

Indexed as: Oger v. Whatcott (No. 4), 2018 BCHRT 184

IN THE MATTER OF THE *HUMAN RIGHTS CODE*,
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Morgane Oger

COMPLAINANT

AND:

William Whatcott

RESPONDENT

AND:

Justice Centre for Constitutional Freedoms
and Canadian Association for Free Expression

INTERVENORS

AND:

Attorney General of British Columbia

**PURSUANT TO THE
*CONSTITUTIONAL QUESTIONS ACT***

**REASONS FOR DECISION
APPLICATION TO INTERVENE
Section 22.1**

Tribunal Member:

Devyn Cousineau

Counsel for the Complainant:

Susanna Allevato Quail

Counsel for the Respondent:

Dr. Charles Lugosi

Counsel for the West Coast Women’s Legal
Education and Action Fund:

Lindsay A. Waddell and Raji Mangat

Counsel for the BC Teachers’ Federation:

Kerri Fisher

I INTRODUCTION

[1] The West Coast Women’s Legal Education and Action Fund [**West Coast LEAF**] and the BC Teachers’ Federation [**BCTF**] apply to intervene in this complaint. Morgane Oger supports the applications. William Whatcott takes no position.

[2] For the reasons that follow, the applications are granted.

II BACKGROUND

[3] Ms. Oger has filed a complaint alleging that Mr. Whatcott violated s. 7 of the *Human Rights Code* [**Code**] when he distributed flyers disputing her fitness to hold public office in light of her gender identity. Ms. Oger subsequently amended her complaint to add an allegation that Mr. Whatcott violated s. 7 of the *Code* when he distributed a new batch of flyers in response to proceedings before the Human Rights Tribunal [**Tribunal**].

[4] In *Oger v. Whatcott*, 2017 BCHRT 195, the Tribunal granted intervenor status to the Canadian Association for Free Expression [**CAFE**]. In its application, CAFE explained that the basis of its intervention would be its concerns that “the complaint infringes Mr. Whatcott’s rights to freedom of speech, freedom of religion and freedom of belief, and freedom to participate in the political process”.

[5] In a letter decision dated November 24, 2017, the Tribunal granted intervenor status to the Justice Centre for Constitutional Freedoms [**JCCF**]. In its application, the JCCF explained that “the application of section 2 *Charter* freedoms such as freedom of expression and the freedom of conscience and religion, lie at the core of [its] mandate and expertise”.

[6] In a letter to the parties dated May 16, 2018, I advised that, in light of the public interest in the issues raised by this complaint, I would be seeking further intervenor applications. Accordingly, a public notice was posted on the Tribunal's website as follows:

Invitation for intervenors

On September 10 – 13, 2018, the Tribunal will be hearing the case of *Morgane Oger v. Bill Whatcott*. The complaint alleges that Mr. Whatcott violated s. 7 of the *Human Rights Code* [**Code**] when he distributed a number of pamphlets about Ms. Oger's fitness for public office in light of her gender identity. The complaint raises issues of general public interest, including:

- how s. 7 of the *Code* is interpreted in light of ss. 2(a), (b), 15 and 27 of the Canadian Charter of Rights and Freedoms, and
- an application of the legal principles set out in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, to the facts of this case

The Tribunal has granted intervenor status to the Canadian Association for Free Expression and the Justice Centre for Constitutional Freedoms, pursuant to s. 22.1 of the *Code*. In light of the legal issues raised by the complaint, the Tribunal is inviting further intervenor applications up until June 15, 2018. Applications should identify the nature of the applicant and how they will be able to usefully contribute to the legal issues raised in the complaint.

[7] In response to this invitation, West Coast LEAF and the BCTF filed the applications currently before me.

[8] On June 18, 2018, the Attorney General of BC advised that it intended to participate, pursuant to the *Constitutional Questions Act*, to address the constitutional issues raised by Mr. Whatcott in his response.

III ANALYSIS AND DECISION

[9] This Tribunal has a broad discretion to allow a person or group to intervene in a complaint, and to specify the terms of that intervention: *Hall v. BC (Ministry of Environment*

(No. 4), 2008 BCHRT 437 at para. 5. This discretion is conferred by 22.1 of the *Code*, which provides:

A member or panel may, at any time after the complaint is filed and on the terms specified by the member or panel, allow any person or group of persons to intervene in the complaint, whether or not that person or group would be affected by an order made by the member or panel under section 37.

[10] The Tribunal has recognized that intervenors may assist it in a number of ways, “including understanding the context in which a complaint arises, the perspectives of individuals and groups other than the parties to the complaint, the factual and legal issues raised by a complaint, and the impact the Tribunal’s decision may have on affected individuals and groups”: *Hall* at para. 6.

[11] In considering an application to intervene, the Tribunal will determine “how likely it is that the intervenor will make a useful contribution” to the resolution of the complaint: *Hughson v. Town of Oliver*, 2000 BCHRT 11 at para. 7. This is balanced against the risk of prejudice to any of the parties, and in particular the risk that the intervenor will ‘take the litigation away’ from the parties.

[12] I am satisfied that both West Coast LEAF and the BCTF are likely to make a useful contribution to the resolution of the issues raised in this complaint.

[13] West Coast LEAF has expertise in intervening at all levels of court on matters related to equality and human rights law. Its proposed submissions will address how s. 7 of the *Code* should be interpreted “in conformity with principles of substantive equality and non-discrimination protected by the *Charter*, the *Code* and relevant international human rights instruments and norms”. It will also address how the Tribunal should reconcile or balance potentially competing *Charter* rights. It has assured the Tribunal that it will provide a unique perspective on these issues, and not duplicate the submissions of the parties or other intervenors.

[14] The BCTF is a trade union and certified bargaining agent for all of the teachers and associated professionals employed by public school boards in the province. It describes itself as a “social justice union that advocates for social change and access to educational opportunities for all students”. It advocates for the rights of the LGBTQ community, and has adopted a comprehensive statement on the principles of transgender rights. Its LGBTQ Action Group is tasked with supporting teachers who identify with the LGBTQ community, and it has worked with government and other agencies to support “inclusive environments in schools”. It says that it is “familiar with the justifiable limits that have been placed around expression rights and notes that some of the leading decisions concerning the tension between free expression and discriminatory speech have come from the education sector”: *R. v. Keegstra*, [1990] 3 SCR 697 and *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825.

[15] The BCTF seeks to make submissions addressing:

- a) the proper approach to interpreting section 7 in light of *Charter* values of free expression with respect to statements and publications that indicate discrimination or expose a person to hatred or contempt;
- b) the policy considerations this Tribunal should contemplate to ensure individuals are afforded protection from discriminatory statements and publications; and
- c) how the Tribunal’s analysis may be applicable in other contexts, including the education sector where there is a demonstrable need for safe and inclusive spaces.

It says that it will ensure its submissions reflect its unique perspective and are not duplicative.

[16] I am satisfied that the proposed submissions of both West Coast LEAF and the BCTF are relevant to the legal issues raised by this complaint. Because it is the first time that this Tribunal will interpret s. 7 of the *Code* since the Supreme Court of Canada’s decision in *Whatcott*, it is in the public interest to ensure that the matter is decided with the benefit of full and expert legal argument. These two further interventions will balance the perspectives put forward by CAFE

and the JCCF, such that the Tribunal will decide the case based on robust argument representing all perspectives.

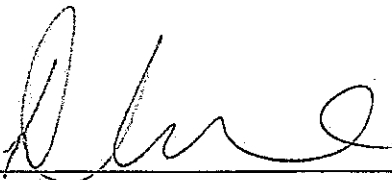
[17] No party has alleged any prejudice will arise from these interventions. Both organizations seek only to make legal submissions. They do not seek to admit evidence. In my view, such submissions can only assist in this process and will not take the litigation away from the parties.

[18] In all of the circumstances, I exercise my discretion to grant the applications.

IV CONCLUSION

[19] West Coast LEAF and BCTF are granted leave to intervene in this complaint as follows:

- a. They have leave to make oral submissions at the opening and close of the hearing ;
- b. They have leave to file written submissions at the close of the hearing;
- c. They do not have standing to take part in any procedural matters before the Tribunal unless the Tribunal asks them for submissions.



Devyn Cousineau, Tribunal Member