COURT OF APPEAL FOR ONTARIO

CITATION: Jacob v. Canada (Attorney General), 2024 ONCA 195
DATE: 20240205
DOCKET: M54745 & M54738 (COA-23-CV-0838)

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

Valerie Jacob

Appellant

and

Attorney General of Canada

Respondent

and

The Canadian Civil Liberties Association and the Income Security Advocacy Centre

Proposed Interveners

Mannu Chowdhury, Ewa Krajewska, Érik Arsenault and Anu Bakshi, for the proposed intervener, the Income Security Advocacy Centre

Sujit Choudhry, for the appellant

Bahaa Sunallah and Monisha Ambwani, for the respondent

Heard: January 31, 2024

REASONS FOR DECISION

[1] The Canadian Civil Liberties Association (“CCLA”) and the Income Security Advocacy Centre (“ISAC”) seek leave to intervene in this appeal as friends of the court. The appellant, Valerie Jacob, consents to both interventions. The Respondent, Attorney General of Canada, takes no position in relation to the CCLA’s motion for leave to intervene and opposes the motion brought by the ISAC. For the reasons that follow, both motions are granted.

[2] This appeal arises from an unsuccessful s. 15 *Charter* challenge relating to benefit programs during the COVID-19 pandemic: the Canada Emergency Response Benefit (“CERB”), the Canada Recovery Benefit (“CRB”) and the Canada Recovery Sickness Benefit (“CRSB”). The programs were offered to workers who lost employment income as a result of the pandemic. To be considered a “worker”, the claimant must have earned at least $5,000 from specified income in the 12 months prior to the claim. Income from federal or provincial disability support benefits did not qualify as income. The appellant challenged the $5,000 threshold, claiming that it discriminated against people living with disabilities.

[3] Dealing first with the motion of the CCLA. There is no question that the CCLA is a well-recognized group with special expertise in constitutional issues and civil liberties. The CCLA have advanced their proposed position in their motion materials, specifically at paras. 34-36 of the factum on the motion to intervene. Based on that position, which there is no need to repeat here, I am satisfied that

they will bring a unique contribution to the appeal, including on the issues of remedy and the retroactive application of a declaration of invalidity.

[4] As for ISAC, the respondent opposes their motion strictly on the basis that the proposed intervention will not provide a useful and distinct contribution to the appeal. I will narrow in on that position because it is clear to me that the ISAC is otherwise well positioned with sufficient expertise to make a helpful contribution to this appeal. Their intervention will also not prejudice the parties.

[5] The ISAC seeks to advance two broad-based submissions that they say meet the threshold test for making a distinct and useful contribution.

[6] First, the ISAC, being the only advocacy organization in Ontario specializing in income security, wishes to focus upon the protection and promotion of substantive equality within the context of this case. This includes the social, political, economic, and historical barriers they say are at work in this appeal. The ISAC contends that a full accounting of this contextual framework, in relation to which they have a particular expertise, will assist the court with conducting a proper substantive equality analysis, something that the parties have not delved into, or at least have not delved into with any detail.

[7] Second, the ISAC wishes to advance submissions on aspects of the substantive equality analysis, taking the existing law and building upon it, including

demonstrating how it should apply in the context of disability and income security programs.

[8] The respondent argues that the ISAC will not make a useful and distinct contribution to the appeal because their proposed arguments are repetitive of the submissions already before the court and are rooted in long-standing legal principles that are not for this court to revisit.

[9] I agree that an intervener cannot simply offer repetitive positions already advanced by the parties. Nor can they intervene simply to ask a court to reaffirm the state of the law as already established by the Supreme Court of Canada. However, I disagree that this is what the ISAC is endeavoring to do.

[10] This appeal is likely to call upon the court to grapple with how to approach adverse-impact discrimination and substantive equality in the context of lower income individuals living with disabilities. I see the unique expertise of the ISAC, a well-recognized organization with specialized knowledge in this area of the law, being of assistance to this court in considering how the legal principles, as established by the Supreme Court of Canada in cases such as *R. v. Sharma*, 2022 SCC 39, 165 O.R. (3d) 98, and *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113, should apply against this contextual backdrop.

[11] This appeal will have potentially far-reaching implications, with the potential to impact people living with disabilities and income insecurity. I do not see the ISAC

as simply asking this court to reaffirm or overturn existing law. Rather, their focus will be on how to approach adverse-impact discrimination and substantive equality. This is a notoriously difficult area of law and one that has seen some recent fluctuation. Assisting the court in navigating that law in the specific area of their expertise falls within the proper role of an intervener.

[12] With that said, it would be very easy for the ISAC to slip into taking a position on the ultimate outcome of the appeal. Of course, they must not do so. If they cross this line, then the respondent may raise its concerns with the court.

[13] Both the CCLA and the ISAC are granted leave to intervene on the following terms:

> 1. CCLA and ISAC are granted leave to intervene on the basis of the submissions set out in their motion materials;
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> 2. CCLA and ISAC will take the record as it is and not supplement the record by way of their factum or otherwise, nor will they comment upon or weigh in upon the disposition of this appeal;
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> 3. CCLA and ISAC will make reasonable efforts to avoid duplicating the submissions of the parties and each other;
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> 4. CCLA and ISAC may each file a factum of no more than 10 pages in length, no later than February 23, 2024;

5. CCLA and ISAC will each be granted no more than 15 minutes to make oral submissions at the hearing of the appeal; and

6. CCLA and ISAC will not be entitled to, nor subject to, any costs of this motions or of the appeal.

“Fairburn A.C.J.O.”