

COURT OF APPEAL FOR ONTARIO

CITATION: Dorsey v. Canada (Attorney General), 2022 ONCA 762

DATE: 20221107

DOCKET: M53812 (C70956)

Sossin J.A. (Case Management Judge)

BETWEEN

Frank Dorsey and Ghassan Salah

Applicants (Appellants)

and

The Attorney General of Canada

Respondent (Respondent)

and

The John Howard Society of Canada

Intervener

Jessica Orkin, Adriel Weaver, Simon Borys, and Kate Mitchell, for the appellants

John Provart and Wendy Wright, for the respondent

Paul Quick, for the intervener

Heard: in writing

REASONS FOR DECISION

[1] Following the case management conference via Zoom held on September 29, 2022 the Court directed that the appellants, respondent and the intervener John Howard Society of Canada (“JHSC”) provide their views on

whether the JHSC has a right to participate in this appeal on the basis that it was granted status as a party intervener in the court below.

[2] The appellant and respondent have now advised that they consent to JHSC be granted leave to intervene as an added party to the appeal.

[3] While the parties also agree that the scope of the JHSC's participation as an added party intervener in the appeal is subject to the court's discretion, the parties disagree as to the appropriate scope of the JHSC's intervention, such as how the JHSC will be treated for purposes of the length of factum, and allocation of oral argument. The terms of the JHSC's intervention need not be addressed at this juncture as there will be a separate case management conference on preparation for the appeal.

[4] While the outcome of the JHSC's status in the court is no longer in dispute, the parties take differing positions on how the court should treat parties who were granted status as a party in the proceeding under appeal.

[5] The parties agree that r. 13 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 governs the question of interveners being added as parties to a proceeding.

[6] Rule 13 provides,

Leave to Intervene as Added Party

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person 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.

(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.

Leave to Intervene as Friend of the Court

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, 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.

Leave to Intervene in Divisional Court or Court of Appeal

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.

(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 or Associate Chief Justice of Ontario or a judge designated by either of them.

[7] The JHSC's position is that having been added as a party intervener to the proceeding in the court below, the JHSC remains an added-party intervener in the appeal, without need to re-apply for leave. In its view, the JHSC was granted status as an added party to this proceeding, not just a stage of it. The Rules define and

use “proceeding” to refer to the continuity of an action or application’s process through the courts, including any appeals. Under r. 13.01 of the *Rules of Civil Procedure*, courts may add a person “as a party to the proceeding”, which is in contrast to r. 13.02, which expressly states that a person may, “and without becoming a party to the proceeding”, intervene as a friend of the court.

[8] The JHSC also submits that the jurisprudence supports JHSC’s status as a continuing party on appeal. Nordheimer J. (as he then was) in *North American Financial Group Inc. v Ontario (Securities Commission)*, 2017 ONSC 2965 (Div. Ct.), declined to make an order that would prohibit the added party interveners from appealing or seeking leave to appeal any order of the Divisional Court, and held at para. 10:

It seems to me that, in the normal course, where an intervener is given leave to intervene as a party, the intervener should enjoy the same rights of appeal as any other party does, again restricted to the issues in which their interests are engaged. While there may be cases where an intervener should not be afforded those rights of appeal, in my view, that would be the unusual result, not the normal one.

[9] However, in *Hearn v. McLeod Estate*, 2019 ONCA 682, 439 D.L.R. (4th) 217, an added-party intervener was denied status as a party on appeal. The respondent relies on this precedent to argue that leave must be sought afresh where an added party to a matter wishes to continue that status on appeal.

[10] In *Hearn*, the appeal was uncontested, and the intervener did not respond to a letter inquiring whether it intended to participate, did not meet the filing deadlines, and made a late adjournment request. The court held, at para. 9:

On April 1, 2019, Mr. Panacci wrote to this court requesting an adjournment, and effectively asserted that intervenor status in the court below gave him the rights of a party in this matter. The panel refused the adjournment request. On April 8, 2019, Mr. Panacci requested leave to file a factum, which we refused on the basis that his clients were not parties. [Emphasis added.]

[11] The court in *Hearn* did not refer to the *Rules of Civil Procedure* or the basis for its decision and the treatment of the intervening parties in that case should be viewed as arising from and limited to the factual matrix before the court in that case.

[12] Generally, interveners who were added as parties in a proceeding being appealed from should expect to continue as parties on appeal, and to have this confirmed through the appeal management process, without having to make a fresh motion under r. 13.03(2).

[13] However, this is not a right of participation on the appeal. Rather, interveners may consider that, pursuant to the discretion afforded to the court under r. 13.03(2), they will be granted leave to continue as an added party unless there are intervening events or exceptional circumstances which justify the court declining to grant their continuing intervention as a party. In cases where such

grounds are raised and this issue is contested, the intervening party should make a motion under r. 13.03(2) to have their status determined.

[14] The status of the JHSC as an added party intervener in this court is confirmed. The terms of the JHSC's participation in the appeal will be determined at a case management conference.

“L. Sossin J.A.”