

Federal Court



Cour fédérale

Date: 20240909

Docket: T-1458-20

Citation: 2024 FC 1414

Ottawa, Ontario, September 9, 2024

PRESENT: Madam Justice Gagné

PROPOSED CLASS PROCEEDING

BETWEEN:

**NICHOLAS MARCUS THOMPSON, JENNIFER PHILLIPS,
MICHELLE HERBERT, KATHY SAMUEL, WAGNA CELIDON,
DUANE GUY GUERRA, STUART PHILP, SHALANE ROONEY,
DANIEL MALCOM, ALAIN BABINEAU, BERNADETH BETCHI,
CAROL SIP, MONICA AGARD and MARCIA BANFIELD SMITH**

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

and

AMNESTY INTERNATIONAL CANADA

Intervener

and

THE SPEAKER OF THE SENATE

Intervener

ORDER AND REASONS

[1] The Speaker of the Senate is seeking leave to intervene in a Motion by the Plaintiffs to appeal an order rendered by Associate Judge Benoit Duchesne, in his capacity of Case management Judge of the present Proposed class proceeding. AJ Duchesne refused to grant the Plaintiffs leave to adduce the following fresh evidence, for use in the certification motion, after the completion of the cross-examinations:

1. The Standing Senate Committee on Human Rights' (the "Committee") report dated December 11, 2023, titled "Anti-Black Racism, Sexism and Systemic Discrimination in the Canadian Human Rights Commission" (the "Senate CHRC Report"); and
2. The transcripts of the public hearings conducted by the Committee on May 1, May 8, and May 15, 2023, that preceded the Senate CHRC Report and are associated with it (the "Senate Committee Transcripts").

[2] The Speaker of the Senate argues that these documents constitute proceedings in Parliament and that as such, this Court must ensure that the issue of their admission and use be determined in a manner consistent with parliamentary privilege.

[3] The Speaker of the Senate states that she has a genuine interest in the issues at stake in this motion to appeal given the impact that its outcome may have on the use of Senate proceedings by the parties and by the courts. This, in turn, may affect the operation of two recognized categories of parliamentary privilege: free speech in Parliament and the Senate's exclusive control over its proceedings.

[4] The Speaker of the Senate does not seek to supplement the record, nor does she seek the costs of this intervention.

[5] The Plaintiffs oppose the motion on the grounds that i) the Court did not make any finding on the issue of parliamentary privilege — and it is therefore not an issue under appeal; ii) the proposed intervention represents a collateral attack on the Plaintiffs’ action at large; iii) this motion for leave to intervene should have been made at the fresh evidence motion that was determined by AJ Duchesne; and, iv) the proposed intervener’s approach is discriminatory to Black workers as Courts have extensively relied on reports of the Senate in the past in support of their analysis of matters of public policy.

[6] The Defendant, on the other hand, does not oppose the motion.

[7] Rule 109 of the *Federal Courts Rules* provides that an intervener must (a) describe how it wishes to participate in the proceeding, and (b) how that participation will assist the determination of a factual or legal issue related to the proceeding. Rule 109 also provides that, should leave be granted, the Court must give direction on the service of documents and the role of the intervener.

[8] Although the criteria for allowing or not allowing an intervention is flexible, the prevailing consideration is whether it is in the interest of justice to grant leave to intervene (*Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44, para 42). A number of non-exhaustive contextual factors have been developed and applied by this Court and the Federal Court of

Appeal to guide them in that exercise, though the Federal Court of Appeal has recently focused on three main factors: the usefulness of the intervention, the requester's interest in the matter, and the interests of justice (*Chelsea (Municipality) v Canada (Attorney General)*, 2023 FCA 179, para 9).

[9] In my view, the proposed intervention meets all three factors.

[10] Contrary to the Plaintiffs' argument, I am of the view that parliamentary privilege is an issue that needs to be resolved if their fresh evidence is to be admitted.

[11] That said the proposed intervener has direct expertise in matters of parliamentary privilege. Her proposed submissions would differ from those of the parties as she intends to present arguments that reflect the Senate's perspective as a legislative body that has a unique constitutional role and to which parliamentary privilege attaches. As such, her intervention will be useful to the Court.

[12] On the second factor, the Speaker of the Senate has a real interest in the subject matter of the motion to appeal AJ Duchesne's order. She acts as the guardian of parliamentary privilege both for the Senate and for its members.

[13] The impugned documents are arguably proceedings of the Senate and, as such, would be protected by parliamentary privilege. The use of those proceedings in a manner inconsistent with parliamentary privilege engages the interests of the Senate and its Speaker. The Speaker of the

Senate is concerned that, by admitting into evidence Senate proceedings in an attempt to establish controversial facts in litigation, courts could impeach and question those proceedings. As parliamentary privilege serves to protect the integrity of committee work by protecting senators and witnesses against any liability for what they say in committee proceedings and by ensuring that outside bodies such as the courts do not impeach or question their work, the Speaker of the Senate has an interest in the admissibility of the impugned evidence.

[14] Finally, on the third factor, I am of the view that it is in the interest of justice to grant the Speaker of the Senate leave to intervene, strictly on the issue of parliamentary privilege triggered by the motion to appeal. This is an issue of public interest about which she will bring further, different, and valuable insight.

[15] The proposed intervention will have no impact on the orderly progression of the schedule for the proceeding, nor will it cause any prejudice to the parties.

ORDER in T-1458-20

THIS COURT ORDERS that:

1. The Speaker of the Senate is granted leave to intervene in the motion to appeal Associate Judge Benoit Duchesne's order dated July 8, 2024 (*Thompson v. Canada*, 2024 FC 1064);
2. The Speaker of the Senate is allowed to file written representations not exceeding fifteen (15) pages within 30 days of the date of this order;
3. The Speaker of the Senate is allowed to present oral arguments at the hearing of the motion to appeal;
4. The Speaker of the Senate be served with any further documents required to be served on the parties in relation to the motion to appeal;
5. The style of cause is amended to reflect the fact that the Speaker of the Senate is an Intervener;
6. No costs are granted.

“Jocelyne Gagné”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1458-20

STYLE OF CAUSE: NICHOLAS MARCUS THOMPSON et al v HIS
MAJESTY THE KING and AMNESTY
INTERNATIONAL CANADA and THE SPEAKER OF
THE SENATE

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULES 109 AND 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: GAGNÉ J.

DATED: SEPTEMBER 9, 2024

WRITTEN SUBMISSIONS:

Courtney Betty
Hugh Scher

FOR THE PLAINTIFFS

Paul J. Martin

FOR THE DEFENDANT

Marc-André Roy
Anne Burgess

FOR THE INTERVENER
THE SPEAKER OF THE SENATE

SOLICITORS OF RECORD:

Betty's Law Office
Toronto, ON

FOR THE PLAINTIFFS

Scher Law Professional Corporation
Toronto, ON

Holtz Lawyers
Thornhill, ON

Makki Law Professional Corporation
Toronto, ON

Fasken Martineau DuMoulin LLP
Toronto, ON

FOR THE DEFENDANT

Cambridge LLP
Toronto, ON

FOR THE INTERVENER
AMNESTY INTERNATIONAL CANADA

Office of the Law Clerk and
Parliamentary Counsel
Ottawa, ON

FOR THE INTERVENER
THE SPEAKER OF THE SENATE