COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Faculty Association of the University of British Columbia v. University of British Columbia,*** 2008 BCCA 376

Date: 20080926
Docket: CA035974

Between:

The Faculty Association of the University of British Columbia

Appellant
(Faculty Association)

And

The University of British Columbia

Respondent
(University)

And

Canadian Union of Public Employees, Local 2278

Intervenor

And

Canadian Association of University Teachers

Intervenor

And

Association of Universities and Colleges of Canada

Intervenor

Before: The Honourable Mr. Justice Lowry
(In Chambers)

A. E. Black, Q.C.	Counsel for the Appellant
T. A. Roper, Q.C. and B. A. Korenkiewicz	Counsel for the Respondent
G. J. Baugh	Counsel for the Intervenor, Canadian Union of Public Employees
B. Elwood	Counsel for the Intervenor, Canadian Association of University Teachers

VANCOUVER
SEP 2 6 2008
COURT OF APPEAL
REGISTRY

L. B. Herbst	Counsel for the Intervenor, Association of Universities and Colleges of Canada
Place and Date of Hearing:	Vancouver, British Columbia September 5, 2008
Place and Date of Judgment:	Vancouver, British Columbia September 26, 2008

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] Applications are made to intervene in this appeal of a preliminary award made March 12, 2008, of an Arbitrator, David C. McPhillips. He concluded he was without jurisdiction under the collective agreement between The Faculty Association of the University of British Columbia and the University to entertain a grievance by the former regarding the Policy on Student Evaluation of Teaching of the Senate of the University for the creation, implementation, and application of student evaluations of teaching in all academic programs at the University's Vancouver campus. The Arbitrator concluded the Senate Policy was not arbitrable even though it affects the members of the bargaining unit.

[2] Two of the applications to intervene in the Faculty Association's appeal, made by the Association of Universities and Colleges of Canada and the Canadian Association of University Teachers, have been allowed, by consent, with the intervenors being permitted to file factums not exceeding 20 pages in length. Whether they will be permitted to make oral argument will be determined by the Court at the hearing of the appeal.

[3] A third application to intervene is made by the Canadian Union of Public Employees. It is opposed by the University. CUPE Local 2278 represents approximately 2900 employees of the University, under a collective agreement, who are teaching assistants, tutors, markers, and instructors to whom the Senate Policy applies. It represents a large number of employees at other universities in similar capacities who are members of other locals. CUPE maintains it has an interest in

having the preliminary award set aside because, if it is permitted to stand, the University employees CUPE represents will have no effective arbitral remedy under their collective agreement with the University regarding a policy that affects the terms and conditions of their employment.

[4] An applicant for intervenor status is generally required to show some direct interest in the outcome of the appeal, although the absence of a direct interest may in some cases be overcome if the applicant represents a public interest in a public law issue and can bring a different and useful perspective to the resolution of the issue. In ***Gehring v. Chevron Canada Ltd.***, 2007 BCCA 557, 75 B.C.L.R. (4th) 36 (C.A. Chambers), Rowles J.A. stated:

> [6] In *EGALE Canada Inc. v. Canada (Attorney General)*, 2002 BCCA 396, 170 B.C.A.C. 204 (B.C.C.A. [In Chambers]), I gave a brief summary of the principles that are generally considered on an application for leave to intervene:
>
> > [6] The principles to be applied on applications for intervenor status have been considered by this Court in a number of cases....
> >
> > [7] Generally speaking, before an applicant will be allowed to intervene, the court should consider whether the applicant has a direct interest in the litigation or whether the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties. When an application for intervention is made on a public law issue, the application may be allowed even though the applicant does not have a direct interest in the appeal.

[5] The question here is whether the affected members of CUPE have a direct interest in the outcome of the appeal. What constitutes a direct interest in the context of applications of this kind has been broadly considered.

[6] In ***Guadagni v. British Columbia (Workers' Compensation Board)*** (1988), 30 B.C.L.R. (2d) 259 (C.A. Chambers), Locke J.A., the B.C. Federation of Labour sought leave to intervene in an appeal concerning the proper interpretation of certain provisions of the ***Workers Compensation Act***. At 264, its application was denied in part because it had no direct interest:

> The legal rights of the members of the association or in turn their members are not affected, no additional legal obligations are imposed upon those members and it cannot be said to affect their interests prejudicially in any direct sense. All that can be said is that a decision of this court as to the meaning of a statute has the potentiality to affect any worker in the province covered by Pt. 1 of the Workers Compensation Act who may belong to a union affiliated with the federation.

[7] ***Guadagni*** was applied on this point in ***R. v. N.T.C. Smokehouse***, [1991] B.C.J. No. 2082 (QL) (C.A. Chambers), Proudfoot J.A., in which a direct interest was described as "arising when legal rights of the proposed intervenor will be affected or when any additional legal obligations would be imposed on the proposed intervenor resulting in a direct prejudicial effect".

[8] In ***Richmond (Township) v. Dha*** (1991), 47 C.P.C. (2d) 23 (B.C.C.A.) (*sub. nom.* ***Dha v. Ozdoba***), the Municipal Insurance Association of British Columbia and the Union of British Columbia Municipalities sought leave to intervene in an appeal involving the issue of municipal liability for damage to a house resulting from the breach of a duty of care owed by the municipal building inspector to the homeowners. The application was denied, in part because:

> [12] The applicants in this case may be affected by the outcome of the appeal in the sense that it will stand as a precedent which may affect the potential liability of all municipalities in the province. But, that is not enough to justify intervention: *Schofield v. Ontario (Minister of Consumer & Commercial Relations)* (1980), 19 C.P.C. 245, 28 O.R. (2d) 764, 112 D.L.R. (3d) 132 (C.A.).

[9] Having a direct interest has been contrasted with simply being concerned about the effect of a decision or being affected by it because of its precedential value: ***Vancouver Rape Relief v. Nixon***, 2004 BCCA 516, 26 Admin. L.R. (4th) 75 at para. 7 (Chambers); ***Bosa Development Corp. v. British Columbia (Assessor of Area 12 – Coquitlam)*** (1996), 82 B.C.A.C. 260 at para. 22 (Chambers). Simply being affected by a decision on the basis of *stare decisis* is an indirect interest only: ***Maple Trust Co. v. Canada (Attorney General)***, 2007 BCCA 195, 241 B.C.A.C. 222 (Chambers), Low J.A.:

> [5] ... Although it is said that the issue in question is one of general importance to institutional and other lenders within and outside this jurisdiction and that the decision by this Court in the present appeal will have precedential value in the case in which the court adjourned HSBC's application for an order for sale, the issue is one of private law not public law. It is clear from the decided cases that intervenor status is more readily available to interested individuals or entities where social or constitutional issues are involved, whether under the ***Charter*** or otherwise...

[10] In ***Gateway Casinos LP v. British Columbia Government and Service Employees' Union***, 2007 BCCA 48, 235 B.C.A.C. 248 (Chambers), Smith J.A., an action in trespass was initiated against a union attempting to organize the employees of a casino; the action was dismissed, the casino appealed, and the United Food and Commercial Workers International Union, Local 1518, sought to

intervene in the appeal. The would-be intervenor argued it had "a direct interest in this appeal because an outcome in favour of the appellants would set a precedent that will constrain its ability to attend in parking lots to convey information during labour disputes and to organize employees whose work is carried out in such parking lots": para. 9. But, at para. 11, it was held:

> The interest advanced by the applicant is not a direct interest. That it may be affected by the outcome of the appeal is not sufficient in itself to justify its intervention: see ***Dha v. Ozdoba*** (1991), 47 C.P.C. (2d) 23 (B.C.C.A.) (Chambers, Macfarlane J.A.), ***Vancouver Rape Relief Society v. Nixon***, *supra*. In this respect, it is in no different position than all other unions in British Columbia.

[11] The employees of the University represented by CUPE Local 2278 are subject to the University's Senate Policy if they take on substantial responsibility for the student learning experience in a course. The data obtained through the student evaluation process as established by the policy is a factor in assessment of faculty for merit and/or performance adjustment salary awards, promotion, tenure and institutional recognition. The policy mandates that deans, directors and department heads take action in response to teaching performance that is less than satisfactory. The collective agreement between CUPE and the University provides for reappointment and performance evaluation.

[12] CUPE thus appears to assert a direct interest on the basis that some of the members of one of its locals are subject to the policy, which addresses some of the same things that are addressed in the collective agreement. CUPE's position can be understood as follows: CUPE Local 2278 has the legal right to negotiate the

terms and conditions of employment on behalf of its members, some of whom are subject to the policy; the policy affects some of the terms and conditions of employment, including some that are addressed in the collective agreement. Depending on the outcome of this appeal, CUPE's ability to negotiate those terms and conditions of employment – or to otherwise engage the collective bargaining apparatus – will be constrained, because it has no purchase against the Senate; therefore its legal rights and obligations will be affected, and accordingly it has a direct interest.

[13] To the extent that the Senate Policy has the potential effect of undermining the provisions of the collective agreement and affects the ability of CUPE Local 2278 to bargain meaningfully about certain terms and conditions of employment, CUPE Local 2278 would appear to have a direct interest in the sense I have outlined.

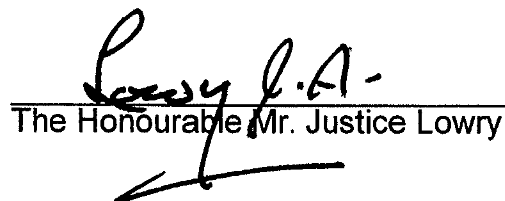
[14] I do not take the same view with respect to members of CUPE employed by other universities or educational institutions who are not part of Local 2278. The outcome of the appeal may have an effect on other locals, but only as a matter of precedential value, and because it involves the interpretation of a statute which applies to the universities at which many of CUPE's members work.

[15] Submissions were made with respect to the scope of argument CUPE should be permitted to make if its application to intervene is granted. It is clear that intervenors are not permitted to raise new issues but are limited to making submissions on the issues as defined by the parties, with a view to providing the

court with a helpful fresh perspective on those issues: ***Gateway Casinos***, *supra*, at para. 8; ***Canada (Attorney General) v. Aluminum Co. of Canada Ltd.*** (1987), 35 D.L.R. (4th) 495 (B.C.C.A.) at 507. Intervenors should not be permitted to "take the litigation away from those directly affected by it" or otherwise produce injustice to the immediate parties (for example, by forcing the parties to respond to repetitive arguments, or by causing undue delay).

[16] The University seeks to have me make an assessment of an argument CUPE raises on this application to intervene and to preclude it being further advanced. Given the limited extent to which any argument has been developed at this stage, I am reluctant to do so. I consider the better course is to leave the question of whether CUPE's points of argument exceed the well-established permissible limits to the hearing of the appeal or perhaps to a further application after CUPE's factum has been filed.

[17] It follows that CUPE's application to intervene is allowed to the extent of making submissions on behalf of Local 2278 only. It too will be permitted to file a factum of not more than 20 pages in length. Whether it will be permitted to make oral argument will be determined on the hearing of the appeal.



The Honourable Mr. Justice Lowry