A-408-09

FEDERAL COURT OF APPEAL

BETWEEN:

NELL TOUSSAINT

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

RESPONDENT'S WRITTEN REPRESENTATIONS OPPOSING THE MOTION TO INTERVENE BROUGHT BY CCPI

The Deputy Attorney General of Canada, on behalf of the Respondent Minister, submits as follows:

OVERVIEW OF THE RESPONDENT'S POSITION

1. The Respondent Minister opposes the motion for leave to intervene brought by the Charter Committee on Poverty Issues (CCPI). The proposed intervener fails to meet the test for leave to intervene under Rule 109 of the *Federal Courts Rules*. The proposed intervener has no direct interest in the outcome of this appeal. Further, it is clear from the proposed intervener's submissions that they will *not* be providing the Court with a perspective that is in any way different from the legal perspective being advanced by the Appellant Toussaint. An intervener must offer something above and beyond that which is brought to the case by an appellant, and

cannot be used to supplant what is properly the role of counsel for the Appellant.

A. PROPOSED INTERVENER FAILS TO MEET THE REQUIREMENTS FOR INTERVENTION

1) The Test for Intervention

2. Rule 109 sets out the Court's jurisdiction to grant leave to a non-party to intervene in a proceeding:

> **109**. (1) Leave to intervene - The Court may, on motion, grant leave to any person to intervene in a proceeding.
>
> (2) Contents of notice of motion - Notice of a motion under subsection (1) shall
>
> (a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and
>
> (b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.
>
> (3) Directions - In granting a motion under subsection (1), the Court shall give directions regarding
>
> (a) the service of documents; and
>
> (b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.
>
> [emphasis added]
>
> ***Federal Courts Rules*, s. 109**

3. The requirement in Rule 109(2)(b) is the "fundamental question to be determined on a motion for intervention":

> [...] In short, the issue to be addressed on a motion for intervention under rule 109 is whether the participation of the proposed intervener will assist the court in determining a factual or legal issue related to the proceeding. Given the shift in focus indicated by the wording of rule 109 in the Federal Court Rules, 1998, the approach taken in the jurisprudence concerning interventions under the various rules in the previous Federal Court Rules should be approached with caution. However, some of the factors outlined in the previous jurisprudence continue to be relevant, on a motion for intervention under rule 109, in assessing whether the participation of the proposed intervener will assist the Court in determining a factual or legal issue related to the proceeding. For example, the Court may consider, among other things, the nature of the evidence to be adduced, the ability of the existing parties to adduce all of the relevant evidence or to adequately advance the position of the proposed intervener, and whether the Court can hear and decide the case on its merits without the assistance of the proposed intervener. [emphasis added]
>
> ***Apotex Inc. v. Canada (Minister of Health)*, [2000] F.C.J. No. 248, at para. 11**

4. In *C.U.P.E. v. Canadian Airlines,* this Court described the factors relevant to a motion to intervene as follows:

(a) Is the proposed intervener directly affected by the outcome?

(b) Does there exist a justiciable issue and a veritable public interest?

(c) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(d) Is the position of the proposed intervener adequately defended by one of the parties to the case?

(e) Are the interests of justice better served by the intervention of the proposed third party?

(f) Can the Court hear and decide the proceeding on its merits without the proposed intervener?

***C.U.P.E. v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (F.C.A.), at para. 8**

2) No Direct Interest

5. First and foremost, the intervener does not have any direct interest in the outcome of the present litigation: they are not directly affected by, nor have they an independent interest in the issue of the Appellant Touissant's immigration status in Canada. The CCPI's mandate to represent the interests of low income persons does not automatically entitle CCPI to participate. CCPI is not a foreign national who wishes to request discretionary relief from the normal requirements of the IRPA by filing an inland H&C application but who cannot afford the fee for one. While CCPI claims that the Court of Appeal's decision may impact on the population that CCPI studies and represents, those potential research and representation interests are too remote and tangential so as to garner intervention status. Those interests are even lower than a jurisprudential interest, which itself does not support a case for intervener status.

***Li v. Canada (M.C.I.)*, 2004 FCA 267**
***C.U.P.E., supra*, at paras. 11-12**

6. CCPI also cannot claim a veritable public interest from the potential legal issues concerning s. 7 and ss. 15 of the *Charter* raised in this case. Such issues often arise in *Charter* litigation. *Charter* cases are almost

always resolved without the submissions of interveners. The fact that broader issues may arise in *Charter* litigation does not in itself warrant the grant of intervener status.

3) Role CCPI Seeks is Inappropriate for an Intervener

7. This is not a case where CCPI seeks to intervene on a discrete issue, but on all the issues that the Appellant advances. CCPI cannot assert that there is no other reasonable means to put its position forward when the very position that it proposes to take has been advanced previously by Appellant's counsel. Permitting the CCPI to advance the same arguments would infringe the rule that an intervener cannot participate to repeat the submissions of a party.

***Ferroequus Railway Co. v. Canadian National Railway Co.*, 2003 FCA 408**

8. The Respondent submits that what CCPI seeks is to supplant the role of Appellant's counsel, or to act as co-counsel. This view is borne out by a review of the transcript from the proceeding in the Federal Court. It is clear from the transcript that in fact counsel for CCPI made all of the submissions on rule of law, section 15 of the Charter, and section 1 of the Charter. In fact, the Federal Court stated to Appellant's Counsel that he appeared to have "given away all of the heavy lifting." This is not the proper role of an intervener. An intervener is meant to add something new to the

Appellant's arguments, and is not meant to act as substitute for Appellant's counsel.

> **Affidavit of Anna Thompson, Exhibit "A", Transcript of Proceedings Heard Before Justice Judith Snider, p. 15, lines 21-22**

9. Indeed, the intervener's request is anchored to a misapprehension of the proper role of an intervener. The intervener is effectively proposing to act as co-counsel for the Appellant Toussaint. This is nothing but piling on, and as such is unacceptable and outside of the scope and the function of an intervener as contemplated by the jurisprudence. In this regard, Mr. Justice Major of the Supreme Court of Canada stated as follows:

> The value of an intervener's brief is in direct proportion to its objectivity. Those interventions that argue the merits of the appeal and align their argument to support one party or the other with respect to the specific outcome of the appeal are, on this basis, of no value. That approach is simply piling on, and incompatible with proper intervention.
>
> The anticipation of the Court is that the intervener remains neutral in the result, but introduces points different and helpful to the Court. [emphasis added]
>
> ***Supreme Court of Canada Practice: 2000*** **Eds. Brian A. Crane and Henry S. Brown (Toronto: Carswell, 1999), p. 204**

10. This Honourable Court should follow well-established jurisprudence and dismiss an application for intervention when it is not

persuaded that the intervener will add to what counsel for one of the parties intends to argue.

***Suresh v. Canada (M.C.I.)*, [1999] 4 F.C. 206 (C.A.)**

***Anderson v. Canada (Customs & Revenue Agency)*, 2003 FCA 352**

11. CCPI has also not shown that the consideration of its perspective is necessary for the fair adjudication of the case. CCPI does not have any special expertise on immigration law, let alone the specific issues pertaining to access to the H&C application assessment process arising here, nor has it shown that its expertise on poverty issues is essential for assessing the *Charter* challenge on its merits. In fact, the Appellant is equally positioned to advance the arguments that CCPI seeks to put forward, and none of the arguments proposed by CCPI are adverse to the position of the Appellant.

***R. v. Morgentaler*, [1993] 1 S.C.R. 462**

***Canada (Min of Canadian Heritage) v. Mikisew Cree First Nation*, 2004 FCA 66**

12. As CCPI has not demonstrated that it meets the criteria for the grant of intervener status, its request for intervener status should be denied.

B. COMPELLING REASONS NOT TO GRANT INTERVENER STATUS

13. In addition to the fact that it does not meet the criteria for the grant of intervener status, there are other compelling reasons to deny CCPI

intervener status. CCPI's true aim is not solely to argue issues regarding the propriety of the H&C application processing fee on constitutional grounds, but to change the myriad of policy choices that are made in the law respecting low income persons. CCPI, in seeking to change the law, raises a political issue. CCPI must persuade Parliament and not This Honourable Court that a change is warranted. CCPI's request for intervention should be denied as it invites This Honourable Court to step into the legislative role reserved for Parliament.

C. CONCLUSION

14. In the words of Noël, J.A., in order to meet the requirements for intervention, it was incumbent upon the proposed intervener to demonstrate in their motion materials "how its expertise would be of assistance *in the determination of the issues placed before the Court by the parties*", and thus "what it would bring to the debate *over and beyond what was already available to the Court through the parties*" (emphasis added). In the case at bar, the proposed intervener has failed to meet its onus. There is no indication that counsel for the Appellant is not competent to make the arguments proposed by the intervener. To allow the intervener, who approaches this case with a distinct and open bias in favour of the Appellant Toussiant, to repeat those very same submissions would be contrary to the jurisprudence and the purpose of intervention. The proposed intervention is unnecessary and would not assist the Court in any meaningful way.

***C.U.P.E.*, supra, at para. 12**

15. Adopting the Court's wording in the *C.U.P.E. v. Canadian Airlines* case, the Respondent submits that the position of the intervener is adequately defended by one of the parties to the case. The interests of justice are not better served by the intervention as the same issues and arguments are being put forward by the Appellant. Therefore, this Court can hear and decide this appeal on its merits without the proposed intervention of the CCPI.

***C.U.P.E., supra*, at para. 8**

16. When determining whether to grant or deny an applications for intervention, fairness to the parties and the expeditiousness of the litigation are two main concerns of the Court:

> Expeditiousness and fairness considerations, I think, are at the root of the conditions that must be met by proposed interveners. Where the rights of interveners are not effected by the litigation and the interveners are not shown to add anything new to the issues, the Court cannot allow itself to become bogged down with an expansion of participants in the litigation. While some authorities suggest that the rules of court may be used to avoid or reduce delay or expense, from a practical perspective, the addition of participants will almost inevitably complicate the proceedings and result in some additional time and expense. (emphasis added)
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> ***Canadian Council of Professional Engineers v. Memorial University of Nfld.*, [1997] F.C.J. No.1053 (QL) at para. 8, per Rothstein, J.**

17. In the case at bar, the proposed intervener has no direct interest in the outcome of this appeal and will not be providing the Court with a perspective that is in any way different from the legal perspective being advanced by the Appellant. In short, there is no likelihood that the proposed intervener will be able to make a useful contribution to the resolution of the issues under appeal, and the addition of the proposed intervener as a participant will inevitably complicate and delay the proceedings and result in unnecessary additional time and expense.

ORDER SOUGHT

18. The Respondent submits that the motion for leave to intervene be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this Friday, January 29, 2010.

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