Federal Court Cour fédérale

Date: 20210719

Docket: T-1008-20

Citation: 2021 FC 759

Ottawa, Ontario, July 19, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

COALSPUR MINES (OPERATIONS) LTD.

Applicant

and

THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, THE ATTORNEY GENERAL OF CANADA, LOUIS BULL TRIBE, KEEPERS OF THE WATER COUNCIL, KEEPERS OF THE ATHABASCA WATERSHED SOCIETY, THE WEST ATHABASCA WATERSHED BIOREGIONAL SOCIETY, AND STONEY NAKODA NATIONS (BEARSPAW FIRST NATION, CHINIKI FIRST NATION AND WESLEY FIRST NATION)

Respondents

JUDGMENT AND REASONS

[1] Coalspur Mines (Operations) Ltd. [Coalspur] seeks judicial review of an order issued by the Minister of Environment and Climate Change [Minister] dated July 30, 2020 [Designation

Order]. The Designation Order designated the Visa Coal Underground Test Mine Project [limited Underground Test Mine] and the Vista Coal Mine Phase II Expansion Project [Phase II] pursuant to subsection 9(1) of the *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*].

[2] This application is one of two concerning the Designation Order. The other is brought by Ermineskin Cree Nation [Ermineskin], an Indian band within the meaning of the *Indian Act*, RSC, 1985, c I-5.

[3] Coalspur is the proponent of the activities in question, and brings its application in this Court file T-1008-20. Ermineskin's application is brought in Court file T-1014-20.

[4] Both Applications request the same relief, namely an Order quashing the Designation Order. Both were argued one after the other on May 19 and 20, 2021.

[5] I have decided the Ermineskin application and quashed the Designation Order, see *Ermineskin Cree Nation v The Minister of Environment and Climate Change, The Attorney General of Canada and Coalspur Mines (Operations) Ltd.*, 2021 FC 758.

[6] The present Application brought by Coalspur is dismissed because it is moot; the Designation Order sought to be quashed in this application was quashed in the Ermineskin file.

[7] The leading case on mootness is *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] [Sopinka J]. *Borowski* holds that a Court may dismiss a matter before it is moot.

[8] *Borowski* sets out the general principles:

> **Mootness**
>
> 15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly, if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
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> 16 The approach in recent cases involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term “moot” applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the “live controversy” test. A court may nonetheless elect to address a moot issue if the circumstances warrant.
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> **When is an appeal moot? — The authorities**
>
> 17 The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.
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> 18 In *R. v. Clark*, [1944] S.C.R. 69, [1944] 1 D.L.R. 495 [Ont.], this court refused to grant leave to appeal to applicants seeking a judgment excluding the respondents from sitting and exercising their functions as Members of the Ontario Legislative Assembly. However, the Legislative Assembly had been dissolved prior to the

hearing before this court. As a result, Duff C.J.C., on behalf of the court, held at p. 72:

> It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, *the sub-stratum of the litigation has disappeared*. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. [emphasis added]

19 A challenged municipal by-law was repealed prior to a hearing in *Moir v. Huntingdon* (1891), 19 S.C.R. 363 [Lower Can.], leading to a conclusion that the appealing party had no actual interest and that a decision could have no effect on the parties except as to costs. Similarly, in a fact situation analogous to this appeal, the Privy Council refused to address the constitutionality of challenged legislation where two statutes in question were repealed prior to the hearing: *A.G. Alta. v. A.G. Can*., [1939] A.C. 117, [1938] 3 W.W.R. 337, [1938] 4 D.L.R. 433 (P.C.).

20 Appeals have not been entertained in situations in which the appellant had agreed to an undertaking to pay the respondent the damages awarded in the court below plus costs regardless of the disposition of the appeal: Coca-Cola Co. v. Mathews, [1944] S.C.R. 385, [1945] 1 D.L.R. 1 [Ont.], and Sun Life Assur. Co. of Can. v. Jervis, [1944] A.C. 111, [1944] 1 All E.R. 469 (H.L.). In Coca-Cola v. Mathews, Rinfret C.J.C. held the result of the undertaking was to eliminate any further lis between the parties such that the court would have been forced to decide an abstract proposition of law.

21 As well, the sale of a restaurant for which a renewal of a licence was sought as required by the impugned municipal by-law rendered an issue technically moot: Vic Restaurant Inc. v. Montreal, [1959] S.C.R. 58, 17 D.L.R. (2d) 81 [Que.]. Issues in contention may be of a short duration resulting in an absence of a live controversy by the time of appellate review. Such a situation arose in I.B.E.W., Loc. 2085 v. Winnipeg Bldrs.' Exchange, [1967] S.C.R. 628, 61 W.W.R. 682, 65 D.L.R. (2d) 242 [Man.], in which the cessation of a strike between the parties ended the actual dispute over the validity of an injunction prohibiting certain strike action by one party.

22 The particular circumstances of the parties to an action may also eliminate the tangible nature of a dispute. The death of parties challenging the validity of a parole revocation hearing (*Re*

Cadeddu and R. (1983), 41 O.R. (2d) 481, 35 C.R. (3d) xxviii, 4 C.C.C. (3d) 112, 146 D.L.R. (3d) 653 (C.A.)) and a speeding ticket (*R. v. Mercure*, [1988] 1 S.C.R. 234, [1988] 2 W.W.R. 577, 39 C.C.C. (3d) 385, 48 D.L.R. (4th) 1, 65 Sask. R. 1, (sub nom. *Mercure v. Sask*.) 83 N.R. 81) ended any concrete controversy between the parties.

23 As well, the inapplicability of a statute to the party challenging the legislation renders a dispute moot: *L.S.U.C. v. Skapinker*, [1984] 1 S.C.R. 357, 20 Admin. L.R. 1, 11 C.C.C. (3d) 481, 8 C.R.R. 193, 9 D.L.R. (4th) 161, 3 O.A.C. 321, 53 N.R. 169. This is similar to those situations in which an appeal from a criminal conviction is seen as moot where the accused has fulfilled his sentence prior to an appeal: *Maltby v. A.G. Sask*. (1984), 13 C.C.C. (3d) 308, 10 D.L.R. (4th) 745, 14 C.R.R. 142, 34 Sask. R. 177 (C.A.).

24 The issue of mootness has arisen more frequently in American jurisprudence, and there, the doctrine is more fully developed. This may be due in part to the constitutional requirement, contained in s. 2(1) of art. III of the American Constitution, that there exist a “case or controversy”:

> Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

However, despite the constitutional enshrinement of the principle, the mootness doctrine has its roots in common law principles similar to those in Canada; see “The Mootness Doctrine in the Supreme Court” (1974), 88 Harvard L.R. 373, at p. 374. Situations resulting in a finding of mootness are similar to those in Canada. For example, in *Hall v. Beals*, 396 U.S. 45, 24 L. Ed. 2d 214, 90 S. Ct. 200 (1969), a challenge to a Colorado voter residency requirement of six months was held moot due to a legislative

> change in the law removing the plaintiff from the application of the statute. Mootness was also raised in *U.S. v. W.T. Grant Co*., 345 U.S. 629, 97 L. Ed. 1303, 73 S. Ct. 894 (1953), where a defendant voluntarily ceased allegedly unlawful conduct. Similarly, in *Sibron v. New York*, 392 U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968), mootness was an issue where an accused completed his sentence prior to an appeal of his conviction.
>
> 25 The American jurisprudence indicates a similar willingness to consider the merits of an action in some circumstances even when the controversy is no longer concrete and tangible. The rule that abstract, hypothetical or contingent questions will not be heard is not absolute: see Tribe, American Constitutional Law, 2nd ed. (1988), at p. 84; Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 Calif. L.R. 1385. A two-stage process is involved in which a court may consider the merits of an appeal even where the issue is moot.

[9] In the present case, the Applicant asks for an Order already granted in another case. The Applicant seeks to set aside an Order that has already been set aside. It seems to me that the sub-stratum of the litigation has disappeared. In my view, this application is moot because the core issue has already been decided: the validity of the Designation Order was judicially reviewed, the Designation Order was quashed and the matter has been remanded for reconsideration. As such, the Applicant has obtained all the relief it requests.

[10] In my view, there is no longer a live controversy except in respect of reasons. However, as the matter now stands, reasons are academic because the Designation Order has been quashed.

[11] While parties to litigation may want reasons, that cannot negate a finding that a case is moot. The case at bar is similar to many of the authorities cited in *Borowski* where parties also may have wanted reasons such as: *R. v Clark*, [1944] SCR 69; *Moir v Huntingdon* (1891), 19 SCR 363 [Lower Can]; *Coca-Cola Co. v Mathews*, [1944] SCR 385; S*un Life Assur. Co. of Can.*

v Jervis, [1944] AC 11169 (HL); *Vic Restaurant Inc. v Montreal*, [1959] SCR 58; *I.B.E.W., Loc. 2085 v Winnipeg Bldrs.' Exchange*, [1967] SCR 628.

[12] Indeed, no reasons are provided in any case found moot, unless the Court decides to decide the issue notwithstanding mootness.

[13] *Borowski* at paragraph 29 and following sets out factors a court may consider to determine if a case might be considered notwithstanding it is moor. These discretionary factors are recently summarized by the Federal Court of Appeal in *Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 [*CUPE*] [Stratas JA]:

> [7] The parties' only possible interest in this case continuing is jurisprudential. A mere jurisprudential interest fails to satisfy the need for a concrete and tangible controversy: *Borowski* at 353. Even the jurisprudential interest in this case may be moot: as will be explained, the legislation in issue in this case has been changed.
>
> [8] Although we have a discretion to hear a moot case, we should not do so here.
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> [9] Three considerations guide this discretion:
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> > the absence or presence of an adversarial context;
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> > whether there is any practical utility in deciding the matter or if it is a waste of judicial resources; and
> >
> > whether the court would be exceeding its proper role by making law in the abstract, a task reserved for Parliament.
> >
> > (See *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 202 at para. 16 citing *Borowski*.)
>
> [10] The first consideration weighs in favour of deciding the moot issue. We do have an adversarial context: both sides, represented by counsel, take opposing positions.

> [11] The second consideration strongly weighs in favour of not deciding the moot issue. Deciding it would waste judicial resources. The appeals officer's decision does not impose obligations on either party and does not have any practical consequences.
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> [12] As well, the jurisprudential issues are not evasive of review: Air Canada says similar proceedings are under way between the parties. As well, Parliament has amended the statutory definition of "danger" since these proceedings began: *Economic Action Plan 2013 Act, No. 2,* S.C. 2013, c. 40, s. 176. Future cases will turn on the new definition.
>
> [13] As for the third consideration, gratuitously interpreting the former wording of the provision in issue, in a case with no practical consequences, just to create a legal precedent, would be a form of law-making for the sake of law-making. That is not our proper task.
>
> [14] The mootness issue assumes greater significance following *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1. There, the Supreme Court underscored that courts must consider expediency and cost-efficiency when considering applications for judicial review and should not grant remedies when they serve no useful purpose: at para. 140, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 55.

[14] Applying these considerations, I would observe the following.

[15] First, while there may be a continuing adversarial context, it is also possible the parties will accept the decision of this Court in *Ermineskin* and proceed with proper a reconsideration not flawed by the issues in *Ermineskin*. This points away from deciding this moot case, or at best is neutral.

[16] Second, I am unable to see a practical utility in deciding this matter. Any decision of mine will have no practical effect on the rights of either the Applicant or the Respondents. From the perspective of the Applicant, at best, this Court would quash the Designation Order, but the Court has already done that. From the perspective of the Respondents, the Order is already quashed, and I have no power to revive it. Proceeding further would therefore be a waste of judicial resources. This also points away from deciding this case.

[17] Third, while to proceed further would not take the Court into law-making, I would nonetheless be unnecessarily deciding a dispute without practical benefit. I should note that, as was the case in *CUPE*, the jurisprudential issues in this case, namely the reasonableness of a decision, is not evasive of review but is rather one that arises numerous times in the Court. This point is neutral.

[18] In addition, I note *CUPE's* direction to the effect that in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, "the Supreme Court underscored that courts must consider expediency and cost-efficiency when considering applications for judicial review and should not grant remedies when they serve no useful purpose". This points away from deciding this case.

[19] In the result I have determined to exercise my discretion and not decide the legal arguments in this case notwithstanding the case is moot. The Designation Order I am asked to set aside has already been set aside.

[20] I wish to make it clear that in the Ermineskin file, my Judgment and Reasons deal only with the duty to consult. I made no findings on the other two grounds brought forward by Ermineskin, namely breach of procedural fairness and reasonableness (see paras 126 and 127 of the Ermineskin file Judgment and Reasons).

[21] Further, Coalspur's Application deals only with reasonableness (other than an extremely short argument concerning unreasonableness arising from failure to consult Indigenous peoples). I make no findings with respect to the facts or issues raised in this Application by Coalspsur; it is decided on mootness alone.

[22] On the issue of costs, the parties agreed that if Coalspur is unsuccessful, costs of $4,050 would be payable to the Respondent Minister. On the other hand, if Coalspur is successful, it requested $4,100 payable by the Respondent Minister and $4,100 payable by the Respondent Keepers of the Water, Keepers of the Athabasca Watershed Society and the West Athabasca Bioregional Society. The Respondent Minister disagrees and submits Coalspur is entitled to a total of $4,100 in costs.

[23] Because the Designation Order has already been set aside and I am dismissing this application as moot, in my respectful view and in my exercise of discretion, there should be no order as to costs.

JUDGMENT in T-1008-20

THIS COURT'S JUDGMENT is that:

1. This application is dismissed as moot.
2. There is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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