COURT OF APPEAL FOR ONTARIO

DATE: 20121126
DOCKET: M41351

Blair J.A. (in chambers)

In the Matter of the Bankruptcy of Matthew David Moore, of the City of Brampton in the Regional Municipality of Peel, Province of Ontario

BETWEEN

The Superintendent of Bankruptcy

Appellant

and

407 ETR Concession Company Limted
and Matthew David Moore

Respondents

David Thompson and Matthew Moloci, for the moving parties

Michael Huynh, for the appellant

J.T. Curry and Andrew Parley, for the respondent 407 ETR Concession Company Limited

Heard: October 22, 2012

[1] The moving parties are granted leave to intervene in the appeal as friends of the court, on the terms and for the reasons that follow.

Overview

[2] The moving parties are proposed representative plaintiffs in a class action commenced against 407 ETR Concession Company Limited, a respondent in this appeal. The class action has not yet been certified as a class proceeding. Their desire to intervene in the appeal arises from the following circumstances.

[3] Matthew David Moore is a discharged bankrupt. At the time of his assignment in bankruptcy, one of his obligations was a debt to 407 ETR of approximately $30,000 to $35,000 in unpaid charges for the use of the 407 toll highway. Following his conditional discharge from bankruptcy, Mr. Moore sought to obtain a valid vehicle permit for a vehicle registered under his name. However, s. 22(4) of the *Highway 407 Act, 1998*, S.O. 1998, c. 28 (the "407 Act"), prevents the Registrar of Motor Vehicles from validating or issuing permits where it has been notified of unpaid 407 tolls. Having received notice from 407 ETR regarding Mr. Moore's outstanding charges, the Registrar refused to validate or issue any permits to Mr. Moore.

[4] Mr. Moore then obtained an absolute discharge from the Registrar in Bankruptcy. He also obtained an order from the Registrar in Bankruptcy recognizing that his absolute discharge released him from all claims provable in bankruptcy (including his debt to 407 ETR), and directing the Ministry of Transportation to issue him license plates.

[5] Mr. Moore was unsuccessful when the matter came before the Superior Court, however. There, Mr. Moore argued that s. 22(4) of the *407 Act* was in conflict with s. 178(2) of the *Bankruptcy and Insolvency Act* (the "BIA"), which provides that an order of discharge releases the bankrupt from all claims provable in bankruptcy. However, the Superior Court judge concluded that there was no operational conflict, and ruled that the statutory collection mechanism in favour of 407 ETR continued to operate against Mr. Moore in spite of his absolute discharge of bankruptcy.

[6] The Superintendent of Bankruptcy was not aware of any of the proceedings below until after they had concluded. Subsequently, the Superintendent sought leave from this Court to intervene in the proceedings and to appeal the decision of the Superior Court judge because of its significance for the operation of the bankruptcy regime. However, following the order of the Superior Court judge, Mr. Moore and 407 ETR settled their differences, and Mr. Moore advised the Superintendent that he no longer intended to appeal the decision of the Superior Court judge because he had received a "very, very attractive offer" to settle. On September 5, 2012, this Court granted the Superintendent leave to appeal.

[7] That decision gives rise to this motion.

[8] The moving parties are proposed representatives of approximately 6000 individuals who are in the same position as Mr. Moore. They seek to certify a class proceeding against 407 ETR claiming, in addition to other orders, declaratory relief (to the effect that their debts to 407 ETR are released by virtue of their discharges from bankruptcy) and damages (both exemplary and punitive) for a variety of alleged abuses and breaches. Without doubt, the disposition of the Superintendent's appeal to this Court will have an impact, one way or the other, on the core issues in the proposed class proceeding.

Analysis

[9] Rule 13 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, permits interested parties to apply to the court to intervene either as a party or as a friend of the court:

> Rule 13.01
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> (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,
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> (a) an interest in the subject matter of the proceedings;
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> (b) that the person may be adversely affected by a judgment in the proceeding; or
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> (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.
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> (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.
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> Rule 13.02
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> Any person may, with leave of a judge or at the invitation of the presiding judge or master, 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.
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> Rule 13.03(2)
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> 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.[1]

[10] In *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), Dubin C.J.O., at p. 167, summarized the factors underlying Rule 13 by observing that "in [his] opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood

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[1] The Associate Chief Justice of Ontario has designated me to hear this motion.

of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties."[2]

[11] Here, I am satisfied that the foregoing principles justify granting leave to the moving parties to intervene as friends of the court.

[12] I agree with counsel for 407 ETR that the moving parties do not have "an interest in the subject matter of the proceeding," simply because the outcome of the appeal between the Superintendent and 407 ETR may have a bearing on the proposed class action. As Wilson J.A. noted, in *Re Schofield v. Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764 (C.A.), at p. 769, "it seems to me that the fact that the decision of [the lis between the immediate parties] may be applied subsequently by another Court as a precedent in resolving a lis between other parties is not a sufficient interest to justify a grant of standing to one of those other parties." However, the moving parties do meet the "common question of law" criteria, and on that basis bring themselves within the provisions of rule 13.01(1).

[13] That would not be sufficient, in itself, to persuade me to grant leave to intervene, however, given the broader principles that *Peel* and other cases have said are to be applied. The same reasons that motivate the courts' reluctance to

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[2] The current version of Rule 13 is substantially the same as the version dealt with in *Peel*, and the factors enunciated in *Peel* have since been applied to the current version of the rule: See e.g., *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.), Watt J.A.; *Ontario (Minister of the Environment) v. Castonguay Blasting Ltd.* (2011), 62 C.E.L.R. (3d) 171 (Ont. C.A.), Feldman J.A..

grant intervenor standing on the basis of a mere precedential interest in the outcome of the litigation apply to the common question of law criteria as well.[3] There are many actions and appeals that raise questions of law, the resolution of which will have a bearing on many other actions. Particularly in the burgeoning world of class proceedings, there may be an irresistible temptation either to "jump the queue" (Mr. Curry's description) or to engage in "efficient fast-forwarding" (as Mr. Thompson characterized it) in terms of the certification process by attempting to intervene in appeal proceedings where an important issue is otherwise being dealt with. Generally in our system of justice, however, issues are best resolved on the basis of the application of principles of law to the particular set of facts arising between the parties.

[14] What persuades me to grant leave to intervene in this appeal are the nature of the case, which raises important public policy issues, and the distinct perspective that the moving parties will bring to the determination of the appeal. The moving parties represent the interests of actual bankrupts. In particular, these are bankrupts who have received discharges under the BIA releasing all of their debts provable in bankruptcy – the debt owed to 407 ETR is such a debt –

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[3] *Schofield* was decided based on rule 504a of the *Rules of Practice*, which did not have the "common question" criteria. However, since then, the principle from *Schofield* has been applied to all of Rule 13: See e.g. M. v. H., 20 O.R. (3d) 70, at p. 77 (On why Rule 13 as a whole, has been interpreted narrowly in private actions, Epstein J. observed that, "if the courts ... were to interpret, Rule 13 as giving intervention rights to individuals who might be affected, adversely or otherwise, solely by the legal precedent which the first case creates ... there would be no principled way of excluding the second or the fiftieth case. The common law system would implode upon itself.")

but whose debt to 407 ETR remains an impediment to their obtaining vehicle permits because of the operation of provincial legislation. Mr. Moore represented the voice of such a bankrupt, but there is now a void: that voice has been removed from the proceeding because of his settlement with 407 ETR.

[15] Leave was granted to the Superintendent, even though he was not a party to the original proceeding, to launch the appeal largely because of the broad issues of importance it raises for the bankruptcy regime in Canada, and because of the Superintendent's supervisory role in relation to the integrity of that system. As counsel for the Superintendent acknowledged in argument, however, the Superintendent does not represent the perspective of the bankrupt in the proceedings. While I agree with counsel for 407 ETR that the Superintendent is well-placed to raise public interest concerns relating to the fairness of the bankruptcy system, the perspective of the bankrupt will, in my view, add a different contribution to the appeal that may well be helpful to the panel determining the issues under appeal.

[16] I do not see any prejudice to 407 ETR in granting intervenor status to the moving parties, nor do I think that doing so will lead to any significant delay or additional complexity in the processing of the appeal.

[17] I am not prepared to grant the moving parties leave to intervene as parties to the appeal. However, I grant them leave to intervene as friends of the court on the following terms:

a) The moving parties will take the record as it is framed by the parties and by the Attorneys General of Canada and of Ontario (if they participate), and will not be permitted to adduce further evidence. The only exception is that the moving parties will be permitted to file a copy of the statement of claim in the proposed class proceeding, but only for purposes of explaining who they are and the general legal issues raised by the proposed class proceeding.

b) They will not seek costs on the appeal, nor will costs be awarded against them.

c) They will file their factum within 10 days of receipt of the factums of the parties and of the Attorneys General of Canada and Ontario (if they participate).

d) There will be no costs on this motion.

Released: NOV 2 6 2012

RSB

R.A. Blair J.A.