

SUPREME COURT OF YUKON

Citation: *AB v Yukon (Government of)*,
2022 YKSC 70

Date: 20221208
S.C. No. 21-A0024
Registry: Whitehorse

BETWEEN:

A.B.
C.D., BY THEIR LITIGATION GUARDIAN A.B.

PLAINTIFFS

AND

THE GOVERNMENT OF YUKON (DEPARTMENT OF EDUCATION)

DEFENDANT

It is prohibited to publish any information that could disclose the identity of either of the plaintiffs, or any information relating to C.D.'s gender, age, medical diagnosis or symptoms related thereto.

Before Justice E.M. Campbell

Vincent Larochelle

Counsel for the Plaintiffs

Counsel for the Defendant

Amy Porteous

Counsel for the Applicant, the Yukon
Association of Educational Professionals

Shaunagh Stikeman

REASONS FOR DECISION

INTRODUCTION

[1] The plaintiffs filed a statement of claim in which they assert that various Government of Yukon policies, practices, guidelines, actions, inaction or conduct related to the provision of, and access to, education to students with disabilities in the Yukon violate s. 7 and/or s. 15 of the *Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982* (the “*Charter*”), and/or various provisions of the *Education Act*, RSY 2002, c 63 (the “*Act*”). They claim the *Charter* violations are not saved by s. 1 of

the *Charter*. They seek declaratory and injunctive relief against the defendant, the Government of Yukon (“Yukon”).

[2] One of the plaintiffs, C.D., is a student with disabilities who has special educational needs. The other plaintiff, A.B., is C.D.’s parent and litigation guardian. A.B. and C.D. reside in a Yukon community where C.D. attends public school.

[3] In *AB v Yukon (Government of)*, 2022 YKSC 69, I granted public interest standing to the plaintiffs to pursue their claims against the defendant. I described the plaintiffs’ claims in more details in that decision.

[4] The Yukon Association of Educational Professionals (the “YAEP”) seeks to intervene in this action on the basis its members have a special perspective on the issues raised in this action regarding the provision of, and access to, education to students with disability who have special educational needs.

[5] The YAEP seeks leave to intervene on terms that would allow it to adduce evidence, file written submissions, and make oral submissions at the hearing of this action. It also seeks a limited right to cross-examine witnesses at the hearing. In addition, the YAEP seeks leave to provide the perspective of two other associations, Autism Yukon and the Learning Disabilities Association of Yukon (“LDAY”). In addition, the YAEP seeks that no costs be ordered for and/or against it on this application or in this proceeding.

[6] At the hearing, the plaintiffs supported the YAEP’s application. The defendant conceded the YAEP met the test for intervenor status.

[7] At the end of the hearing, based on the record and submissions of counsel, I granted the YAEP’s application to intervene in this action with reasons to follow.

The Test for Intervention

- [8] Intervention is generally permitted on either of two grounds:
- i. where the applicant has a direct interest in the litigation; or
 - ii. where the applicant brings a different and useful perspective on an issue of public importance.

(*Frost v Blake*, 2021 YKSC 29 (“*Frost*”) at paras.17 to 21; *Wright v Yukon (Director of Public Safety and Investigations)*, 2021 YKSC 55 (“*Wright*”) at paras. 6 to 8)

[9] YAEP’s application to intervene is based on the second ground.

- [10] The factors to consider in determining an application to intervene include:
- a. Does the proposed intervenor have a broad representative base?
 - b. Does the case legitimately engage the proposed intervenor’s interests in the public law issue raised?
 - c. Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?
 - d. Does the proposed intervenor seek to expand the scope of the proceedings by raising issues not raised by the parties?

(*Frost* at para. 19, adopting *Snaw-Naw-As First Nation v Canada (Attorney General)*, 2021 BCCA 89 (“*Snaw-Naw-As*”); *Wright* at para. 8)

[11] As stated earlier, the plaintiffs and the defendant agree the YAEP meets the test for intervenor status. Nonetheless, I believe it necessary to briefly review the evidence relevant to each of the factors of the test for intervention that led me to grant intervenor status to the YAEP.

a. Does the proposed intervenor have a broad representative base?

[12] The YAEP has a broad representative base of approximately 1,100 members, which includes all educational assistants, teachers, and school administrators in the Yukon that are members of the bargaining unit.

b. Does the case legitimately engage the proposed intervenor's interests in the public law issue raised?

[13] One of the objectives of the YAEP, as set out in s. 3 of the *Teaching Profession Act*, RSY 2002, c 215, is to advance and promote the cause of education in the Yukon. Also, this action intersects with the rights, obligations, and responsibilities of Yukon's educational professionals emanating from the *Act*, the *Teaching Profession Act*, and the *Education Labour Relations Act*, RSY 2002, c. 62; as well as their collective agreement with Yukon.

[14] The YAEP's interests are legitimately engaged with respect to the public law issues raised in this action regarding the provision of, and access to, education to children who have special educational needs, such as the scope and validity of the defendant's policy regarding entitlement to Individualized Education Plans ("IEP"); the relationship between the defendant's methodology of allocating and funding Learning Assistant Teachers ("LAT") and the special educational needs of students; as well as the relationship between the defendant's processes for conducting assessments for IEPs, implementing and reviewing IEPs, and the special educational needs of students.

[15] Finally, the outcome of this litigation will directly impact YAEP members as they are the ones who are tasked, in the context of their employment, with assessing, implementing, and reviewing the special education needs of students as well as delivering education to students with special educational needs.

c. Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?

[16] The YAEP has a unique and valuable perspective to provide in this proceeding because its members - teachers, educational assistants (“EAs”), LATs, school administrators - are at the forefront of the provision of special education in the Yukon. The YAEP’s members are the educators and administrators who, on a daily basis, implement, assess and deliver special education in the Yukon, which is at the center of this proceeding.

[17] Therefore, the YAEP can provide a different perspective than the plaintiffs, who can provide the perspective of students in need of special education and their families; and the defendant, Yukon, the public body that has the mandate to deliver special education in this territory.

d. Does the proposed intervenor seek to expand the scope of the proceedings by raising issues not raised by the parties?

[18] The intervenor proposes to make submissions, from its unique perspective, on a number of issues raised by the plaintiffs in their Statement of Claim that are of a particular interest to the YAEP and that it identified in its application. In doing so, the YAEP is not seeking to improperly expand the scope of this proceeding.

[19] Based on the above, the YAEP meets the test to intervene in this action and, as stated at the end of the hearing of this application, is granted intervenor status.

The terms of the YAEP’s intervention

Oral and written submissions

[20] The plaintiffs do not oppose the intervenor’s request for leave to file written submissions and make oral submissions at the hearing. The defendant is not opposed

to the intervenor filing written submissions. However, the defendant argues that allowing oral submissions, in addition to written submissions, would be redundant and unnecessary. The defendant further submits that, if the Court were to permit the intervenor to make oral submissions, they should be brief relative to those of the parties.

[21] The YAEP was granted permission to intervene because it is in a position to provide submissions that are different and valuable on the issues raised by the parties, “... with a view to providing the court with a helpful fresh perspective on those issues” (*Faculty Association of the University of British Columbia v University of British Columbia*, 2008 BCCA 376 at para 15). The purpose of intervention as well as the nature and scope of the issues raised in this case militate in favour of granting the YAEP leave to file written submissions. However, this application is brought at an early stage of the proceeding. Therefore, the specific scope and length of those submissions are to be determined at a case management conference to be held after the evidence has been adduced at the hearing or as otherwise directed by the Court.

[22] Oral submissions constitute, among other things, an opportunity to clarify arguments, positions and perspectives advanced in written submissions. Considering the nature and scope of the issues raised in this case, I am of the view the YAEP should be granted leave to make oral submissions at the hearing of this action. Again, the specific scope and length of those submissions are to be determined at a case management conference to be held after the evidence has been adduced or as otherwise directed by the Court.

The Other Terms of Intervention sought by the YAEP

[23] The real issues with respect to the terms of the intervention is whether the YAEP should be granted leave to:

- a. present the perspectives of LDAY and Autism Yukon;
- b. contribute to the trial record by adducing evidence and cross-examining witnesses; and
- c. be exempted from an order of costs and prevented from seeking costs.

[24] Interventions at the trial level are not common. In addition, intervenors are not commonly permitted to adduce evidence and cross-examine witnesses. (*Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2015 BCSC 2166 (“*Ahousaht*”) at para 5). The reasons behind the courts reluctance to grant intervenor status and to allow intervenors to actively contribute to the trial record are addressed in *Ahousaht* as follows:

[5]having not filed pleadings or been the subject of discovery, their positions would not be defined and the actual parties could be prejudiced. The participation of intervenors should not “take the litigation away from those directly affected by it”: *Canada (Attorney General v. Aluminum Company of Canada Ltd.* (1987), 10 B.C.L.R. (2d) 371; *Cambie Surgeries Corporation v. British Columbia Medical Services Commission*) 2014 BCSC 1028.

Contribution to the trial record and presentation of LDAY and Autism Yukon’s perspective.

[25] The YAEP seeks leave to include the perspectives of two organizations, LDAY and Autism Yukon, in its intervention. LDAY and Autism Yukon do not have the financial resources and capacity to seek leave to intervene separately in this case.

[26] The YAEP submits the support of Autism Yukon and LDAY to its intervention will ensure it is able to include and give a voice to the unique and different perspectives of the individuals represented by these organizations. The YAEP filed an affidavit of the Executive Director of LDAY and of the President of Autism Yukon in that regard.

[27] LDAY is a non-profit organization dedicated to increasing awareness of learning differences and supporting children, youths, and adults with learning difficulties or disabilities. LDAY has been operating in the Yukon since 1973.

[28] LDAY currently supports approximately 200 children and youths, and 65 adult learners and workers in the Yukon.

[29] LDAY, among other things, plays an active role and advocates for its members and their families regarding the delivery of special education in the Yukon. For example, LDAY coordinates private assessments necessary to determine whether a student is entitled to receive special education. It also coordinates and funds for tutoring to be provided to students with learning differences and disabilities.

[30] LDAY supports the YAEP's application to intervene because it is of the view that the outcome of this action may have a significant impact on access to special education for students with learning differences and disabilities in the Yukon. LDAY is prepared to support the YAEP's intervention by providing affidavit evidence with respect to its involvement and observations regarding the delivery of, and access to, special education to students with disabilities.

[31] Autism Yukon is a non-profit organization whose mission is to improve the quality of life of those affected by autism in the Yukon, including individuals, families, educators, employers, and the community.

[32] Autism Yukon has been operating in the Yukon for 15 years and represent 100 members. It is, among other things, an active advocate with respect to the delivery of special education in the Yukon for its members.

[33] Autism Yukon supports the YAEP's application to intervene because it is of the view that the outcome of this action may have a significant impact on access to special education for students on the autism spectrum in Yukon. Autism Yukon is of the view that it can support the YAEP's intervention by providing knowledge and evidence from the perspective of students on the autism spectrum, their families, and support workers.

[34] The YAEP also seeks leave to adduce evidence at the hearing of this action. The YAEP submits it only proposes to adduce evidence that is circumscribed by the issues defined by the pleadings; that is not duplicative; and that will assist the Court in resolving the matters at issue by completing the evidentiary record. The YAEP seeks permission to adduce:

- An expert report, from the perspective of education professionals, regarding the impact on Yukon students in need of special education of Yukon's current system of assessing, implementing and reviewing IEPs.
- A second affidavit from the President of the YAEP regarding access, sufficiency, delivery, and impact of special education in Yukon schools.
- Affidavits from EAs, from a practical perspective, regarding their role and capacity to assist in the delivery of special education in Yukon schools.
- Affidavits from LATs, from a practical perspective, regarding the conduct of assessments for IEPs, and the implementation and reviews of IEPs.

- Affidavits of school administrators who oversee the implementation of special education in the Yukon schools.
- Affidavit from a representative of LDAY regarding access and suitability of assessments required to obtain an IEP, the implementation and review of IEPs, as it relates to the needs of students (including students with disabilities), requiring special education in Yukon schools.
- Affidavits from a representative of Autism Yukon with respect of the access to, and suitability of, assessments required to obtain an IEP, and the implementation and review of IEPs as it relates to the needs of students requiring special education, particularly autistic students in Yukon schools.
- Such other affidavit(s) as may be required as the litigation proceeds.

[35] In addition, the YAEP seeks leave to cross-examine the plaintiffs' and the defendant's witnesses at the hearing but only if their evidence relates to an important point that was contrary to the evidence that YAEP wishes to call.

[36] The plaintiffs do not oppose the YAEP being granted leave to adduce evidence and to present the views of LDAY and Autism Yukon, in a form and with such limits as are determined by the Court.

[37] The defendant opposes this part of the YAEP's application. The defendant submits the volume of evidence the intervenor, a non-party, proposes to adduce at trial is significant and threatens to overwhelm the parties' contributions to their litigation and to prolong the proceedings significantly.

[38] Also, the defendant submits the expert report the YAEP wishes to file is not described with enough details to determine whether it would constitute proper intervenor evidence or duplicative evidence, which is not permitted. The defendant submits that it would be premature to determine the permissibility of an expert report that is not yet available.

[39] In addition, the defendant is opposed to the YAEP's proposal to present the views of two separate and distinct organizations. The defendant submits the role of an intervenor is to provide its own perspective, not to collect and present the perspectives of others.

[40] Finally, the defendant submits LDAY and Autism Yukon serve entirely different populations than the YAEP does, and do not operate from the same perspective. The defendant submits that LDAY's and Autism Yukon's perspectives are more likely to coincide with that of the plaintiffs, whose perspective will already be before the Court.

[41] The YAEP and its members play a pivotal role in overseeing, implementing, assessing, and delivering special education in the Yukon. At first glance, some of the affidavit evidence proposed by the intervenor (from LATs, EAs and school administrators) appears relevant and valuable to the determination of the issues arising from the Statement of Claim, as well as presenting a different perspective than the parties.

[42] However, this proceeding is at an early stage. The parties have not exchanged documents and examinations for discovery have yet to take place. It is too early to determine what material facts will remain at issue between the parties at trial. It is also too early to call upon the parties to precisely identify the nature and extent of the

evidence they intend to adduce at trial. One of the considerations in determining whether to grant leave to an intervenor to adduce evidence is whether it will be duplicative of the evidence filed by the parties (*Ahousaht* at para. 117). In addition, the plaintiffs have been granted public interest standing in this matter. One of the factors of importance in granting public interest standing is the claimant's capacity to present the evidentiary record required to decide the issues. This could potentially lead to the intervenor's proposed evidence overlapping with that of the plaintiffs, which is not desirable as it would lengthen the proceedings unnecessarily. Autism Yukon and LDAY are organizations that have a particular interest in the delivery of, and access to, special education in the Yukon. Both organizations perform advocacy work on behalf of their members and clients in need of special education and both have experience maneuvering the special education system in the Yukon. However, at least some of the evidence and perspective they wish to provide appear to align with the type of evidence that could be expected from the plaintiffs. It is simply too early to know.

[43] Based on the above, I am of the view it is premature to rule on the intervenors' application to present the perspective of LDAY and Autism Yukon, and adduce evidence, as well as to attempt to determine the exact limits of the intervenor's participation at the hearing of this matter. The same reasoning applies to the issue of costs raised by the intervenor, as any increase in participation in the trial process may have an impact on the decision to shield it or not from a costs order and/or to preclude it from seeking or being awarded costs in this proceeding.

[44] As a result, I direct that the unresolved terms of the YAEP's intervention be revisited closer to trial, at a case management conference to be scheduled at a date to be determined by the Court.

Conclusion

[45] The YAEP is granted leave to intervene. The style of cause shall be amended accordingly.

[46] The YAEP is granted permission to file written submissions and to make oral submissions at the hearing of this action. The specific scope and length of the intervenor's written and oral submissions are to be determined at a case management conference to be held after the evidence has been adduced or as otherwise directed by the Court.

[47] It is premature to decide whether the YAEP should be granted leave to present the perspective of LDAY and Autism Yukon, adduce evidence, and cross-examine witnesses at the hearing of this case.

[48] The same conclusion applies to the issue of costs raised by the YAEP.

[49] As a result, these remaining terms of YAEP's intervention shall be discussed and determined at a case management conference to be scheduled closer to trial or as otherwise directed by the Court.

[50] Each party will bear their own costs with respect to this application.

CAMPBELL J.