COUR SUPRÊME DU YUKON

Citation: *Commission Scolaire Francophone du Yukon c. Tribunal d'Appel de l'Éducation du Yukon* 2015 YKSC 24

Date: 20150601
C.S. N^{o}: 15-AP003
Greffe: Whitehorse

Entre:

COMMISSION SCOLAIRE FRANCOPHONE DU YUKON

Pétitionnaire

et

TRIBUNAL D'APPEL DE L'ÉDUCATION DU YUKON

Intimé

Devant l'honorable juge R. S. Veale

Comparutions:
Francis Poulin — Conseiller pour la pétitionnaire
Mathew Good — Conseiller pour l'intimé

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

INTRODUCTION

[1] VEALE J. (Oral): The Commission Scolaire Francophone du Yukon ("CSFY") filed a petition on May 5, 2015, seeking judicial review of two procedural rulings of the Tribunal d'Appel de l'Éducation du Yukon ("the Tribunal") before the Tribunal addresses substantive issues on June 8, 2015.

[2] One ruling relates to the jurisdiction of the Tribunal, and the other to the refusal of the Chair of the Tribunal to recuse herself. There is a second recusal application that the Tribunal has not had an opportunity to decide.

[3] The Chair of the Tribunal has set the substantive matter before it for hearing on June 8, 2015, apparently without consultation with the parties on the availability of that date. CSFY now applies for a stay of proceedings of the matter before the Tribunal so that the Judicial Review can proceed and be determined before the Tribunal decides the matter on its merits. This matter has come before the Court on an urgent basis, and both parties consent to the matter being heard in English, and I've agreed to hear it as a matter of necessity.

BACKGROUND

[4] Sylvie Geoffroy is the mother of Etienne Geoffroy-Gagnon. Until 2011, Etienne attended L'Academie Parhélie, which I will refer to as the French high school. In 2012, he left the French high school to attend the Wood Street Annex part of the English high school, F.H. Collins. He is presently completing his Grade 12 in June of this year.

[5] Etienne, although in an English high school, wanted to graduate from a French high school and asked the Minister of Education if he could be registered in the French language distant education program offered by Alberta. The Minister, pursuant to a Memorandum of Understanding with CSFY, said CSFY should make the decision.

[6] On January 29, 2013, CSFY refused Etienne's request, and his mother filed an appeal with the Tribunal on June 11, 2013. Both CSFY and the Minister of Education challenged the jurisdiction of the Tribunal. On August 14, 2014, the Tribunal decided that it had jurisdiction.

[7] As a result of events at a pre-hearing conference on October 2, 2014, CSFY applied on November 6, 2014, to have the Chair of the Tribunal recuse herself. In a decision dated March 16, 2015, the Chair decided not to recuse herself. The Tribunal also outlined the procedure to be followed and the composition of the Panel in the March 16 letter.

[8] Counsel for CSFY began to prepare its judicial review Petition in April 2015 and filed on May 5, 2015. In a May 8 letter, the Tribunal confirmed the procedure outlined on the March 16 letter, and fixed the hearing date for June 8, 2015, which was 30 days after the notice was issued. A schedule was set and further pre-hearing conference directed for May 21.

[9] The May 8 letter stated as follows:

> The Tribunal has scheduled the hearing of this matter for June 8, 2015 for the duration of one day. The hearing will be held at the Association franco-yukonaise, 302 Strickland Street in Whitehorse beginning at 8:30 a.m.
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> This is the only date before summer on which the Tribunal members and support facilities are all available. The Tribunal appreciates the parties' efforts to accommodate this schedule. Given that the matter has been going on for almost two years, it is imperative that it be finally adjudicated as soon as possible.

[10] On May 12, 2015, the Petition for judicial review was served on the Tribunal. On May 19, 2015, the Tribunal provided its reasons on the request for a stay, and it directed that the hearing proceed, and it stated as follows:

> The Tribunal is in receipt of the request by the CSFY of May 11, 2015 for a stay of its proceedings to permit the Yukon Supreme Court to address the petition for judicial review filed by the CSFY on May 5, 2015 concerning the Tribunal's jurisdiction and the recusal of the Chair.

> The present appeal was filed on June 11, 2013. The Tribunal provided its reasons regarding its jurisdiction in this matter on August 14, 2014 and its reasons regarding the request by the CSFY for the Chair's recusal on March 16, 2015. The hearing of this matter has finally been scheduled for June 8, 2015, almost two years' [sic] after the appeal was filed.
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> All the necessary arrangements have been put in place by the Tribunal for the hearing. The Tribunal was not aware of the application for judicial review until after it had already fixed the date for the hearing, and advised the parties. The CSFY has not offered any reason for its delay in seeking judicial review of the Tribunal's preliminary decisions.
>
> In the circumstances, the Tribunal is not prepared to adjourn its process or further delay the adjudication of the merits. The hearing will take place as scheduled.

[11] As I indicated earlier, CSFY has a further recusal application relating to another member of the Tribunal on the grounds of the conflict in interest, and the application has yet to be heard by the Tribunal.

[12] The application for a stay of proceeding was received on May 25, 2015, it was filed and heard on an urgent basis on May 28, 2015.

THE LAW

[13] Applications for interlocutory injunctions and stays are governed by the three-part test set out in *RJR-MacDonald Inc. c. Canada (Procureur général),* [1994] 1 R.C.S. 311, as follows:

(1) Is there a serious question to be tried;

(2) Will the CSFY suffer irreparable harm if the relief is not granted, and

(3) What is the balance of convenience.

[14] Counsel are in agreement that the questions regarding jurisdiction and reasonable apprehension of bias are serious questions. As to the irreparable harm,

CSFY points out that the matter is being heard too late to assist Etienne, who is graduating in June 2015. CSFY also relies on the decision of *Chubb-Kennedy v. Edgewater Casino (No. 2)*, 2014 B.CHRT 33 (CanLII) at paras. 19 and 20 as follows,

> [19] I accept that if the judicial review Petition is successful, it could be wholly dispositive of the matter which is before the Tribunal. If that were to happen, all of the parties, as well as the Tribunal, would be prejudiced by needless expenditure of resources on a matter that should never have proceeded to a hearing in the first place.
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> [20] I am satisfied that the harm in such circumstances meets the definition of irreparable which refers to the nature of the harm rather than its magnitude. *Whirlpool Corp and Inglis Ltd. v. Camco Inc. and General Electric Co.* [1995] F.C.J. No. 1740, para. 9.

[15] There is no question that financial loss can be considered irreparable harm and, in this case, CSFY would incur additional expense. By the same token, all parties will be incurring expenses and the fact that each participant faces cost to participate should not be considered irreparable harm. It is not a situation like *RJR MacDonald* where the applicant was facing significant expenses to implement a regulation. The real concern of CSFY is that if they succeed on the judicial review, the expense before the Tribunal would be unnecessary. In my view, this is more suitably addressed under the third test, the balance of convenience.

[16] The balance of convenience will often determine the results in applications involving the *Charter of Rights* and, in this case, s. 23 of the *Charte*r entitled "Minority language education rights" is in issue.

[17] Counsel for CSFY submits that the questions of jurisdiction and impartiality should first be determined by the Court because it has a reasonably strong chance of success on the question of jurisdiction. That may be the situation, but one would expect

that the judicial review application would be brought immediately following the Tribunal's decision.

[18] Counsel for the Tribunal submits that the preferred approach in these matters of Judicial Review is summarized in the text by Brown and Evans - Judicial Review of Administrative Action in Canada at 3-62, 3-63 as follows, and I quote:

> … [T]he court has a discretion as to whether to undertake review before the administrative process has been completed. In those circumstances, the pivotal consideration for a court is the need to avoid fragmenting the administrative process and encouraging piecemeal resort to the courts. …
>
> [C]ourts now generally defer a determination of an allegation that an administrative decision-maker has no jurisdiction over a matter or has breached the duty of fairness until the administrative process is complete. Not only does this avoid the fragmentation of the issues and possibly unnecessary litigation, but it also permits the reviewing court to have the benefit of a complete record and, through the tribunal's reasons for decision, its expertise. As well, a court may be reluctant to decide a question of statutory interpretation before findings of fact have been made to provide a concrete context for an answer.

[19] The issue of courts exercising restraint in intervening in matters before tribunals was recently addressed in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, where it was recognized that the Courts have discretion to intervene. Cromwell J. said the following at para. 36:

> While such intervention may sometimes be appropriate, there are sound practical and theoretical reasons for restraint (citations deleted). Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for a judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in

> tribunals and Courts and may compromise carefully crafted, comprehensive legislative regimes. …

[20] While the case before me is not a preliminary screening issue, nor is it early days in the appeal brought by Sylvie Geoffroy in June 2013, this Tribunal has a broad discretion over its own procedure as set out in the Tribunal's policy:

> 10. In the event that a mediator is appointed and the Parties do not reach agreement, the matter shall proceed to a hearing and a date for that hearing must be set as soon as possible.
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> 11. Prior to commencing with a formal hearing, the chair will conduct a pre-hearing conference to confirm the issues and to set the date by which the parties must have provided for a full disclosure of documents, identify hearing dates, expectation of time necessary for hearing, confirmation and to outline the hearing process. …

DECISION

[21] Although I am concerned about the manner in which the Tribunal has set the hearing dates and whether one day will be adequate, I am reluctant to interfere with these procedural details. Rather, this Court is more concerned that there be a full record for the Court when the hearing of the judicial review occurs, particularly when the matter has been outstanding for two years, and the Tribunal is ready to proceed and render a decision.

[22] This Court has no wish to encourage the inefficient multiplicity of proceedings in tribunals and Courts but for exceptional circumstances, which I do not find here. The application to stay the proceeding is therefore dismissed.

[23] However, I do say this. One of the risks of setting a hearing for one day with translation is that there will inevitably be more than one day required to hear the matter fully and fairly. The result is often a splitting of the hearing, which is always an

undesirable matter. In those circumstances, the wiser course would be to be ready for a two or three-day hearing just in case, or adjourn the matter to a later date, as there does not appear to be any urgency for Etienne, who has already lost his opportunity to graduate in French.

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VEALE J.