In the Court of Appeal of the Northwest Territories

Citation: Yellowknife Public Denominational District Education Authority v. Euchner, 2008 NWTCA 01

Date: 20080201
Docket: A-1-AP-2007000017
Registry: Yellowknife, N.W.T.

In the matter of the *Local Authorities Elections Act*, R.S.N.W.T. 1988, c. L-10, the *Education Act*, S.N.W.T. 1995, c. 28 and the *Northwest Territories Act*, R.S.C. 1985, c. N-27, s.16(n) and

In the matter of a decision of Debbie Euchner, the returning officer for the Yellowknife Public Denominational Education Authority, that Amy Hacala and Deborah Simpson, persons not of the Catholic faith nominated as candidates for election to the Board of Trustees of the Yellowknife Public Denominational Education Authority at an election to be held on October 16, 2006

Between:

Yellowknife Public Denominational District Education Authority and Kern Von Hagen

Appellants

- and -

Debbie Euchner, in her capacity under the *Local Authorities Elections Act*, R.S.N.W.T. 1988, c. L-10 as returning officer of Yellowknife Denominational District Education Authority

Respondent

The Court:

The Honourable Madam Justice Elizabeth McFadyen
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Jack Watson

Memorandum of Judgment

Applications for Leave to Intervene

Memorandum of Judgment

The Court:

[1] Four applicants, Alberta Catholic School Trustees' Association (Alberta applicant), Saskatchewan Catholic School Boards Association Inc. (Saskatchewan applicant), Canadian Catholic School Trustees' Association (Canadian applicant) and Ontario Catholic School Trustees' Association (Ontario applicant), each seek leave to intervene in an appeal where the issues raised include whether the rights of minority Catholic ratepayers to establish separate schools are constitutionally entrenched in the Northwest Territories, and whether s. 16(n) of the *Northwest Territories Act*, R.S.C. 1985, c. N-27, which provides for the establishment of schools, is invalid federal legislation contrary to the *Canadian Bill of Rights* and the *Charter of Rights and Freedoms*. The proposed interventions are opposed by the Attorney General of the Northwest Territories acting on behalf of the respondent.

Background

[2] The decision under appeal held that constitutional protection applies unevenly in Canada and that, in contrast to provinces such as Alberta and Saskatchewan, statutory rights to denominational education in the Northwest Territories have not been made permanent, or constitutionally enshrined, by any constitutional document because the *Northwest Territories Act* does not form a part of the *Constitution of Canada*. Although there is no constitutional right to denominational education, the court held that there is a statutory right pursuant to the *Education Act*, S.N.W.T. 1995, c. 28, for minority Catholic or Protestant taxpayers to petition the government to establish a separate school system in their municipality. The court refused to read into the legislation a requirement that trustees in a Catholic school board be of Roman Catholic faith. Rather, he held that the legislation only requires that the trustee be a "supporter" of the separate school system. The trial judge further held that the absence of any such requirement in the legislation is by design and not mere omission.

[3] The four applicants are associations representing Roman Catholic interests in Catholic education.

Test for leave to intervene

[4] This Court has inherent jurisdiction to grant leave to intervene. As explained by the Supreme Court of Canada in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 at para. 1, "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."

[5] The applicants summarize the test for granting leave to intervene generally as requiring consideration of the following questions:

1. Will the intervener be directly affected by the appeal;

2. Is the presence of the intervener necessary for the court to properly decide the matter;
3. Might the intervener's interest in the proceedings not be fully protected by the parties;
4. Will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal;
5. Will the intervention unduly delay the proceedings;
6. Will there possibly be prejudice to the parties if intervention is granted;
7. Will intervention widen the *lis* between the parties; and
8. Will the intervention transform the court into a political arena?

[6] The applicants further submitted that the courts are generally more lenient in granting intervener status in cases involving constitutional issues. They cited the decision of the Alberta Court of Appeal in *Papaschase Indian Band No. 136 v. Canada*, 2005 ABCA 320, 380 A.R. 301. In that case the court employed a two-step approach, firstly considering the subject matter of the proceedings and, secondly, determining the proposed interveners' interest in that subject matter. The court stated at para. 9:

> In constitutional cases, if an applicant can show its interests will be affected by the outcome of the litigation, intervener status should be granted: *Skapinker v. Law Society of Upper Canada* (1984), 9 D.L.R. (4th) 161 (S.C.C.). Or, as already noted, if the intervener applicant possesses some expertise which might be of assistance to the court in resolving the issues before it, that too will do. As explained by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05, and approved by the Supreme Court of Canada in *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335 (S.C.C.), at 340:
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> > an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue.

Application of the test

[7] Both the Alberta and Saskatchewan applicants submit that they are directly affected by the decision in this appeal. Both share a legislative history with the Northwest Territories and in particular, the *Rupert's Land and North-Western Territory Order* of June 23, 1870 (the 1870 Order), by which constitutional document these territories became part of Canada. The appellants on the appeal will argue that the 1870 Order guaranteed a constitutional right for the minority denominational population to establish and govern separate schools in all areas of Canada formerly part of Rupert's Land and the North-Western Territory, and further that Roman Catholics located therein were guaranteed the same rights as religious minorities in the Province of Canada as of July 1, 1867. While the interests of Roman Catholics residing in Alberta and Saskatchewan are not directly affected, in the sense that decisions of this Court are not binding in those jurisdictions, it is

apparent that the Alberta and Saskatchewan applicants are vitally interested in the interpretation of the common constitutional document.

[8] The Alberta and Saskatchewan applicants also each point out that they have been involved in litigation involving claimed constitutional guarantees of Roman Catholic education. The Alberta applicant also submits that it brings expertise having researched and litigated upon importation of the law as it existed in 1867 in the original four provinces into the Northwest Territories in 1870.

[9] The Canadian and Ontario applicants do not submit they are directly affected, but submit they can contribute something useful and different. The Canadian applicant submits that it will bring a national perspective and can provide guidance from across Canada by commenting on the different provincial experiences and can discuss the federal protection extended through the *Northwest Territories Act* and different legislation across Canada. The Ontario applicant submits it has developed expertise with respect to the history of denominational education rights in Ontario and elsewhere.

[10] The respondent says that the appeal requires only an interpretation of the law applicable in the Northwest Territories, and submits that there is not dispute as to public denominational school rights in any of the provinces. It is argued that the proposed interventions are not necessary and will simply result in multiple submissions.

[11] Having closely examined the submissions of each of the applicants, we allow intervention only by the Alberta and Saskatchewan applicants. They share with the appellant a common legislative history, to the extent that their addition to Canada arises from the 1870 Order. In addition, we are satisfied that they possess experience and will bring a fresh perspective similarly as in *Papaschase*. Each of their submissions shall be limited to addressing only the constitutional and Charter issues raised by the appellants in the appeal, without repetition of the submissions already contained in the Factum of the Appellants.

[12] While the Canadian and Ontario applicants share in the sincere and intense interest in the future of Catholic education, we are not persuaded that these applicants will be able to bring forward arguments that would not otherwise be made or perspectives that will not otherwise by advanced. We are concerned that additional interventions by them will serve to lengthen the appeal without compensating benefit to the parties and the court, and simply result in multiple submissions on the same points as foreseen by the respondent.

Conclusion

[13] The applications of each of the Canadian and Ontario applicants are dismissed.

[14] Leave is granted to each of the Alberta and Saskatchewan applicants (the Interveners) to intervene on the following terms:

1. Each Intervener may make a written submission, not exceeding 20 pages, dealing only with the constitutional and Charter issues raised by the appellants in the appeal, as set out in para. 11 above, which written submissions will be filed and served upon the respondent not later than the end of Friday, February 29, 2008.

2. If the respondent desires, the Attorney General may file and serve on her behalf a written reply to the submissions of the Interveners, such reply not to exceed 20 pages and to be filed and served not later than the end of Friday, March 28, 2008.

3. The panel hearing the appeal will determine whether or not it will grant oral argument by the Interveners, and if so, any time limits for the oral arguments so allowed.

4. The Interveners will bear their own costs of their applications and interventions.

Applications heard at Yellowknife, N.W.T.
on Tuesday, January 22, 2008

Memorandum filed at Yellowknife, N.W.T.
this 1st day of February, 2008

McFadyen J.A.

O'Brien J.A.

as authorized by: Watson J.A.

Appearances:

Kevin P. Feehan, Q.C.
for the Appellants, Alberta Catholic School Trustees' Association and Canadian Catholic School Trustees' Association

Martin Goldney
for the Respondent

Collin Hirschfeld
for Saskatchewan Catholic School Boards Association Inc.

Peter Lauwers
for Ontario Catholic School Trustees' Association

IN THE COURT OF APPEAL
NORTHWEST TERRITORIES

In the matter of the *Local Authorities Elections Act*, R.S.N.W.T. 1988, c. L-10, the *Education Act*, S.N.W.T. 1995, c. 28 and the *Northwest Territories Act*, R.S.C. 1985, c. N-27, s.16(n) and

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