Federal Courts Reports
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CANADA

[2022] 2 F.C.R. D-16

PRACTICE

Related subject: Food and Drugs

Motion by Canadian Health Food Association, Direct Sellers Association of Canada (proposed interveners) for leave to intervene — In underlying appeal, Court considering reasonableness of Minister of Health's decision that appellant contravened *Natural Health Product Regulations*, SOR/2003-196 (Regulations) by selling "natural health product" without product licence — Proposed interveners wanting for Regulations to be interpreted in "reasonable" way, one giving their member companies certainty, predictability, clarity — All intervention decisions of Court expressly or impliedly emphasizing three elements to be considered: (1) usefulness of intervener's participation to what Court has to decide, (2) genuine interest on part of intervener, (3) consideration of interests of justice — *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3 most-recent, leading authority — Pursuant to *Sport Maska*, consideration of interests of justice should be flexible, fact-responsive approach — Proposed interveners relying on *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, (1990), 45 C.R.R. 382 (C.A.) — That decision criticized by Federal Court of Appeal — *Sport Maska* suggested that elements of test for intervention in *Rothmans* inapt — In any consideration of motion for leave to intervene, best to start with *Sport Maska* — *Sport Maska* reaffirming threefold elements in test for intervention — First element, usefulness, set out in *Federal Courts Rules*, SOR/98-106, r. 109 — Requiring proposed intervener to show how it will be useful — Key to assessment of usefulness consideration of what actual, real issues are in proceeding — Intervener intending to urge Court to adopt particular interpretation of legislation, impose it on administrative decision maker barking up wrong tree — Court, as reviewing court engaged in reasonableness review, will not develop its own interpretation of Regulations, use it as yardstick to see whether administrative decision maker's interpretation measuring up, nor will it impose its interpretation over that of administrative decision maker — At most, under reasonableness review, Court can coach administrative decision maker on methodology of legislative interpretation, how to go about its task — Whether proposed interveners meeting test for intervention — Proposed interveners not satisfying requirement of usefulness — To extent intended submissions of proposed interveners consistent with Court's task to assess reasonableness, they largely duplicate those of appellants — This finding sufficient to dismiss motion —With respect to third element (interests of justice), underlying appeal began in April 2022 — Proposed interveners announced their intention to intervene in December 2022 — Delay contrary to imperatives of rule 3 that proceeding be conducted "so as to secure the just, most expeditious and least expensive outcome" — Militating against granting leave to intervene — *Obiter* (not directed at proposed interveners, who filed a high quality motion and prosecuted it well): Criticism concerning recent judicial comments about proper limits to intervention misplaced — Interveners admitted into proceedings usually those who have shown understanding of judiciary's proper role — Freestanding policy-making, law-making not for the judiciary — Those who understand proper role of judiciary, show how they can help Court on real issues in a case more likely to be admitted — Motion dismissed.

LE-VEL BRANDS, LLC V. CANADA (ATTORNEY GENERAL) (A-92-22, 2023 FCA 66, Stratas J.A., reasons for order dated March 23, 2023, 14 pp.)