Federal Court  Cour fédérale

Date: 20221102

Docket: T-225-22

Citation: 2022 FC 1500

Ottawa, Ontario, November 2, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

A.B.

Applicant

and

C.D, E.F., AND G.F.

Respondents

JUDGMENT AND REASONS
(Public Version of Confidential Draft Version Issued October 25, 2022)

I. Overview

[1] The Applicant A.B. seeks judicial review of the terms under which the Canadian Human Rights Tribunal [CHRT] granted the Applicant limited interested person status on January 24, 2022 [Standing Decision], in the context of a pending human rights complaint by the Respondent, C.D. involving allegations against the Respondent, G.F. [Complaint]. Although A.B. is not the focus of the Complaint, there is no dispute that A.B. is highly implicated in the Complaint and could be impacted significantly by the outcome.

[2] For the reasons below, I dismiss the Applicant's judicial review application.

II. Relevant Procedural History

[3] The judicial review proceeding is subject to the Amended Confidentiality Order of Associate Judge Coughlan (as she now is known) dated March 21, 2022 [FC Confidentiality Order]. Pursuant to the FC Confidentiality Order, the style of cause of this proceeding has been anonymized, and material filed with the Court, and the information contained in the material, including the parties' names, are treated as confidential and are not available to anyone other than the parties and appropriate Court personnel, until further order of the Court. Further, the parties to the proceeding may apply to the Court to vacate or vary the FC Confidentiality Order within 30 days of the issuance of the decision by the CHRT Tribunal Member seized of a confidentiality motion by A.B. under section 52 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

[4] In addition, the FC Confidentiality Order provides that the terms and conditions of use of the confidential information, and the maintenance of confidentiality during any hearing of the proceeding and any subsequent reasons for judgment, shall be in the discretion of the Court seized of the matter.

[5] Immediately before the hearing of this judicial review application, the Court heard a motion by A.B. for an interim ban of publication of A.B.'s identity and any information that would tend to identify A.B. or A.B.'s family in relation to this proceeding, including the motion

for this Order [Motion Order], until further order of the Court. The Court granted A.B.'s motion for the reasons and on the terms outlined in the Motion Order.

[6] I note that, subsequent to the hearing of judicial review application, the CHRT issued its ruling on September 7, 2022, substantially granting A.B.'s *CHRA* section 52 confidentiality motion, with modifications [CHRT's Confidentiality Ruling] which A.B. provided to the Court, without objection from the other parties who were aware in advance that A.B. would do so. The CHRT's Confidentiality Ruling includes a publication ban on specified information that would tend to identify A.B. or A.B.'s family members in relation to the CHRT proceeding.

III. Relevant Factual Background

[7] The Respondent, C.D. is a group of Indigenous complainants who allege discrimination by the Respondent, G.F. on basis of race and ethnicity. The Complaint stems from an asserted failure to adapt traditional investigative methods during G.F.'s investigation into alleged childhood abuse at the hands of A.B. who held teaching jobs in northern British Columbia in the 1960s and 1970s. The complainants say that the investigation was biased in favour of A.B.'s position as an influential white person and, thus, they seek the provision of a service (i.e. impartial, unbiased and thorough investigation) by G.F.

[8] In connection with the Complaint, A.B. became aware of a breach of an implied undertaking of confidentiality applicable to certain documents produced in a defamation action before the British Columbia Supreme Court [BCSC] initiated by Laura Robinson, a journalist

and C.D.'s non-legal representative, against A.B. The BCSC dismissed Ms. Robinson's action; Ms. Robinson did not appeal the decision.

[9] The Respondent, E.F. was provided with documents marked with identifiers that signalled they had been produced to Ms. Robinson under the implied undertaking during the action eventually dismissed by the BCSC. Ms. Robinson, who allegedly provided the documents to E.F. in breach of the implied undertaking, remains involved in the Complaint as C.D.'s non-legal representative and a witness in the CHRT proceeding, initiated by referral from E.F.

[10] As a non-party, A.B. only became aware of the CHRT proceeding after it was well underway. A.B. sought interested person status pursuant to Rule 27 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 [*Tribunal Rules*] to seek a stay or dismissal of the CHRT proceeding. The above-mentioned Standing Decision grants limited interested person standing to A.B., subject to the following summarized terms or restrictions [Restrictions] that A.B. now challenges in this judicial review proceeding:

(a) A.B. may participate in the CHRT proceeding only on two discrete issues: (i) the alleged breach of the implied undertaking to the BCSC, and (ii) applying for confidentiality in the CHRT proceeding;

(b) on the breach of undertaking issue, A.B. is limited to adducing evidence on the background of the documents disclosed to E.F. in alleged breach of the implied undertaking, and may be permitted to make submissions with respect to the breach if requested by the CHRT, but shall not be permitted to bring any motions related to this issue; and

(c) on the confidentiality issue, A.B. is permitted to bring a motion and adduce evidence only for confidentiality and sealing orders under section 52 of the *CHRA*, and for no other purpose.

[11] For clarity, I note that A.B. seeks judicial review of the Restrictions only, asking the Court to quash and set them aside, and to remit the Standing Decision for reconsideration, with or without directions.

IV. Issues, Standard of Review and Relevant Provisions

[12] Although A.B. raised procedural fairness as an issue, A.B. advised the Court at the hearing that A.B. no longer is pursuing this issue because A.B. was invited to and did make submissions regarding the implied undertaking breach (i.e. Restriction (b) above) and, thus, the focus of the judicial review is the reasonableness of the Restrictions.

[13] There is no dispute that the presumptive, reasonableness standard of review is applicable in the circumstances: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25. A reasonable decision is one based on an internally coherent and rational chain of analysis that is justified, transparent and intelligible in relation to the applicable factual and legal constraints; the party challenging a decision has the burden of convincing the Court that it is unreasonable: *Vavilov*, above at paras 85, 99-100.

[14] There also are two preliminary issues addressed at the outset of the Analysis section below. The first is whether C.D. is permitted to file a supplemental affidavit. The second is

whether the judicial review application is premature and, thus, whether the Court should dismiss it.

[15] See Annex “A” to this Judgment and Reasons for applicable legislative provisions.

V. Analysis

A. *Should C.D. be permitted to file a supplemental affidavit?*

[16] I am satisfied that C.D.’s supplemental affidavit should be accepted for filing. The other parties to this judicial review did not object to the filing.

[17] C.D. seeks leave to file a supplemental affidavit sworn by Tayler Mizzi that was submitted to the Court on June 14, 2022. The affiant attaches as exhibits to the affidavit an email, a letter and nine other documents referenced in that letter sent by the CHRT to the parties’ counsel and to A.B.’s counsel. The documents concern E.F.’s motion to seal any documents potentially in breach of the implied undertaking for confidentiality or any reference to them, and are mentioned in C.D.’s memorandum of fact and law in the judicial review. Some documents attached to this affidavit – Exhibits E, F and G – already were before the Federal Court.

[18] Rule 312 of the *Federal Courts Rules*, SOR/98-106 [*FCR*] permits a party to file additional affidavits with leave of the Court. To obtain this permission, the party must convince the Court that the proposed additional evidence will serve the interests of justice, will assist the Court, and will not cause substantial or serious prejudice to the other parties. As well, the party

must demonstrate that the evidence was not available when the party filed its affidavits or could not have been discovered with the exercise of due diligence: *Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 at paras 8-9; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 11.

[19] In my view, C.D. has shown that they received the documents attached to the affidavit only on June 9, 2022, and therefore, the additional documents were not available when they filed their initial affidavits. I also find that the supplemental affidavit provides background information that assists the Court and that the evidence causes no substantial or serious prejudice to the other parties.

[20] I note that during the hearing of this judicial review, the Respondent G.F. proposed to share a new document with the Court, which consisted of a letter from G.F. to the CHRT dated March 9, 2022 outlining their view of the issues that remain outstanding before the CHRT. C.D. and E.F. objected to the admissibility of this document, while A.B. did not. I find this document is not relevant to the judicial review, nor was it ever filed with this Court. It therefore has not been taken into consideration in these reasons.

B. *Should the judicial review application be dismissed for prematurity?*

[21] Contrary to the Respondents' submissions, I am satisfied that A.B.'s application for judicial review is not premature.

[22] The general principle is that judicial review can proceed only after all adequate remedial recourses in the administrative process have been exhausted. Courts should avoid interfering with ongoing administrative processes, absent exceptional circumstances, until after they are completed, or until all available and effective remedies have been exhausted: *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 at paras 30-31 [*C.B. Powell Limited*]; *Constantinescu v Canada (Attorney General)*, 2021 FC 213 at para 16 [*Constantinescu*]; *Canada (Public Safety and Emergency Preparedness) v Shen*, 2018 FC 636 at paras 50-53 [*Shen*]). This principle aims at preventing, among other things, fragmentation of the administrative process, costs and delays, and the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process: *C.B. Powell Limited*, above at para 32; *Air Canada v Lorenz*, 1999 CanLII 9373 (FC), 175 FTR 211 at paras 18-35 [*Lorenz*].

[23] The Federal Court of Appeal further states that, "the threshold for exceptionality is high": *C.B. Powell Limited*, above at para 33. This Court has held that the existence of exceptional circumstances must be "clear and obvious": *Shen*, above at para 53.

[24] Respondents C.D. and E.F. argue that the Standing Decision is an interlocutory ruling in the context of the CHRT proceeding and the proper procedure would be to bring an application for judicial review of the CHRT's final decision so this Court could refer to the entire record of the proceeding. Further, C.D. argues prejudice because of the delay and costs occasioned by the judicial review, with a third complainant having passed away earlier this year, while E.F. argues

that the judicial review is tantamount to a collateral attack against E.F.'s decision to refer the complaint to the CHRT.

[25] Contrary to the context in *C.B. Powell Limited*, *Constantinescu*, *Lorenz* and *Shen*, A.B. is not a party to the underlying administrative proceeding. A.B. obtained an order granting interested person status, and now takes issue with the Restrictions imposed by the CHRT on that status. I find that the Standing Decision is not an interlocutory decision insofar as A.B. is concerned. Even if A.B. were to bring an application for judicial review at the end of the CHRT proceeding, the issue of the imposed Restrictions would be moot because the proceeding would be finished. In my view, A.B.'s recourse before the CHRT regarding "interested person" status is exhausted.

[26] Regarding the "collateral attack" argument, and bearing in mind that the Supreme Court of Canada defines a collateral attack as "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment," I find that there is no order or judgment to attack: *Wilson v The Queen*, 1983 CanLII 35 (SCC), [1983] 2 SCR 594 at 599. E.F.'s decision to refer the Complaint to the CHRT is part of an ongoing proceeding.

C. *Are the Restrictions unreasonable?*

[27] As explained below, I answer this question in the negative.

[28] According to A.B., the first pillar on which the judicial review application rests is that the CHRT erred in its interpretation of Rule 10 of the *Tribunal Rules* in holding that only a party can file a motion to dismiss a complaint under Rule 10. As I understand it, A.B.'s argument is that the CHRT also can move under Rule 10 on its own initiative and, therefore, the CHRT's interpretation is erroneous. I disagree.

[29] A.B.'s argument is misplaced, in my view. First, the CHRT made this finding when confronted with A.B.'s submission (in the context of A.B.'s written request for "interested person" status) that A.B. "seeks limited standing as an interested person to bring an application seeking dismissal of the complaint under s. 10 of the Rules in remedy of the breach of the undertaking and the misuse and abuse of … this Tribunal's process." As between a non-party and a party, the CHRT reasonably held, in my view, that only a party may bring such a motion. A.B.'s submission simply did not mention the CHRT's own initiative, nor did A.B. encourage the CHRT to invoke it to dismiss the Complaint for breach of the implied undertaking and abuse of process.

[30] Second, the CHRT concluded that the proceeding may have an impact on A.B.'s interest. Having reached this conclusion, the CHRT next indicated agreement with E.F.'s submission that A.B.'s involvement in the proceeding should be limited. The CHRT set out E.F.'s submissions in this regard earlier in the Standing Decision, including that A.B. would not have standing, as an interested person, "to seek dismissal for abuse of process because, according to Rule 10 of the Tribunal's Rules, abuse of process orders must be sought by a 'party' **or on the Tribunal's own**

initiative." [Emphasis added.] In my view, the argument that the CHRT misinterpreted Rule 10 is not sustainable.

[31] Third, I am not prepared to infer, as A.B. now argues before this Court, that A.B. sought standing to bring a motion to ask the CHRT to exercise its discretion to control its own process, when, on a plain reading, A.B.'s request for interested person status was not made on this basis. Even if it could be said that A.B.'s request for interested person status was unclear and, hence, A.B. should be given the benefit of the doubt, I am not persuaded that the Federal Court of Appeal decision in *Coote v Canada (Human Rights Commission)*, 2021 FCA 150 at para 9 [*Coote*] assists A.B. here.

[32] In *Coote,* the Attorney General of Canada [AGC] made a request, under Rule 74 of the *FCR*, as a potential respondent, for the removal of Notices of Appeal filed by a vexatious litigant. Rule 74(2) specifically contemplates an order made of the Court's own initiative under subsection 74(1), provided that **all interested parties** have been given an opportunity to be heard. The Federal Court of Appeal was satisfied that by reason of the submissions received from the parties (i.e. the AGC and the putative appellant) through their exchange of correspondence, that the Court was in a position to decide the AGC's Rule 74 request: *Coote*, above at para 12. I am prepared to infer that the Federal Court of Appeal considered the AGC an interested party for the purposes of Rule 74, which is not surprising given that the process for declaring a litigant vexatious requires the consent of the AGC, pursuant to section 40 of the *Federal Courts Act*, RSC 1985, c F-7.

[33] Here, A.B. is an interested person, as opposed to a party. There is no dispute that A.B. did not seek "party" status under Rule 28 of the *Tribunal Rules* which permits a person seeking party status to file a motion for an order to that effect. In other words, I find the *Coote* decision distinguishable.

[34] In the end, I am not persuaded that the CHRT's omission of a reference to its own initiative in the Standing Decision was either an error or, more to the point, unreasonable in the circumstances.

[35] I also am not persuaded that the CHRT unreasonably construed subsection 27(2) of the *Tribunal Rules*, as A.B. advocates. A.B. takes issue, not with the CHRT's articulation of the test for determining interested person status, but rather with the CHRT's application of the test. The Standing Decision indicates that a person applying for interested person status under Rule 27 must meet at least one of the following criteria: (i) the person's expertise will assist the CHRT; (ii) their involvement will add to the legal positions of the parties; and (iii) the proceeding may have an impact on their interests: *Letnes v Royal Canadian Mounted Police*, 2021 CHRT 30 (CanLII) [*Letnes*]. Further, the CHRT's analysis must be done in a flexible and holistic manner, on a case-by-case basis: *Letnes*, at para 13; *Attaran v Citizenship and Immigration Canada*, 2018 CHRT 6 (CanLII). The burden is on the proposed interested person to establish that they meet the test.

[36] I do not disagree with A.B. that the CHRT controls its own process. That does not mean necessarily in my view, however, that the CHRT is obligated to accept the submissions it

receives under subsection 27(2) from a person seeking interested person status, regarding the assistance the person wishes to provide and the extent to which the person wishes to participate in the inquiry or proceeding.

[37] Indeed, subsection 27(3) of the *Tribunal Rules* stipulates that if the motion for interested person status is granted, the CHRT must specify the extent to which the interested person is permitted to participate in the proceeding. I find that, to some extent, A.B. is conflating the test for interested person status under subsection 27(2) with the limitations or restrictions the CHRT chooses to impose under subsection 27(3).

[38] Having considered A.B.'s November 1, 2021 request for interested person status, including the supporting written submissions, it was open to the CHRT, in my view, to impose restrictions (i.e. "the extent to which the interested person is permitted to participate in the inquiry" under subsection 27(3) of the *Tribunal Rules*). Put another way, it was for the CHRT to craft those restrictions, recognizing that it controls its own process, and not for A.B. to dictate them. I am satisfied that the CHRT did not do so unreasonably in the circumstances.

[39] I find that the Standing Decision permits the Court to understand the CHRT's reasons for granting limited interested person status to A.B. and that those reasons are justified based on the constellation of facts, principles and arguments considered by the CHRT in the context of A.B.'s request.

VI. Conclusion

[40] For the above reasons, I therefore dismiss this judicial review application.

VII. Costs

[41] I exercise my discretion to award C.D. their costs of this motion at the mid-range of Column III of Tariff B, payable by A.B. If A.B. and C.D. cannot agree on the quantum of costs within two weeks of the date of this Judgment and Reasons, they can make brief submissions to the Court not exceeding two pages to determine the amount. No costs are awarded to E.F. and G.F. who do not seek costs and take no position on costs.

JUDGMENT in T-225-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review of the January 24, 2022 decision of the Canadian Human Rights Tribunal granting the Applicant limited interested person status, particularly, the restrictions imposed by the Canadian Human Rights Tribunal on that status, is dismissed.
2. C.D.'s costs of this motion are payable by A.B. at the mid-range of Column III of Tariff B. If A.B. and C.D. cannot agree on the quantum of costs within two weeks of the date of this Judgment and Reasons, they can make brief submissions to the Court not exceeding two pages to determine the amount.
3. No costs are awarded to E.F. and G.F. who do not seek costs and take no position on costs.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

Canadian Human Rights Tribunal Rules of Procedure, 2021 (SOR/2021-137)
Règles de pratique du Tribunal canadien des droits de la personne (2021) (DORS/2021-137)

Consequences of Non-compliance **Vexatious conduct or abuse of process** **10** A panel may, on the motion of a party or its own initiative, make any order that it considers necessary against vexatious conduct or abuse of process.	**Conséquence de la non-conformité** **Comportements vexatoires et abus de procédure** **10** La formation peut, de sa propre initiative ou sur requête d'une partie, rendre l'ordonnance qu'elle estime nécessaire en cas de comportements vexatoires ou d'abus de procédure.
Addition of Parties and Interested Persons **Motion for interested person status** **27 (1)** A person that wishes to be recognized as an interested person in respect of an inquiry must serve and file a notice of motion for an order to that effect. **Content of motion** **(2)** The notice of motion must specify the assistance the person wishes to provide to the inquiry and the extent to which the person wishes to participate in the inquiry. **Decision of panel** **(3)** If the panel grants the motion, it must specify the extent to which the interested person is permitted to participate in the inquiry. **Motion for party status** **28** A person that wishes to be recognized by the panel as a party in respect of the inquiry must serve and file a notice of motion for an order to that effect.	**Adjonction de parties et d'intervenants** **Requête pour agir en qualité d'intervenant** **27 (1)** La personne désirant obtenir la qualité d'intervenant à l'égard de l'instruction signifie et dépose un avis de requête visant à obtenir une ordonnance à cet égard. **Contenu de l'avis** **(2)** L'avis de requête précise l'assistance que la personne désire apporter à l'instruction et l'étendue de la participation à l'instruction qu'elle souhaite. **Décision de la formation** **(3)** Si la formation fait droit à la requête, elle précise l'étendue de la participation de l'intervenant à l'instruction. **Requête pour obtenir la qualité de partie** **28** La personne désirant obtenir la qualité de partie à l'instruction signifie et dépose un avis de requête visant à obtenir une ordonnance à cet égard.

Federal Courts Rules (SOR/98-106)
Règles des Cours fédérales (DORS/98-106)

Applications **Additional steps**	**Demandes** **Dossier complémentaire**
312 With leave of the Court, a party may	**312** Une partie peut, avec l'autorisation de la Cour :
(a) file affidavits additional to those provided for in rules 306 and 307; **(b)** conduct cross-examinations on affidavits additional to those provided for in rule 308; or **(c)** file a supplementary record.	**a)** déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307; **b)** effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308; **c)** déposer un dossier complémentaire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-225-22
STYLE OF CAUSE:	A.B. v C.D., E.F., AND G.F.
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 17, 2022
JUDGMENT AND REASONS:	FUHRER J.
DATED:	NOVEMBER 2, 2022

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