COURT OF APPEAL FOR THE YUKON TERRITORY

Citation : *Commission Scolaire Francophone du Yukon c. Procureure Générale du Yukon* 2011 YKCA 11

Date: 20111223
Docket: YU684

Between:

La Commission Scolaire Francophone du Yukon No. 23

Respondent
(Plaintiff)

And

Attorney General of the Yukon Territory

Appellant
(Defendant)

Before: The Honourable Justice Groberman
(in chambers)

On appeal from the Supreme Court of Yukon, July 26, 2011, (*La Commission Scolaire Francophone du Yukon No. 23 c. Procureure Générale du Yukon,,* 2011 YKSC 57, Whitehorse No. 08-A0162)

Counsel for the appellant:	Maxime Faille François Baril
Counsel for the Respondent:	Roger J.J. Lepage
Counsel for the applicant Conseil scolaire francophone de la Colombie-Britannique	Christian Paquette Jean-Pierre Hachey
Counsel for the applicant Commission nationale des parents francophones	Simon Ruel Nicholas Malone
Counsel for the applicant Fédération nationale des conseils scolaires francophones	Mark Power Mathieu Stanton
Location and date of the hearing (by teleconference)	Whitehorse, Yukon December 9, 2011
Location and date of the decision:	Whitehorse, Yukon December 23, 2011

Reasons for the judgment delivered by the Honourable Justice Groberman:

[1] Here are motions for leave to intervene in this appeal. The motions have been brought by the Commission nationale des parents francophones ("CNPF" [National commission of Francophone parents]), the Fédération nationale des conseils scolaires francophones ("FNCSF" [National federation of Francophone school boards]) and the Conseil scolaire francophone de la Colombie-Britannique ("CSFC-B" [Francophone Education Authority of British Columbia]).

[2] The CNPF is a national coalition of Francophone parents' organizations in the provinces and territories where Francophones are in the minority. It was established in 1979 and represents its member organizations nationwide.

[3] The FNCSF is an organization that includes thirty-one French-language school boards, education authorities and school divisions in nine provinces and three territories where English is the dominant language. It was founded in 1990 and operates as a national voice representing the interests of its members.

[4] The CSFC-B is the school board responsible for the homogeneous French-language education program across the province of British Columbia. It is the equivalent body to the respondent in British Columbia. The CSFC-B manages 36 schools. There are approximately 4,600 students enrolled in its schools.

[5] The proposed interventions address various issues. The CNPF has a particular interest in the trial judge's finding that the government has an obligation to fund a preschool education program established and administered by the respondent. The CNPF is interested in the issue of whether the right to administer preschool programs is included in the right of management granted to Francophone minorities under s. 23 of the *Canadian Charter of Rights and Freedoms*.

[6] The FNCSF wishes to intervene in the appeal to make submissions regarding the trial judge's finding that the Government of Yukon has a fiduciary duty with regard to the funds received from the federal government to meet the requirements of s. 23 of the *Charter*.

[7] The CSFC-B proposes to intervene on the issue of the respondent's authority to admit children whose parents are not rights holders under s. 23 of the *Charter*. The trial judge ruled that the right to admit these children is part of the right of management.

[8] Leave to intervene is governed by Rule 36 of the *Court of Appeal Rules*:

> 36 (1) Any person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine.

[9] The decision to allow an intervention is a discretionary one, and the principles that apply to the exercise of this power are not necessarily identical in all courts in Canada. However, the jurisprudence of this court is particularly influenced by the jurisprudence of our sister court, the British Columbia Court of Appeal.

[10] There are generally two situations in which the court is prepared to allow an intervention. First, when a decision could have a direct impact on a person, in order to be fair it is necessary to provide that person with an opportunity to make submissions. The court is usually generous in allowing interventions, even in private litigation, when a person's interests are directly involved in the case.

[11] The second situation in which an intervention is allowed is a case that raises issues involving public interests. It is necessary to ensure that all important perspectives are considered before deciding such a case. There are many examples of interventions that have been allowed for this purpose, particularly in the context of the interpretation of the *Charter.*

[12] The applicants contend that this case directly affects their rights. They note that a decision of the Yukon Court of Appeal may influence the development of jurisprudence regarding s. 23 of the *Charter.*

[13] It is obvious that the interpretation of this section is of fundamental importance from the applicants' perspective. I also accept that the applicants are organizations that are well qualified to make their submissions; they are well established, and they represent large groups who are concerned about the scope of s. 23 of the *Charter.*

[14] Although these organizations are interested in the interpretation of s. 23, I cannot conclude that they have a direct interest in this case. Frequently, a potential intervenor claims to have a direct interest which is in fact limited to the development of the jurisprudence. This is not considered to be a direct interest (*Susan Heyes Inc.. v. South Coast BC Transportation Society,* 2010 BCCA 113). In the case of *Faculty Association of the University of Columbia v. University of British Columbia* 2008 BCCA 376 (Chambers) at para. 9, Lowry J.A. said:

> [9] Having a direct interest has been contrasted with simply being concerned about the effect of a decision or being affected by it because of its precedential value: *Vancouver Rape Relief v. Nixon,* 2004 BCCA 516, 26 Admin. L.R. (4th) 75 at para. 7 (Chambers); *Bosa Development Corp. v. British Columbia (Assessor of Area 12 - Coquitlam)* (1996), 82 B.C.A.C. 260 at para. 22 (Chambers). Simply being affected by a decision on the basis of *stare decisis* is an indirect interest only: *Maple Trust Co. v. Canada (Attorney General),* 2007 BCCA 195, 241 B.C.A.C. 222 (Chambers) ....

[15] To the extent that the applicants represent people who do not live in the Yukon, a decision of this court will not directly affect their rights. At most, a decision of this court could be persuasive in another province or territory. It would not have binding force. Consequently, neither governments, nor school boards, nor eligible parents across Canada can be directly affected by the decision in this case.

[16] It is true that the CNPF has members in the Yukon, but these members are also represented by the respondent, which is run by Yukon Francophone parents. I am not convinced of the need to grant the CNPF leave to intervene so that Yukon members are adequately represented with respect to their direct interests. With regard to the FNCSF, the respondent itself is the only Yukon member of the organization.

[17] Clearly, this case raises several issues of public interest. Given that the applicants have no direct interest in this matter, we must consider whether they bring important perspectives that are different from those of the parties and can assist the court in deciding the case.

[18] The CSFC-B cites *Canadian Labour Congress v. Bhindi* (1985) 17 D.L.R. (4th) 193 (BCCA) in support of the proposition that it is not absolutely necessary to demonstrate that the potential intervenor has a perspective that is different from those of the parties. On pages 203-4, the majority said:

> No authority has been offered in support of the argument that before intervenor status will be granted, the applicant must show that its interests differ from the interests of the Union. On the contrary, in the Supreme Court of Canada, "intervenor" status will be granted in constitutional cases where the proposed "intervenor" can show that its interests will be affected by the outcome of the litigation: see, for example, *Law Society of Upper Canada v. Skapinker,* (1984), 9 D.L.R. (4th) 161, 11 C.C.C. (3d) 481, 53 N. R. 169, where the Federation of Law Societies of Canada was given leave to intervene.
>
> I would add on this point, that it is important in dealing with Charter issues raised for the first time, that the Courts have the assistance of argument from all segments of the community. The courts should not resist but should welcome such assistance. See the judgment of Thorson J.A. in *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 28 O. R. (2d) 764 at p. 773 as follows:

> It seems to me that there are circumstances in which an applicant can properly be granted leave to intervene in an appeal between other parties, without his necessarily having any interest in that appeal which may be prejudicially affected in any "direct sense", within the meaning of that expression as used by LeDain, J., in *Rothmans of Pall Mall et al v. Minister of National Revenue et al* (1976), 67 D.L.R. (3d) 505, [1976] 2 F.C. 500, [1976] C.T.C. 339, and repeated with approval by Heald, J., in the passage in the *Solosky* case [[1978] 1 F.C. 609] quoted by my colleague. As an example of one such situation, one can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the Court in reaching its decision but which, but for the applicant's intervention, might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal.

[19] It seems to me that this analysis combines a number of different considerations that may justify an intervention. In more recent judgments, there is a tendency to separate the various grounds for granting the right to intervene. Indeed, *Bhindi* itself is analyzed as an instance in which the intervenor had a direct interest in the litigation (see *Milk Board v. Clearview Dairy Farm* (1986), 8 B.C.L.R. (2d) 394 (C.A. Chambers)) .

[20] More recent jurisprudence from the British Columbia Court of Appeal has established that when a potential intervenor has no direct interest in the litigation, it must have a different perspective from that of the parties: *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands),* 2011 BCCA 294 (Chambers) at para. 16; *ÉGALE Canada Inc. v. Canada (Attorney General),* 2002 BCCA 396 (Chambers) at para. 7, *Bosa Development Corp. v. British Columbia (Assessor of Area 92 - Coquitlam)* (1996), 82 B.C.A.C., 260 (Chambers) at para. 23.

[21] The CNPF claims to have a perspective that is different from that of the respondent. In her affidavit, Ms. Ghislaine Pilon, Chair of the Commission, said:

> [T]he CNPF is interested in the national and collective dimension of the debate that will be raised ... for all francophone minorities in Canada, with respect to the place of the respondent's preschool education program within section 23 of the Charter.
>
> Although it is complementary to the respondent's interests with regard to this aspect of the litigation, the proposed intervention by the CNPF seeks to affirm — irrespective of the reasons given in the first instance decision on this issue — the legitimate place French-language pre-school education programs have among the rights and obligations arising from section 23 of the Charter.

[22] The notice of motion explains:

> [T]he constitutional claims of [the respondent] regarding its right to manage preschool education come out of a specific context and legislative framework, namely, the provisions of the Education Act and the commitments of the Government of Yukon under the Canada-Yukon agreement signed in 2006.
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> For this reason, the CNPF is concerned that its collective and distinct perspective on the question of the expansion of preschool education programs under section 23 of the Charter is not fully represented by the parties, as the recognition of this right at the national level is not among the direct interests of [the respondent] in this litigation.

[23] In my view, it is impossible to distinguish between the perspective of the CNPF and that of the respondent. It may be that the CNPF wishes to advance arguments that are slightly different from those of the respondent. If this is the case (and it is not clear, since the respondent's factum has not yet been filed), this indicates a difference in strategy only, and not a difference in perspective. It is my observation that the arguments put forward by the CNPF are not inconsistent with the arguments that are expected from the respondent, and these arguments can be advanced by the respondent. Normally in this situation, we must respect the choices of a party with respect to the litigation strategy.

[24] In any case, I am not convinced that the subtle difference between the arguments put forward by the CNPF and those expected from the respondent is significant enough to justify the proposed intervention.

[25] In my view, there is even less reason to grant leave to intervene to the FNCSF. Although it is a national organization, I can discern no difference in perspective between the FNCSF and the respondent. I am therefore not convinced that it is useful to grant the FNCSF the right to intervene.

[26] I have no doubt that the FNCSF could help the respondent to present its case. If the right to intervene were granted to the FNCSF, it could share the submissions with the respondent, and it could increase the arguments in its own memorandum. However, I am not convinced that this could assist the court. Rather, it is important that the arguments be presented concisely and efficiently. The right to intervene is not granted merely to allow the work to be shared or the arguments to be repeated.

[27] The situation of the CSFC-B is, in my opinion, closer to the line. It has a perspective that is similar to that of the respondent. With regard to the question of a school board's right to decide to admit the children of non-rights holders, its position is identical to that of the respondent. It claims, however, that it has more experience with regard to this issue, because of

the demographics of British Columbia. British Columbia has more recent immigrants than the Yukon, and it may have a less uniform Francophone culture.

[28] I will accept, for the moment, that the experience of the CSFC-B is subtly different from that of the respondent. I note however that the experience of the CSFC-B is not reflected in the evidence. In a situation such as this, it is difficult to see how the experience of the CSFC-B could assist the court in its deliberations.

[29] Finally, I am not persuaded that the CSFC-B can add an important perspective to this case.

[30] Before concluding this decision, I would like to stress that I accept that the applicants are organizations that have studied the issues before the court and are dedicated to providing education in accordance with s. 23 of the *Charter*. They have been interested in the development of jurisprudence regarding this section. However, their rights are not directly affected in this case, and I am not convinced that they have a perspective to offer that is different from that of the respondent.

[31] For these reasons, I dismiss the motions.

[*signed*]

The Honourable Justice Groberman