

Federal Court



Cour fédérale

Date: 20160426

Docket: T-492-16

Ottawa, Ontario, April 26, 2017

PRESENT: Case Management Judge Mandy Aylen

BETWEEN:

**STACEY SHINER IN HER PERSONAL
CAPACITY AND AS GUARDIAN OF JOSEY
K. WILLIER**

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER

UPON MOTION filed by First Nations Child and Family Caring Society [Caring Society], pursuant to Rule 369 of the *Federal Courts Rules* [Rules], for an order granting the Caring Society leave to intervene in the present proceeding under the following terms:

- (a) The Caring Society will file a memorandum of fact and law at a time set by the Court;
- (b) It will make oral submissions at the hearing;
- (c) It will not bring any evidence or add in any way to the record that has already been filed; and

(d) It does not ask for costs and asks that costs not be ordered against it, regardless of the outcome of the case;

CONSIDERING the Notice of Motion, the affidavit of Cindy Blackstock sworn April 4, 2017 and the exhibits thereto, and the written representations of the Caring Society;

CONSIDERING that the Applicant consents to the relief sought;

CONSIDERING that the Respondent, Attorney General of Canada [AGC], does not oppose the Caring Society being granted leave to intervene in the proceeding, but asserts that the Caring Society should not be permitted to expand the legal issue before the Court as to the Applicant's eligibility for orthodontic treatment.

[1] The Federal Court of Appeal recently confirmed in *Bauer Hockey Corp. v. Easton Sports Canada Inc.*, 2016 FCA 44 (CanLII) [*Bauer Hockey*] that the criteria originally detailed in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 84 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.) [*Rothmans*], continue to apply when making a determination of whether to grant intervener status. Specifically:

- (a) Is the proposed intervener directly affected by the outcome?
- (b) Does there exist a justiciable issue and a veritable public interest?
- (c) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
- (d) Is the position of the proposed intervener adequately defended by one of the parties to the case?

- (e) Are the interests of justice better served by the intervention of the proposed third party?
- (f) Can the Court hear and decide the cause on the merits without the proposed intervener?

[2] The Court is satisfied, based on the evidence put forward by the Caring Society, that the Caring Society should be granted intervener status. The only issue to be determined, and which remains partially contentious between the parties, is the terms upon which the Caring Society is permitted to intervene.

[3] The major point of contention between the parties is the scope of the submissions to be made by the Caring Society. The AGC asserts that the Caring Society should not be permitted to make submissions concerning section 15 of the *Charter* and Jordan's Principle, including benefits that may be available in some circumstances under the *Alberta Child, Youth and Family Enforcement Act*. The AGC submits that:

- A. In relation to the *Charter* arguments, the Applicant has not pleaded any *Charter* breach in the Notice of Application, nor was any evidence adduced on this issue. The AGC has not prepared a section 1 defence. To permit any *Charter* arguments to be made would therefore not be in the interests of justice.
- B. In relation to the *Alberta Child, Youth and Family Enforcement Act*, that legislation was not pled in the Notice of Application, nor is there any evidence on

the record concerning benefits available under that program. Moreover, there is no evidence of any jurisprudential dispute between the First Nations and Inuit Health Branch and the Province of Alberta concerning reimbursement for the Applicant's daughter's braces.

[4] The Caring Society, in its reply submissions, asserts that the AGC has misunderstood its proposed submissions. Specifically, the Caring Society states that it seeks leave to make submissions of the following nature (footnotes omitted):

6. The Caring Society does not challenge the validity of any legislation that would breach the *Charter*, making a section 1 analysis necessary. Rather, the Caring Society seeks to bring existing decisions of the Canadian Human Rights Tribunal to the Court's attention. In those decisions, the Tribunal found that the Respondent's First Nations Child and Family Services program discriminates against First Nations children, in particular because it creates perverse incentives that induce parents or social workers to bring children into foster care, in order to benefit from more generous federal funding that is made available for children when they are in care. That discrimination is described in detail in the Tribunal's decisions (against which no application for judicial review has been made) and there is no need to bring further evidence before this Court.

7. The Caring Society intends to argue that the Respondent must take the Tribunal's decisions into account when making decisions like the one that underlies this application for judicial review. Indeed, disregarding a decision that affirms the right to equality jeopardizes the values under section 15 of the *Charter*, including where the initial decision was made under a provincial human rights statute or the *Canadian Human Rights Act*. The Caring Society's submissions with regard to *Charter* values are based on *Doré v. Barreau du Québec*, a recent decision of the Supreme Court of Canada that sets out the framework applicable when a discretionary decision affects *Charter* rights in the administrative law context. In *Doré*, there was no need to bring additional evidence beyond what was before the initial decision-maker. The same applies here.

8. The Respondent does not seem to understand the Caring Society's proposed argument concerning Alberta's *Child, Youth and Family Enhancement Act*, because it incorrectly characterizes the latter providing "benefits". The Caring Society's argument is simply that the Respondent, in exercising its discretion, had to take into consideration the fact that a denial of services under the federal NIHB program would put children at risk of being found in need of protection and apprehended under provincial child welfare legislation. This argument will be based on the legislation and reported cases and will not require any additional evidence.

9. In making that argument, the Caring Society simply brings a different perspective to the assessment of the best interests of the child, which principle is already invoked by the Applicant.

...

10. The Caring Society's proposed intervention focuses on the factors that the Respondent had to take into consideration in making the challenged decision, as a matter of administrative law...

[5] In light of the Caring Society's clarification of the submissions it seeks to make in this proceeding, I reject the AGC's assertion that such submissions would not be in the interests of justice and I find that such submissions may properly be made by the Caring Society.

[6] The AGC asserts that the Caring Society should also not be permitted to repeat arguments raised by the Applicant, particularly in relation to the issue of the best interests of the child. I agree that no purpose is served by permitting such repetition.

[7] The Caring Society seeks leave to file a 15 page factum, to be filed within 3 days of this Order, and to make oral arguments for 30 minutes at the hearing. The AGC asserts that the Caring Society should only be permitted to file a factum not exceeding 10 pages (also within 3

days of this Order) and that their oral submissions should be limited to 15 minutes. The only rationale advanced by the AGC for reducing the length of the Caring Society's written and oral submissions is due to the fact that the motion to intervene was commenced at a very late stage of this proceeding. I find that the length of the written and oral submissions as requested by the Caring Society is reasonable in the circumstances and will be granted.

[8] The AGC has requested that it be granted leave to file responding written submission, not to exceed 10 pages, within seven days following receipt of the Caring Society's written submission. Given that the hearing of this matter is scheduled for May 8, 2017, there is insufficient time to permit the AGC seven days to respond to the written submissions of the Caring Society. In order to accommodate the Court's and the parties' preparation for the hearing, the latest date for service and filing of the AGC's responding written submissions is the morning of May 5, 2017, which is what shall be ordered.

[9] Moreover, as I have granted the Caring Society leave to file written submissions of 15 pages in length, the same shall be ordered in respect of the AGC's responding submissions.

THIS COURT ORDERS THAT:

1. First Nations Child and Family Caring Society is hereby granted leave to intervene in this proceeding on the following terms:
 - a. It shall not add to the evidentiary record before the Court.

- b. It shall, by no later than 9:00 am EDT on May 1, 2017, serve and file a memorandum of fact and law on the issues identified in its written submissions on this motion, not to exceed 15 pages in length, together with its book of authorities.
 - c. A copy of the Intervener's memorandum of fact and law shall be emailed directly to counsel for the Applicant and counsel for the Respondent by no later than 9:00 am EDT on April 30, 2017.
 - d. It shall be permitted to make oral submissions at the hearing of this application not to exceed 30 minutes, unless otherwise determined by the Judge hearing the application.
 - e. The Intervener's written and oral submissions shall not duplicate those of the Applicant.
 - f. The Intervener is not permitted to seek costs on the application, nor shall it be liable for costs absent any abuse of process on its part.
2. The Respondent is granted leave to serve and file a further memorandum of fact and law, not to exceed 15 pages in length, in response to the submissions of the Intervener, together with any further book of authorities, by no later than 9:00 am EDT on May 5, 2017.

3. A copy of the Respondent's further memorandum of fact and law shall be emailed to counsel for the Applicant and counsel for the Intervener by no later than 9:00 am EDT on May 5, 2017.
4. A copy of the Respondent's further memorandum of fact and law shall be emailed to the Court at CMT_Ottawa@cas-satj.gc.ca by no later than 9:00 am EDT on May 5, 2017.
5. There shall be no costs of this motion.

"Mandy Aylen"

Case Management Judge