Federal Court  Cour fédérale

Date: 20191129

Docket: T-1621-19

Citation: 2019 FC 1529

Ottawa, Ontario, November 29, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

FIRST NATION CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI FIRST NATION

Respondents

ORDER AND REASONS

I. Nature of matter

[1] On October 4, 2019, the Attorney General of Canada [AGC] applied to this Court seeking judicial review of a September 6, 2019 Canadian Human Rights Tribunal [CHRT] decision that

ordered Canada to pay compensation to individuals affected by Canada's discriminatory child and family services funding practices [Compensation Ruling]. The parties dispute the exact nature of this decision. On the same day, the AGC brought a motion asking this Court to stay the Compensation Ruling pending the outcome of the application for judicial review.

[2] The Respondent Caring Society brought its own motion on November 19, 2019 requesting that the Court exercise its discretion to hold the AGC's underlying application for judicial review in abeyance (to adjourn or stay it) in order to allow the CHRT to complete the compensation process.

[3] For the reasons that follow, both motions are denied.

II. Background

[4] This matter has been before the CHRT for over a decade. In 2007, the Caring Society and Assembly of First Nations [AFN] filed a discrimination complaint with the Canadian Human Rights Commission [CHRC] against Canada respecting the funding of child and family services on reserve.

[5] In 2016, the CHRT found that Canada's funding of child and family services on reserve and in the Yukon was discriminatory.

[6] On September 6, 2019, the CHRT rendered its Compensation Ruling. For the purposes of this proceeding, it is not necessary to detail the specifics of the Compensation Ruling.

[7] On October 11, 2019, I was appointed the Case Management Judge for this application. On October 25, 2019, the parties attended a case management conference and agreed to a timeline, leading to the scheduling of this hearing in Ottawa for November 25 and 26, 2019.

[8] With the exception of the Respondent Amnesty International, who chose not to make any submissions on these two motions, all of the Respondents were present for this hearing and made submissions. The parties are in agreement with the applicable tests to be applied in considering the two motions.

[9] On the AGC's motion, the AGC submits that it has satisfied the conjunctive three-part test for obtaining a stay of proceedings as established in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]. The Respondents all argue that the AGC has not met the conjunctive test for a stay.

[10] On the Caring Society's motion, the Caring Society submits that it has established that it is in the interests of justice for the AGC's judicial review of the Compensation Ruling to be held in abeyance so that the CHRT can finalize the process for consultation. All of the Respondents support the Caring Society's arguments save for the CHRC, which argued that, while it takes no position on the Caring Society's motion, it sees the benefits of letting the AGC's judicial review proceed. The AGC, on the other hand, submits that the circumstances do not warrant the exercise of the Court's discretion to hold its judicial review application in abeyance.

[11] Much of the parties' respective arguments revolved around the legality or reasonableness of the Compensation Ruling. These arguments relate to the merits of the underlying judicial review application. As outlined at the outset of the hearing, that is not what these motions are about.

III. Issues

A. *Has the AGC satisfied the three-part test for a stay?*

B. *Has the Caring Society satisfied the test for the exercise of this Court's jurisdiction to stay the underlying judicial review?*

IV. Analysis

A. *Has the AGC satisfied the tripartite test for a stay?*

[12] The Supreme Court of Canada recently restated the *RJR-MacDonald* test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
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> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12)

[13] The burden is on the Applicant to satisfy the *RJR-MacDonald* test, and the test is fact dependent. It is also conjunctive, meaning that all three elements of the test must be satisfied.

(1) Serious Question

[14] The Supreme Court has stated that the "serious question to be tried" part of the test is a relatively low threshold, requiring only that the issues are not frivolous or vexatious.

[15] The AGC raises two main issues that it says give rise to the satisfaction of this aspect of the test: (1) individual compensation was not an appropriate remedy for this complaint since it originated as a systemic discrimination complaint; and (2) even if this Court finds the CHRT had the authority to order individual compensation, the compensation ordered was disproportionate as between individuals (different children suffered different harms) and in light of Canada's prior remedial actions on funding matters over the years.

[16] The Respondents argue that the AGC has not satisfied this part of the test. The Respondent Nishnawbe Aski Nation [NAN] goes further and argues that the AGC's motion is premature (*Jaser v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 368 at para 25).

[17] Considering the above, I find that the AGC's stay motion is not premature. I find that the nature of the Compensation Ruling leaves room for further argument as to whether it is a final or interim decision, as evidenced by the parties' submissions on these motions. This allows me to exercise my discretion to consider the AGC's motion. By stating this, I take no position and make no finding on this issue as those arguments stray into the merits of the judicial review application, which is not appropriate at this stage.

[18] Turning now to whether a serious question exists, I am satisfied that the AGC has met this part of the test. Contrary to the Respondents' views, I do not see the issues raised by the AGC as being frivolous or vexatious. I will now move on to the second part of the test.

(2) Irreparable Harm

[19] The AGC claims it will suffer three types of irreparable harm if I do not grant a stay: (1) there will be conflicting decisions in light of the CHRT retaining jurisdiction while the judicial review application proceeds before this Court; (2) there will be an unwarranted devotion of resources to setting up and implementing the compensation process; (3) there will be unrecoverable loss of compensation paid out to certain individuals during the course of the judicial review. The affidavit of Sony Perron sets out the specifics of the harms that Canada claims will befall it.

[20] The parties have all acknowledged that this part of the test requires non-speculative harm. The Respondents argue that the CHRT only required the parties to engage in discussions about the process for compensation, with consideration given to its suggestions for discussion, as set out the Compensation Ruling.

[21] I am not persuaded by the AGC's submissions that it has met this part of the test for the following reasons. First, I see no prejudice or harm to Canada in engaging in discussions with the parties on process and to report back to the CHRT by December 10, 2019. It was clear in the submissions of the parties that no such discussions had occurred as of the hearing dates. After the

hearing, it was brought to my attention that, in response to a letter from the AGC, the CHRT agreed to extend the reporting deadline from December 10, 2019 to January 29, 2020.

[22] Second, there is no order to pay compensation to any specific individuals by a specific date. The CHRT ordered the parties to discuss several areas including how to identify individuals and in what manner these individuals would be compensated (i.e. trust funds for minors, direct payments to adults, etc.). On the evidence, particularly that of Mr. Perron in cross-examination on his affidavit, there are no imminent compensation payments to be made by Canada. Of course that may change in the future, in which case the parties can consider their respective legal options at that point in time.

[23] Third, in light of the first two reasons, there is no risk that any compensation will not be recovered because there is no compensation to be paid out at this time.

[24] The AGC has not satisfied this part of the test because its claimed irreparable harms are speculative. Bearing in mind that the test is conjunctive, meaning all three parts of the test must be satisfied, I need not consider the third part of the test.

B. *Has the Caring Society satisfied the test for the exercise of this Court's jurisdiction to stay the underlying judicial review?*

[25] The Caring Society argues that section 50(1)(b) of the *Federal Courts Act* provides the Court with broad discretion to stay an application where the Court is of the view that it is in the interests of justice do so.

[26] The parties agree that *Mylan Pharmaceuticals ULC v AstraZeneca Canada Inc*, 2011 FCA 312 sets out the applicable legal principles for this exercise of discretion. At paragraph 5, the Court states:

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> *This Court deciding not to exercise its jurisdiction until some time later*. When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration- the need for proceedings to move fairly and with due dispatch- but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that a Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less.

[27] I take this to mean that the interests of justice test does not have a clear definition and therefore requires a case-by-case assessment.

[28] The Caring Society argues that allowing the AGC's judicial review application to proceed will cause harm to the victims of Canada's discriminatory conduct through confusion, delay of the final resolution on compensation, and potentially conflicting or duplicative decisions. It also argues that judicial economy favours one judicial review on the issue of compensation rather than the possibility of several judicial reviews of the other parts of the Compensation Ruling as it assumes a clearer form. It suggests that Canada should pursue its concerns before the CHRT in accordance with the Compensation Ruling since the CHRT has allowed for such submissions to be made. The other Respondents agreed with this approach. It

also argues that it has a limited ability to bear additional costs if the underlying judicial review is allowed to proceed.

[29] The AGC submits that it would not be in the interests of justice to place its application for judicial review in abeyance. It argues that the Caring Society is required to show prejudice or that they would face injustice if the application was to proceed. The AGC argues there is no such prejudice to the Caring Society or to the children since Canada will continue to fund the actual costs of services to the children while the review takes place. It also argues that the Compensation Ruling is final and therefore it is subject to judicial review. It is not in the interests of justice to engage in the discussions on the compensation process before the CHRT that could be rendered moot by a successful judicial review.

[30] The CHRC, while taking no official position on the Caring Society's motion, suggested that allowing the judicial review proceeding to proceed at the same time as the CHRT discussions may provide certain advantages. They note that having this issue resolved in parallel with the Compensation Ruling discussions may actually prove to be the fastest way to ensure the individuals receive compensation. Therefore, if the stay motion is denied, it may be in the interests of justice to deny the abeyance motion. The CHRC does note, however, that the Caring Society may have an issue with working on two fronts due to the nature of its limited funding and staffing levels.

[31] After considering the submissions of the parties, I am declining to exercise my discretion to hold in abeyance (adjourn or stay) the AGC's judicial review application to allow the CHRT

to finish its work. I do so for several reasons. First, as indicated in my reasons denying the AGC's motion to stay, I am of the view that the only requirement at this time is for the parties to engage in discussions and report back to the CHRT by January 29, 2020 (formerly December 10, 2019). The parties are free to outline the nature and scope of their discussions before the CHRT. In my view, these discussions will not prejudice the parties' respective approaches in the underlying judicial review. The parties' affidavit evidence indicates that there are many knowledgeable people around the table who are more than capable of moving this part of the discussion along.

[32] Second, there is no clear timeline for when the CHRT may complete the work that is set out in the Compensation Ruling. It could be a short time or it could be a very long time. If it is a long time, then one (or more) of the parties may then seek to judicially review the further order(s) of the CHRT at further points in time. This could then result in an even longer period of time to wait for the individuals who are expecting compensation. Surely, this is not a desirable result. All parties submitted that they were seeking "to do the right thing" (my words) for the individuals who are entitled to compensation.

[33] Third, having a judicial review proceeding in the future will provide an incentive for the parties to use the time before the CHRT to expedite good faith discussions with one another and possibly reach a framework to bring before the CHRT for approval. This will not be a wasted exercise.

V. Conclusion

[34] The AGC has not satisfied the three-part test to stay the decision of the CHRT's Compensation Ruling. Accordingly, the AGC's motion is denied.

[35] The Caring Society has not satisfied the Court that it should exercise its discretion to stay or adjourn the AGC's judicial review application pursuant to Rule 50(1)(b) of the *Federal Courts Act*. The Caring Society's motion is denied.

[36] The Caring Society requested that, after I render my decision on the motions, the parties be permitted to make further submissions on costs. I agree with this approach.

THIS COURT ORDERS that:

1. The AGC's motion asking this Court to grant a stay of the CHRT's September 6, 2019 Compensation Ruling pending the hearing of its application for judicial review is dismissed.
2. The Caring Society's motion asking this Court to exercise its discretion to grant an adjournment of the AGC's application for judicial review is dismissed.
3. The Parties are directed to provide submissions on costs by no later than December 31, 2019.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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