Federal Court  Cour fédérale

Date: 20130513

Docket: IMM-2755-13

Citation: 2013 FC 496

Toronto, Ontario, May 13, 2013

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEEL WORKERS)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION; THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] The Respondents have brought a motion to strike this Application on the grounds that:

a) The Applicant is not a party directly affected by the matter in respect of which relief is sought pursuant to s. 18.1 of the *Federal Courts Act*;

b) The Applicant has no other basis upon which to assert standing to bring this application for judicial review;

c) The issue of standing is sufficiently ripe for a preliminary determination by this Court before the granting of leave and the hearing of the judicial review application in this matter; and

d) Such further and other grounds as counsel may advise and this Honourable Court may permit.

[2] The Respondents support their motion with the affidavit of Rebecca Coleman, a paralegal at the Department of Justice, Canada. The Applicant (Responding Party on the Motion) has filed the affidavit of Mark Hunter Rowlinson, Assistant National Director for Canada of the Applicant, in reply. There has been no cross-examination upon either affidavit.

[3] The underlying application brought by the Applicants, United Steel Workers, seeks leave and judicial review of a decision or decisions of an officer or officers of Human Resources and Skills Development Canada (HRSDC), of an unknown date, to issue Labour Market Opinions (LMO) under section 203 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as amended (IRPR); allegedly determining that offers of employment by the Royal Bank of Canada (RBC), and entities known as IGate, to an unknown number of workers from India to work in regulatory and financial applications in Toronto, Ontario, would likely result in a neutral or positive effect on the labour market in Canada. The Applicant, not having access to those LMO's, brought a

motion, pursuant to Rule 14(2) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, for an Order directing that the Respondents provide a copy of the Tribunal Record in their possession to the Court and to the Applicant. The motion now before me arose in the context of that motion for production of the Tribunal Record and, by agreement of the parties, has been heard prior to the determination of the motion for production and the application for leave and judicial review.

[4] In the evidence put forward by the Respondents, it appears that there is only one LMO respecting only one person that is at issue in these proceedings. The LMO has been produced but, as the Applicant's Counsel points out, not any other materials that may be in the Respondents' records that may be pertinent. Apparently, upon receipt of this LMO, the Applicant has started another proceeding in this Court for leave and judicial review (IMM-3247-13). Counsel for each of the parties agreed that this new proceeding is not relevant to the issue before me.

[5] The motion seeking production of the Tribunal Record also sought to add the Royal Bank of Canada and a number of IGate entities as Respondents. This motion has been deferred pending determination of the present motion respecting standing of the Applicant.

[6] In respect of the issues before me, Counsel for the Respondents agreed that the Respondents bore the burden both of persuading me that the motion should be disposed of now, and that the relief sought should be granted.

[7] I will first consider whether it is appropriate, at this stage of the proceedings, to hear and dispose of the motion to strike the application on the basis of lack of standing. As a general rule, the Court is reluctant to strike out an application on a preliminary motion largely for reasons of judicial economy. It is often just as economical to hear the entire application, as it is to hear a preliminary motion. However, with respect to a preliminary objection as to standing, the Supreme Court of Canada in *Findlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, per Le Dain J, for the Court, has stated that when the Court has a sufficient record before it for a proper determination as to standing, it has discretion to hear the issue by way of a preliminary motion. He wrote at paragraph 16:

> *Finally, before examining the question of standing, something should perhaps be said concerning the assumption underlying the judgments below and the argument in this Court that the issue of standing can be properly determined with final effect in this case as a preliminary matter on a motion to strike.*
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> . . .
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> *This question was also considered by the High Court of Australia in Australian Conservation Foundation Inc. v. Commonwealth of Australia (1980), 28 A.L.R. 257, where the opinion was expressed that it is a matter of judicial discretion, having regard to the particular circumstances of a case, whether to determine the question of standing with final effect as a preliminary matter or to reserve it for consideration on the merits. The Court held that for reasons of cost and convenience this judge had properly exercised that discretion in dealing with the question of standing as a preliminary matter and striking out the statement of claim. Assuming that the question whether an issue of standing to sue may be properly determined as a preliminary matter in a particular case is one which a court should consider, whether or not it has been raised by the parties, I agree with the view expressed in the Australian Conservation Foundation case. It depends on the nature of the issues*

> *raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted. In my opinion the present case is one in which the question of standing can be properly determined on a motion to strike. The nature of the respondent's interest in the substantive issues raised by his action is sufficiently clearly established by the allegations and contentions in the statement of claim and the statutory and contractual provisions relied on without the need of evidence or full argument on the merits.*

[8] In the present motion, I am satisfied that the parties have presented a sufficient record and arguments as to the issue of standing. Counsel for the Applicant in oral argument suggested that there might be more evidence once a complete Tribunal Record was filed, but I view this as speculative and I consider that I have before me an adequate record so as to dispose of the motion. Therefore, as an exercise of my discretion, I find that it is appropriate to deal with the motion at this time.

[9] Next, the Court must consider the basis upon which the Applicant asserts that it has standing to bring these proceedings. The Applicant is not the person "directly affected", to use the words from section 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7, by the Labour Market Opinion in question. The Applicant concedes at paragraph 3 of its Memorandum of Argument that it does not represent any workers at the Royal Bank and, in fact, there are no unionized workers at the Royal Bank. The nature of its standing as asserted by the Applicant is public interest standing.

[10] The Supreme Court of Canada, in its recent unanimous decision written by Justice Cromwell, *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence*

Society, [2012] 2 SCR 524, has thoroughly reviewed the question of public interest standing. I repeat what Cromwell J wrote at paragraphs 1, 2, 18, 20, 22, 23 and 27:

> *1 This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled [page531] to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.*
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> *2 In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).*
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> *18 In Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575, the majority of the Court summed up the law of standing to seek a declaration that legislation is invalid as follows: if there is a serious justiciable issue as to the law's invalidity, "a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be*

brought before the Court" (p. 598). At the root of this appeal is how this approach to standing should be applied.

. . .

20 My view is that the three elements identified in Borowski are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a [page540] flexible and generous manner that best serves those underlying purposes.

. . .

22 The courts have long recognized that limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so: Canadian Council of Churches, at p. 252. On the other hand, the increase in governmental regulation and the coming into force of the Charter have led the courts to move away from a purely private law conception of their role. This has been reflected in some relaxation of the traditional private law rules relating to standing to sue: Canadian Council of Churches, at p. 249, and see generally, O. M. Fiss, "The Social and Political Foundations of Adjudication" (1982), 6 Law & Hum. Behav. 121. The Court has recognized that, in a constitutional democracy like Canada with a Charter of Rights and Freedoms, there are occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts.

23 This Court has taken a purposive approach to the development of the law of standing in public [page541] law cases. In determining whether to grant standing, courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action. At the root of the law of standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources": Canadian Council of Churches, at p. 252.

. . .

27 The concern about screening out "mere busybodies" relates not only to the issue of a possible multiplicity of actions but, in addition, to the consideration that plaintiffs with a personal stake in the

> *outcome of a case should get priority in the allocation of judicial resources. The court must also consider the possible effect of granting public interest standing on others. For example, granting standing may undermine the decision not to sue by those with a personal stake in the case. In addition, granting standing for a challenge that ultimately fails may prejudice other challenges by parties with "specific and factually established complaints": Hy and Zel's Inc. v. Ontario (Attorney General), [1993] 3 S.C.R. 675, at p. 694.*

[11] The law prior to the *Eastside Sex Workers* case was summarized by the Federal Court of Appeal in its unanimous decision written by Sexton JA in *Public Mobile Inc v Canada (Attorney General)*, [2011] 3 FCR 344. I repeat what he wrote at paragraph 56:

> *56 Unless public interest standing is granted, the Order in Council would therefore effectively be immune from judicial review. Ensuring that no government action is beyond the reach of the courts is fundamental to the rule of law. Indeed, in Canadian Council of Churches, the Supreme Court wrote that "the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (at page 256; see also Hy and Zel's Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General), [1993] 3 S.C.R. 675, at page 692). It is important that the requirements for public interest standing not be applied mechanistically (Corp. of the Canadian Civil Liberties Assn. v. Canada (Attorney General) (1998), 40 O.R. (3d) 489 (C.A.), at pages 497 and 519 (per Charron J.A.), leave to appeal denied, [1999] 1 S.C.R. vii). Instead, the Court's application of the test should be informed by the factual context and policy issues at play, including the spectre of immunizing government action from review by the courts and the public importance of [page375] the issue raised by the applicant (see Odynsky, at paragraph 61; Harris v. Canada, [2000] 4 F.C. 37 (C.A.); Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General), 2010 BCCA 439, 324 D.L.R. (4th) 1 (Downtown Eastside Sex Workers), at paragraph 41).*

[12] The genesis of the modern law of public interest standing is the decision of the Supreme Court of Canada in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236. The judgment of the Court was written by Cory J. I repeat what he wrote at paragraph 36:

> *36 The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The [page253] decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.*

[13] To summarize these decisions, I view the current jurisprudence with respect to public interest standing to be:

- The Court is to take a flexible, discretionary approach.

- Three factors are to guide the Court in its considerations:

    - Does the case raise a serious justiciable issue?

    - Does the party bringing the proceeding have a real stake or genuine interest in the outcome?

- Is the proposed proceeding a reasonable and effective means for bringing the matter to Court?

- The Court should take a liberal and generous approach in its consideration of the matter.

Does this Case Raise a Serious Justiciable Issue?

[14] The Respondents (Applicants on this motion) concede at paragraph 35 of their Memorandum that on a low standard, the application for leave raises a serious issue. However, they argue, as concluded at paragraph 39 of their Memorandum, that it is far from clear that the issue requires judicial intervention.

[15] There are, unlike the *Eastside Sex Workers* case, no constitutional issues raised in these proceedings. No *Charter* issues have been raised. No challenges to the underlying legislation have been raised.

[16] Should the application proceed, and if leave is granted, the issues will be one or more of procedural fairness, correctness of the decision, and/or reasonableness of the decision.

[17] In oral argument, Counsel for the Applicant United Steel Workers argued that the case is likely to expose flaws and weaknesses in the administration of the system dealing with LMO's and admission of foreign workers into Canada. I view this as speculative, and with some apprehension,

as the proceeding may be more likely to become a means for seeking publicity and politicizing, rather than the determination of a justiciable issue.

Does United Steel Workers have a Real Stake or Genuine Interest in the Outcome?

[18] United Steel Workers does not represent any persons affected by the decision at issue. Unlike the case considered by my colleague Campbell J in *Construction and Specialized Workers Union, Local 1611 v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1353, the United Steel Workers does not have a long history of representing workers in the affected industry. At best, it has represented workers and a few call centres operated by a different bank.

[19] While conceding that the United Steel Workers is a reputable organization and is earnest in seeking to bring this application, I view the connection of the United Steel Workers with the workers and industry at issue here to be tenuous, at best. I contrast this with the finding of the Supreme Court in *Canadian Council of Churches* at paragraph 39, where it found that the applicant had the "*highest possible reputation and has demonstrated a real and continuing interest in the problem of refugees and immigrants".* I also contrast this case with that of *Public Mobile* where there were only about a half a dozen companies competing in the mobile phone business and one of them was allowed to challenge a perceived indulgence granted to another.

Is the Proposed Proceeding a Reasonable and Effective Means for Bringing the Matter to Court?

[20] I have no doubt that, as the record shows, the United Steel Workers is a well-funded organization with substantial in-house legal resources, and with the ability to retain first-class

outside legal representation. It is undoubtedly highly capable of instituting and conducting litigation of many kinds.

[21] The record indicates that the United Steel Workers made reasonable efforts to seek out persons who would lend support to and possibly become parties to proceedings such as this. Only two anonymous phone calls were the result. The newspapers provide the identity of one individual who would have been an appropriate party to a proceeding such as this. That individual has not come forward. There is nothing in the record to indicate what may or may not have motivated this apparent lack of interest, or even whether that individual had been specifically approached.

[22] While the United Steel Workers present an effective Applicant, I must consider what is the real "matter" before the Court. In this regard, I turn back to my consideration as to what the issue is. The issue is judicial review of a single LMO. The issue is not a broad-ranging enquiry into the administration of the foreign workers programme. If the individual or individuals directly affected are not interested in bringing an application - and there is no organization having a long history of representing such individuals - I am reluctant to agree that another well-funded and legally equipped organization with only a tenuous interest in these individuals should be permitted to come forward with an agenda not only to address their specific problems, but to endeavour possibly to pursue larger interests.

Liberal and Generous Manner

[23] I am mindful of the words of the Supreme Court in the *Canadian Council of Churches* that the approach of the Court in matters such as this should be of a "liberal and generous manner", and

of the direction of that Court in *Eastside Sex Workers* that "all of the other relevant considerations being equal, a plaintiff with standing *as of right*, is to be preferred (emphasis added).

[24] Here, there is no Applicant *as of right*. That person - or those persons - have not come forward.

[25] There is no constitutional or *Charter* issue at stake. The validity of legislation is not at issue.

[26] Applying a "purposive" approach, even in a liberal and generous manner, I find that with respect to the matters that are to be judicially determined in this matter, are such that the interest of the United Steel Workers in such matters is too remote. I will not in these circumstances exercise my discretion and grant the United Steel Workers public interest standing.

[27] The motion will be allowed. The application will be struck out. There are no special reasons for granting costs.

[28] If either party considers that there is a basis for the certifying a question, submissions shall be made in writing within ten (10) days from the date of this Order.

ORDER

FOR THE REASONS PROVIDED:

THIS COURT ORDERS that:

1. The motion is granted;

2. The application is struck out;

3. No Order as to costs; and

4. If either party considers that this is a matter for certifying a question, submissions in writing shall be made within ten (10) days from the date of this Order.

"Roger T. Hughes"

Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2755-13
STYLE OF CAUSE:	UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEEL WORKERS) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION; THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR ORDER AND ORDER:	HUGHES J.
DATED:	May 13, 2013

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