THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2012 SKCA 99 Date: 2012-10-29

Between: Docket: CACV2321

Christ the Teacher Roman Catholic Separate School Division No 212
Prospective Appellant
(Applicant)

- and -

Good Spirit School Division No 204
Prospective Respondent
(Respondent)

-and-

Government of Saskatchewan
Prospective Respondent
(Respondent)

Before:

Cameron J.A. in chambers

Counsel:

Collin K. Hirschfeld for the applicant
Khurrum R. Awan for the respondent
Thomas Irvine Q.C. for the Government of Saskatchewan

Application for Leave to Appeal

Heard: October 24, 2012
Disposition: Application dismissed
Written Reasons: October 29, 2012
By: The Honourable Mr. Justice Cameron

CAMERON J.A.

[1] This is an application under Rule 15 of *The Court of Appeal Rules* for leave to appeal from an interlocutory decision of Mr. Justice Mills in the Court of Queen's Bench.

[2] Justice Mills turned down a request by the prospective appellant, a Separate School Division, to determine a point to law pursuant to Rule 188 of *The Queen's Bench Rules*. The point arose out of an action brought against the Separate School Division and the Government of Saskatchewan by the prospective respondent, a Public School Division. Justice Mills also turned down a related request, made pursuant to Rule 173(a) of *The Queen's Bench Rules,* to strike out the Public School Division's pleadings in whole or in part as disclosing no reasonable cause of action. The underlying issue throughout was whether, given the way in which the cause of action was framed, the Public School Division had standing to take or pursue the action.

[3] The action stemmed from the closure by the Public School Division of a public elementary school in Theodore and the subsequent opening by the Separate School Division of a separate elementary school in that community. These events engaged the interest of the Government of Saskatchewan, given the role it plays in the field of education, including the funding of both public and separate elementary schools. The Public School Division was dissatisfied with the actions of both the Separate School Division and the Government in relation to the opening of the separate school in Theodore. It took the position that their actions were unlawful and unconstitutional, alleging among other

things that the creation and funding of the school (i) did not accord with section 17 of *The Saskatchewan Act;* (ii) was inconsistent with the freedom of religion and freedom from discrimination guaranteed in turn by sections 2(a) and 15(1) of the *Canadian Charter of Rights and Freedoms*; and (iii) was not saved by the denominational education provisions of section 93 of the *Constitution Act, 1867* and section 17 of *The Saskatchewan Act.*

[4] In response, the Separate School Division took the position the Public School Division could not invoke these provisions of the *Charter*, because they are concerned with individual freedoms, guaranteed to individual persons, meaning they cannot be invoked by corporate bodies such as the Public School Division to found a cause of action. In addition, the Separate School Division took the position the Public School Division could not rely upon the denominational education provisions of section 93 of the *Constitution Act, 1867* and section 17 of *The Saskatchewan Act* in advancing its action.

[5] To be sure this is an over-simplification of the cause of action pleaded by the Public School Division, and the positions taken by the parties, but this will do for the purposes at hand.

[6] The Separate School Division, having taken the position it did, applied to the Court of Queen's Bench under Rule 188 for the determination of a point of law, the point being whether, on one basis or another, the Public School Division lacked standing to rely on sections 2(a) and 15(1) of the *Charter*, or for that matter sections 93 of the *Constitution Act, 1867* and section 17 of *The*

Saskatchewan Act. Alternatively, it asked the Court for an order under Rule 173(a) striking the underlying pleadings as disclosing no cause of action in the Public School Division.

[7] Justice Mills declined to either determine the point of law or strike the impugned pleadings. He then went on—unfortunately as it turns out—to express the opinion that, while the Public School Division may or may not be entitled to standing on some other basis, it merited "public interest standing" because (i) the action raises a serious legal question, (ii) the Public School Division has a genuine interest in the resolution of that question, and (iii) there is no other reasonable and effective manner in which the question may be brought to court. Thus, he concluded by saying that, had it been necessary for him to decide the matter, he would have granted public interest standing to the Public School District. This expression of opinion, which was presumably intended to quiet the dispute over standing, had the opposite effect. It served to make for even more contention.

[8] Leaving this aside for the time being, the question before me is whether the application for leave to appeal warrants the grant of leave. The criteria to be considered on applications of this kind are set forth in *Rothmans, Benson & Hedges Inc*. v. *Saskatchewan*, 2002 SKCA 119, 227 Sask. R. 121. These criteria have basically to do with merit and importance: Is the proposed appeal of sufficient merit and importance to warrant the attention of the Court of Appeal, having regard for the fact the impugned decision is not final but interlocutory?

[9] With this in mind, I turn first to that branch of Justice Mills' decision having to do with Rule 188. He was asked to determine the point of law in question on the premise the determination of whether the Public School Division had standing, on one basis or another, to pursue its cause of action was potentially determinative of the action or an essential part of it. He was alive to this, but concluded in effect that the matrix of fact and law pertaining to the issues of standing, which is to say standing on one basis or another, was too much in dispute and too complex to warrant pre-trial determination.

[10] To the extent his conclusion is grounded in principle, it is difficult to see an arguable case for error. I say this because he addressed the matter in keeping with the underlay of principle expounded in the case of *Govan Local School Board* v. *Last Mountain School Division No 29*, [1992] 2 W.W.R. 481, 88 D.L.R. (4th) 658 (Sask.C.A). This case remains the leading authority on the subject.

[11] In the circumstances, and having regard for the fact Justice Mills enjoyed a measure of discretion in deciding whether to act on the Rule 188 motion, it is equally difficult to see a sufficiently arguable case for error in his application of the underlay of principle expounded in the *Govan Local School Board* case. The reasons for judgment in that case allude to the potential pitfalls associated with the pre-trial determination of a point of law in the absence of an agreed statement of facts, being those facts upon which a decisive response to the point may depend.

[12] Here there was no agreed statement of facts, nor even any agreement as to what constituted the salient facts. That being so, Justice Mills would have to have assumed, for the purpose of the motion before him, that the allegations of fact contained in the statement of claim were true. This means he would have to have made the determination asked of him on the basis of an assumed rather than an admitted set of facts—an assumed set of acts that remained open to challenge at trial. And he would have to have done so even though the action appeared to be destined for trial in any event. This means that, even if the issues relating to standing were amenable to determination under Rule 188, the determination would not necessarily have been decisive. And, even if it were otherwise, a determination in favour of the Separate School Division would not have spelled an end to the whole of the action but only part of it.

[13] Not that any of this necessarily precludes resort to Rules 188 and 189. But it serves to signal caution and serves, too, to shed considerable light on why Justice Mills, in the exercise of discretion, was disinclined to act on these Rules and make the determination asked of him. Viewed in this light, and having regard to the indicia of merit and importance mentioned in *Rothmans, Benson & Hedges,* I find it difficult to think there is sufficient merit or importance to warrant the grant of leave in relation to this branch of the case.

[14] I do not mean to suggest the application for leave is in this respect frivolous or vexatious, or is apt to unduly delay the trial or unduly add to the cost of the proceedings, or is of little importance to the parties and the proceedings. I mean only to say that an appeal on this branch of the impugned decision is not apt to advance things and does not seem to raise any new or

controversial or unusual issue of practice, or any new or uncertain or unsettled point of law. In other words I do not see that the proposed appeal, so far as it relates to Justice Mills' decision in relation to Rule 188, transcends the particular in its implications. Hence, I am not persuaded to grant leave to appeal on this, the first branch of the case.

[15] That leaves the second branch, or that part of Justice Mills' decision in which he declined to act on Rule 173(a). Again, he addressed the matter in keeping with the body of principle found in the leading cases on the subject, including *Swift Current (City) v. Saskatchewan Power Corp.*, 2007 SKCA 27, [2007] 5 W.W.R. 387. Hence, he asked himself the right question: Whether it was "plain and obvious" that the Public School Division did not have standing. This test posits a low threshold, and Justice Mills concluded that the Separate School Division had failed to cross it.

[16] To see in this a sufficiently arguable case to warrant leave is difficult, which suggests the proposed appeal lacks sufficient merit in the respect under consideration to engage the attention of the Court of Appeal. It is equally difficult, having regard for the indicia of importance mentioned in *Rothmans, Benson & Hedges*, to think the proposed appeal is of sufficient importance, particularly generally, to command the attention of the Court. Indeed, I have concluded that the proposed appeal on this branch of the case is also of insufficient merit and importance to warrant the grant of leave to appeal.

[17] It is not my intention, however, to leave this branch of the case, nor the case as a whole, without addressing Justice Mills' expression of opinion that

the Public School Division merited public interest standing to pursue its cause of action founded on sections 2(a) and 15(1) of the *Charter*. This has caused me some concern, both in itself and in conjunction with a related matter.

[18] The related matter is this. I am informed that, on an earlier application by the Public School Division to amend its pleadings to further plead the constitutional dimensions of its cause of action, the Separate School Division objected to the amendments on the basis its counterpart lacked standing to so plead. That application came before Madam Justice Pritchard. She allowed the amendments over this objection. In consequence, this issue of standing was said before Justice Mills to be *res judicata;* and he is said to have implicitly bought into that idea. Increment by increment, then, the Separate School Division fears that its position in relation to standing has been so eroded as to virtually foreclose a full or fair determination of the matter at trial. The outcome, it fears, has been virtually preordained.

[19] Were I convinced of this, I would seriously entertain the notion of granting leave to appeal on the narrow ground Justice Mills was wrong to have expressed the opinion he did. Among other things, there is an element of incongruity between, on the one hand, saying that the factual and legal matrix associated with the issue of standing is too much in dispute and too complex to warrant pre-trial determination and, on the other hand, expressing the opinion that the grant of public interest standing is warranted in the circumstances. But that is neither here not there. The point is this. It will be clear to all that his were *obiter* comments and, as such, can have no bearing on the determination of the issue of standing at trial.

[20] It should be equally clear that Justice Pritchard's decision to allow amendments to the pleadings can have no bearing on the matter. Her decision was made in the limited interlocutory context of amending pleadings, and as we all know the threshold for obtaining an amendment to pleadings is not particularly rigorous, nor decisive of anything beyond the narrowly based and limited question of whether to allow the proposed amendments.

[21] Viewed in this light, I cannot imagine the trial judge will do anything but approach the issue of standing objectively and with an open mind, uncluttered in the least by what may have been said or done during these interlocutory stages in the conduct of the action. Indeed, I am sufficiently confident of this to suggest the Separate School Division's fears are unfounded. In other words, I am confident the trial judge will give the Separate School Division an open and fair crack at this business of standing.

[22] That being so, and for the whole of these reasons, I have decided to dismiss the application for leave to appeal. There will be an order accordingly and, as usual, an order for costs against the Separate School Division in relation to this application.

Dated this 29th day of October 2012.

"Cameron J.A."

Cameron J.A.