Federal Court  Cour fédérale

Date: 20220923

Dockets: T-402-19
T-141-20
T-1120-21

Ottawa, Ontario, September 23, 2022

PRESENT: Madam Prothonotary Sylvie M. Molgat

Docket: T-402-19

CLASS PROCEEDING

BETWEEN:

XAVIER MOUSHOOM, JEREMY MEAWASIGE
(by his litigation guardian, Jonavon Joseph Meawasige),
JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-141-20

CLASS PROCEEDING

AND BETWEEN:

ASSEMBLY OF FIRST NATIONS,
ASHLEY DAWN LOUISE BACH,
KAREN OSACHOFF, MELISSA WALTERSON,
NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo,
CAROLYN BUFFALO, and DICK EUGENE JACKSON
also known as RICHARD JACKSON

Plaintiffs

and

HIS MAJESTY THE KING as represented by
THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-1120-21

CLASS PROCEEDING

AND BETWEEN:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDER

CONSIDERING the urgent nature of this motion, in view of the hearing of the motion for approval of the settlement negotiated between the parties scheduled to commence on September 19, 2022, the Court issued an Order on September 16, 2022, dismissing this motion without costs, with reasons to follow. The reasons are the following:

UPON a motion in writing dated September 7, 2022, by the First Nations Child and Family Caring Society of Canada [Caring Society or Proposed Intervener], pursuant to Rules 369 and 109 of the *Federal Courts Rules*, SOR/98-106 [Rules], for an Order granting it leave to intervene, following the filing of a motion for settlement approval in this proceeding, on the following terms:

(a) The Caring Society may file a memorandum of fact and law of no more than 15 pages, or such other length as this Court may direct;

(b) The Caring Society shall accept the record as adduced by the parties and shall not file any additional evidence;

(c) The Caring Society may participate in any future case conferences that pertain to this proceeding;

(d) Any documents served on any party in this proceeding must also be served on the Caring Society;

(e) The style of cause for this proceeding be amended to add the Caring Society as an intervener; and

(f) The Caring Society may not seek costs or have costs awarded against it in this proceeding;

UPON reading the motion record of the Proposed Intervener, the responding motion records filed on behalf of the Plaintiffs and the Defendant, all of whom oppose the motion, as well as the written representations of the Proposed Intervener in reply, served and filed in accordance with the Court's Direction dated September 8, 2022;

Overview

[1] The Caring Society is a national non-profit organization committed to promoting the well-being of First Nations children, youth and families through research, training, networking, policy, and public education. It has detailed expertise in Jordan's Principle and has been granted intervener status in a number of legal proceedings affecting the rights of First Nations children.

[2] The Caring Society seeks to intervene in the motion to approve the settlement reached by the parties in these class actions. The issue to be decided on that motion will be whether in all the

circumstances the settlement reached is fair, reasonable and in the best interest of the class as a whole.

[3] The parties are united in their opposition to the motion on similar grounds. They further argue that the Caring Society's excessive delaying in bringing this motion threatens to prejudice the class by delaying their receipt of compensation should the Court approve the settlement.

[4] The motion will be denied. While recognizing the Proposed Intervener's dedication to advocating for First Nations children, the Court finds that it has not satisfied the test to be granted intervener status. The Caring Society is not directly affected by the outcome of the settlement approval motion and it is not in the best interest of justice to permit it to intervene for the purposes of opposing the settlement negotiated by the parties.

Nature of the Matter

[5] The underlying class actions seek compensation for discrimination by Canada against First Nations children and their families in knowingly underfunding child and family services for certain First Nations children, failing to honour and comply with Jordan's Principle, and failing to provide First Nations children with essential services available to non-First Nations children or that would have been required to ensure substantive equality.

[6] Following prolonged mediation and extensive negotiations, the parties finally reached an Agreement-in-Principle in late 2021, and subsequently entered into a Final Settlement Agreement [FSA] on June 30, 2022.

[7] The proposed settlement is described as one of the largest in Canadian history. The FSA represents a global settlement of the class actions and of the compensation portion of related proceedings before the Canadian Human Rights Tribunal [Tribunal] brought in 2007 by the Caring Society and the Assembly of First Nations [AFN] as co-complainants, in which the Tribunal found that Canada had discriminated against First Nations children, youth and families, and awarded compensation: *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 and 2021 CHRT 7 [Compensation Orders]. The class action litigation before this Court, while related to the Tribunal proceedings, is procedurally distinct.

[8] The FSA is conditional, firstly, upon the Tribunal confirming that the negotiated settlement satisfies its Compensation Orders. On July 22, 2022, the AFN filed a motion to the Tribunal, with the support of Canada, seeking a declaration that the proposed settlement is reasonable, fair, and that it satisfies the Tribunal's relevant Orders or, in the alternative, requesting that the Tribunal modify its Orders to conform to the terms of the FSA.

[9] The Caring Society is a party to and a full participant in the Tribunal proceedings relating to the AFN's motion, having filed affidavit evidence, engaged in cross-examinations and filed written submissions numbering some 55 pages. That motion is scheduled for a 2-day hearing before the Tribunal commencing on September 15, 2022.

[10] The FSA is also conditional upon the Court approving the settlement without modification pursuant to Rule 334.29 of the Rules. The Court has directed that the motion to approve the FSA

[Settlement Approval Motion] will only be heard once the Tribunal has determined that the FSA satisfies its Compensation Orders. If the Tribunal decides that the FSA does not satisfy its Compensation Orders, the Settlement Approval Motion will not proceed.

[11] By Direction dated January 14, 2022, the Court set a date for the Settlement Approval Motion to be heard following the Tribunal hearings, for 5 consecutive days commencing on September 19, 2022. In accordance with the timetable established by the Court on May 25, 2022, the motion materials submitted on consent of all parties were filed by the Plaintiff on September 7, 2022. The within motion by the Proposed Intervener was served and filed the following day.

Analysis

[12] Rule 109 of the Rules allows the Court to grant leave to a non-party to intervene in a proceeding. Subsection 109(2) of the Rules requires that a person seeking leave describe how they wish to participate and how their proposed participation will assist the Court in determining a factual or legal issue related to the proceeding.

[13] The tests used to decide a motion for intervention filed under Rule 109 are those stated in *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] 1 FC 90 (CA), and reasserted in *Sport Maska Inc. v Bauer Hockey Corp.*, 2016 FCA 44 [*Sport Maska*]: (i) Is the proposed intervener directly affected by the outcome of the litigation? (ii) Is there a justiciable issue and a veritable public interest? (iii) Is there an apparent lack of any other reasonable or efficient means to submit the issue to the Court? (iv) Is the position of the proposed intervener adequately defended by one of the parties to the case? (v) Would the interests of justice be better

served if the leave to intervene sought is granted? (vi) Can the Court hear and dispose of the proceeding on its merits without granting leave to intervene? (see *Canada (Citizenship and Immigration) v Canadian Council for Refugees,* 2021 FCA 13 [*Canadian Council for Refugees*]; *Alliance for Equality of Blind Canadians v Canada (Attorney General)*, 2022 FCA 131 at paras 6-11 [*Alliance for Equality*]).

[14] The test to be met must be applied flexibly and the weight to be given to each factor will depend on the circumstances of the proceeding. The list is not exhaustive, and it is not necessary for all of the factors to be met. In the end, the issue is whether the interest of justice requires the Court to grant or deny the motion for intervention (see *Sport Maska* at paras 40-42; *Canadian Council for Refugees* at paras 6-9).

[15] The Federal Court of Appeal has recognized that the "usefulness" of the proposed intervener's submissions is a central part of the test for intervention under Rule 109. In determining whether the submissions would be useful, the Court will consider: (a) the issues the parties have raised; (b) what the proposed intervener intends to submit concerning those issues; (c) whether the proposed intervener's submissions are doomed to fail; and (d) whether the proposed intervener's arguable submissions will assist in the determination of the actual, real issues in the proceeding (see *Canada (Attorney General) v Kattenburg*, 2020 FCA 164; *Canadian Council for Refugees* at para 6; *Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour),* 2022 FCA 67 at paras 9-11; *Alliance for Equality* at para 12).

[16] In the specific context of a motion to approve the settlement reached by the parties in a class action, this Court has held that where the real purpose of a proposed intervention is to object to the settlement and there is a process in place to receive objections, there is no basis for granting intervener status (see *McLean v Canada (Attorney General)*, 2019 FC 511 at paras. 17-19 citing *McCarthy v Canadian Red Cross Society*, 2007 CarswellOnt 3735, 158 ACWS (3d) 12; *Whapmagoostui First Nation v McLean*, 2019 FCA 187).

[17] The Caring Society submits that it "will be directly affected by the outcome of this proceeding"; that it "has a direct interest in ensuring that the FSA provides a reasonable settlement for all children, youth and families who are victims of Canada's discrimination"; that "interpretations of the FSA arising from the Federal Court's decision on a motion for approval of that agreement may have implications for the Caring Society in the proceedings before the Tribunal"; and that it will make useful submissions that are different from those of the parties.

[18] The Caring Society has "several technical concerns" with the FSA which it intends to address at the hearing before the Tribunal. It wishes to be granted leave to intervene in these proceedings to make submissions concerning two aspects of the FSA. Firstly, regarding eligibility and compensation with respect to Jordan's Principle and the impact of "vague eligibility criteria" on a victim's ability to opt out, the Caring Society will submit that Jordan's Principle class members cannot meaningfully assess whether their circumstances meet his threshold. Secondly, the Caring Society takes issue with the estates of parents being excluded from compensation, and will argue that doing so is contrary to the approach taken by the Tribunal in its Compensation Orders, and that it constitutes a dramatic departure from the Tribunal's approach to compensation.

[19] Considering the first criteria set out in *Sport Maska*, the Caring Society is a non-profit organization—it is not a member of the class of individuals who suffered as a result of Canada's discrimination on whose behalf these proceedings were brought. Nor does the Caring Society act for class members. Yet it is essentially seeking to make submissions on behalf of the class (or a sub-set of them) whose interests are already represented by Class Counsel and the Representative Plaintiffs.

[20] The Court agrees with the reasoning of Justice Phelan in *McLean v Canada (Attorney General)* and finds that the Caring Society does not have a "direct interest" and that it may, at best, be "indirectly affected" by the outcome of the Settlement Approval Motion such that the first criteria of *Sport Maska* is not met (see *McLean v Canada (Attorney General)*, 2019 FC 515 at para 3).

[21] Regarding the other criteria, the Caring Society has not satisfied the Court that there is no other reasonable or efficient means to submit its concerns to the Court given the participatory rights of Jordan's Principle class members who are affected by the FSA and the objection process available to them.

[22] The Caring Society has also not demonstrated that their proposed submissions will be useful. Whether the FSA is consistent with the Tribunal's approach to compensation may well be an issue that the Tribunal will consider in determining whether the FSA satisfies its Compensation Orders but it is not, in the Court's respectful view, relevant to the Settlement Approval Motion. As to the exclusion of the estates of parents, it is not open to the Court to decide at its discretion to

rewrite or amend the terms of the FSA reached by the parties. In that respect, the proposed submissions of the Caring Society are doomed to fail (see *McLean v Canada (Attorney General)*, 2019 FC 511 at para 15; 2019 FC 1075 at paras 68-70; *Merlo v Canada*, 2017 FC 533 at para 17).

[23] Given the sequencing of the hearings before the Tribunal and the Court, it is not clear how the outcome of the Settlement Approval Motion may have "implications" for the Caring Society, because the Tribunal hearings are proceeding first and the Settlement Approval Motion will only proceed if the Tribunal finds that the FSA satisfies its Compensation Orders.

[24] The concerns the Caring Society wishes to express concerning the FSA are the same as those it has raised and will argue as a full party in the proceedings before the Canadian Human Rights Tribunal which is, in the Court's view, the proper forum for it to do so. Denying leave to intervene will not deprive the Caring Society of the opportunity to have its perspective on the FSA considered.

[25] It is evident from the substantive nature of the submissions the Caring Society proposes to make if permitted to intervene that the objective of the intervention is to object to the settlement negotiated between the parties. Where, as is the case here, there is an objection process available to class members, leave to intervene ought not be granted as doing so would create a separate process from that which is provided for class members.

[26] The Court is not convinced that it is in the best interest of justice to grant intervener status to the Caring Society, nor that the proposed intervention is compatible with the imperatives of

Rule 3 of the Rules. In the Court's view, the interest of justice favours respect for the process provided for objections.

[27] For these reasons, the motion by the First Nations Child and Family Caring Society of Canada was dismissed by Order dated September 16, 2022. As the parties did not seek costs, no costs were awarded.

"Sylvie M. Molgat"
Prothonotary