants and the findings of the Chief Justice. In my respectful view, certain aspects of ARPA Canada's proposed submissions rise well above these specific details of the case at hand and consider broader and important constitutional issues not addressed by the appellants.

- [25] Though ARPA Canada shares a common theological conviction and mission with certain of the appellants, there is no hint that ARPA Canada is strategizing with them to skirt page limits on factums and make arguments that the appellants should make for themselves.
- [26] I am satisfied that certain of ARPA Canada's proposed arguments are in the "Goldilocks" zone of providing a distinct and helpful perspective on the issues raised by the parties without introducing entirely new issues or hijacking the proceedings to serve their own ends.
- [27] So, which of ARPA Canada's arguments lie within the "Goldilocks" zone? In my view, the Court stands to benefit from ARPA Canada's arguments regarding institutional pluralism and the need to consider the intersectional impact of the s. 2 Charter breaches. Respectfully, the balance of ARPA Canada's arguments (on s. 15, minimal impairment and proportionality) are duplicative of the arguments in the appellants' factum or represent arguments the appellants are well-placed to make during oral submissions.

Disposition

- [28] I grant ARPA Canada's application for leave to intervene. ARPA Canada may only make submissions regarding institutional pluralism and the need to consider the intersectional impact of the s. 2 Charter breaches as summarized at subparas. 23(a) and (b) of its written submission filed on December 22, 2021. Its factum must not exceed ten pages and must be filed and served on the parties on or before March 1, 2022.
- [29] ARPA Canada may not duplicate arguments made by the appellants and may not adduce new evidence or otherwise supplement the appeal record.
- [30] I grant the respondents leave to file a factum in response to ARPA Canada's factum. The respondents' response factum must not exceed ten pages and must be filed and served on the appellants and intervenor by March 11, 2022.
- [31] Given the obvious alignment of interests, I do not grant the appellants' request for an extension of time to file their reply factum. To be clear, the appellants' reply factum is due in accordance with the usual timelines and must be confined to matters raised in the respondents' factum.
- [32] I leave the question of whether ARPA Canada may make oral submissions to the division hearing the appeal.

"The Honourable Mr. Justice Marchand"

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