Federal Court of Appeal  Cour d'appel fédérale

Date: 20230926

Docket: A-95-23

Citation: 2023 FCA 193

Present: **GOYETTE J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

GILBERT DOMINIQUE (on behalf of the members of the Pekuakamiulnuatsh First Nation) and CANADIAN HUMAN RIGHTS COMMISSION

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 26, 2023.

REASONS FOR ORDER BY: GOYETTE J.A.

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REASONS FOR ORDER

GOYETTE J.A.

[1] Mr. Gilbert Dominique is Chief of the Pekuakamiulnuatsh First Nation (First Nation). In 2016, acting on behalf of the First Nation, Mr. Dominique filed a discrimination complaint with the Canadian Human Rights Commission (Commission) against Public Safety Canada (Canada). The Canadian Human Rights Tribunal (Tribunal) upheld the complaint. It found that Canada's funding of the First Nation's police service discriminated against the First Nation on the basis of

race, national or ethnic origin pursuant to paragraph 5(*b*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA).

[2] The Federal Court dismissed Canada's application for judicial review: *Canada (Attorney General) v. Pekuakamiulnuatsh First Nation*, 2023 FC 267. On appeal, Canada is asking this Court to rule that the Tribunal's finding of discrimination is unreasonable.

[3] The First Nations Child and Family Caring Society of Canada (Caring Society), a national non-profit organization committed to promoting the well-being of First Nations children, has moved to intervene in this appeal. It says that it will be directly affected by the outcome of this appeal, that its position differs from those of the parties, and that allowing the intervention would serve the interests of justice.

[4] The respondents, Mr. Dominique and the Commission, do not oppose Caring Society's motion. Canada does. Canada acknowledges the role of the Caring Society in human rights litigation relating to the funding of child and family services for First Nation children, youth and families. However, Canada considers that the proposed intervention will not "bring further, different and valuable insights and perspective that will assist the Court in determining [this appeal]".

[5] The recent decision in *Chelsea (Municipalité) c. Canada (Procureur général)*, 2023 CAF 179 [*Chelsea*], provides a concise yet comprehensive statement of the law governing intervention in this Court. The following relies on *Chelsea*, applying it to the case at bar.

[6] As noted in *Chelsea*, this Court's recent jurisprudence focusses on three factors to determine whether an intervention is warranted: 1) the usefulness of the intervention in relation to the issues to be decided by the Court, 2) the applicant's interest in the case, and 3) the interests of justice. Applying these factors leads me to conclude that the Caring Society's intervention is not warranted.

I. Usefulness

[7] With respect to usefulness, the Caring Society proposes to make submissions on two grounds raised in Canada's memorandum of fact and law.

[8] First, the Caring Society intends to challenge Canada's suggested approach to assessing the concept of discrimination under the CHRA, which imports jurisprudence under section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter). The Caring Society recognizes that the respondents challenge Canada's approach, but says that they do so in an ancillary manner. Therefore, the Caring Society proposes to "go further" with a thorough assessment of the CHRA and the Charter, their differences and the overarching purpose of human rights legislation.

[9] I have reviewed the respondents' memoranda of fact and law and consider that they substantially embody the arguments that the Caring Society proposes to advance regarding Canada's suggested approach. Indeed, a whole section of Mr. Dominique's memorandum is

dedicated to this issue. Moreover, one objective of having an intervener is to provide the Court with a perspective that will "cast a different light on the matter" (*Ishaq v. Canada (Citizenship and Immigration)*, 2015 FCA 151 at para. 28), not a perspective that "go[es] further" by elaborating arguments raised by the parties. For these reasons, I am not persuaded that the Caring Society's submissions on Canada's suggested approach meet the usefulness threshold.

[10] The Caring Society's second ground for intervention relates to Canada's argument that the Tribunal erred by failing to consider the province of Quebec's role with respect to the First Nation's police service. In response to Canada's argument, the Caring Society proposes to argue that the Tribunal was not precluded from considering Canada's positive obligations. Yet not only is the question of Canada's positive obligations addressed in Mr. Dominique's memorandum of fact and law (paragraphs 69 to 71), but Mr. Dominique alleges that the Federal Court skillfully concluded that the existence of Canada's positive obligations is not an issue in this case. Since in determining usefulness "the focus is on what the intervener can usefully do to help the Court determine the issues already before it, not other issues" (*Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)*, 2022 FCA 67 [*Right to Life*] at para. 17), I am concerned that allowing the Caring Society to make submissions regarding Canada's positive obligations would not assist the Court in deciding the issues in this appeal. In any event, the respondents' memoranda of fact and law discuss Quebec's role with respect to the First Nation's police service, and Mr. Dominique's memorandum, as mentioned, addresses Canada's positive obligations. Accordingly, the Caring Society's submissions on this point do not meet the threshold of usefulness.

II. The Caring Society's Interest

[11] In addition to being involved in a discrimination litigation involving section 5 of the CHRA, the Caring Society has intervened in numerous matters to promote First Nations children's rights and to try to assist courts in the determination of whether these rights are affected. In this context, I have no doubt that if granted to leave to intervene, the Caring Society would dedicate the necessary knowledge, experience, skills, and resources to assist the Court to the best of its abilities.

[12] That said, I am not convinced that the Caring Society has the required interest to be granted leave to intervene in this appeal. The Caring Society will not be directly affected by the decision of this Court in this appeal. This decision will merely address whether it was reasonable for the Tribunal to consider that Canada discriminated against the First Nation in funding its policy service. The Caring Society is correct that this Court's decision could impact how the Tribunal interprets the CHRA and the latter's interaction with the Charter. But this means that the Caring Society, like many protected groups who receive government services through government funding, has a jurisprudential interest in this Court's decision. This is not sufficient to consider that the Caring Society has an interest in this Court's decision: *Right to Life* at para. 24; *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34 at para. 30.

III. Interests of Justice

[13] Granting the Caring Society leave to intervene would not be in the interests of justice. First, the respondents are well represented such that there is no reality or appearance of an "inequality of arms" or "imbalance on one side": *Le-Vel Brands LLC v. Canada (Attorney General)*, 2023 FCA 66 [*Le-Vel Brands*] at para. 19; *Right to Life* at para. 10. Second, the fact that the Caring Society will not provide useful submissions distinct from those of the respondents entails that the intervention would not be conducive to the "just, most expeditious and least expensive" resolution of this appeal: *Le-Vel Brands* at para. 19; *Right to Life* at para. 10; *Federal Courts Rules*, S.O.R./98-106, Rule 3.

[14] For the foregoing reasons, the motion to intervene is dismissed without costs.

"Nathalie Goyette"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-95-23
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. GILBERT DOMINIQUE (on behalf of the members of the Pekuakamiulnuatsh First Nation) and CANADIAN HUMAN RIGHTS COMMISSION

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	GOYETTE J.A.
DATED:	SEPTEMBER 26, 2023

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