Federal Court of Appeal | Cour d'appel fédérale

Date: 20201023

Docket: A-340-19

Citation: 2020 FCA 180

Present: **GLEASON J.A.**

BETWEEN:

JOAN JACK AND LOUAY ALGHOUL

Appellants

and

GARRY LESLIE MCLEAN, ROGER AUGUSTINE, ANGELA ELIZABETH SIMONE SAMPSON, MARAGARET ANNE SWAN and MARIETTE LUCILLE BUCKSHOT

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 23, 2020.

REASONS FOR ORDER BY: GLEASON J.A.

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REASONS FOR ORDER

GLEASON J.A.

[1] The individual respondents, who were the representative plaintiffs in a class action before the Federal Court involving Indian Day School survivors, have brought a motion seeking an

order permitting them to file additional evidence in this appeal and an order extending the time for filing their memorandum of fact and law.

[2] The additional materials the individual respondents wish to put before this Court fall into three categories. First, there are a number of items that were inadvertently omitted from or were incorrectly photocopied in the appeal book. Second, there are certain pieces of evidence that were before the Federal Court that the individual respondents say they only appreciated were relevant to the appeal once they reviewed the arguments set out in the appellants' memorandum of fact and law. Finally, there are a number of items that were not before the Federal Court that the individual respondents claim should be put before this Court to address arguments made by the appellants in their memorandum. The individual respondents assert that the items in the second and third categories should be considered on appeal to avoid a miscarriage of justice.

[3] The appellants agree to the proposed amendments to the appeal book to correct their errors in compiling it, but object to the requests to admit the other categories of evidence. Her Majesty the Queen, as represented by the Attorney General of Canada, takes no position in respect of this motion.

[4] As the appellants concur that they inadvertently made the errors in preparing the appeal book that the individual respondents highlight, and as the appeal book as filed does not conform to the June 15, 2020 Order of this Court, issued by Near, J.A. to settle its contents, the request to amend the appeal book to correct these errors is well-founded. However, Rule 343(5) of the *Federal Courts Rules*, SOR/98-106 provides that it is an appellant's responsibility to prepare the

appeal book. Therefore, it is more appropriate that the appellants file a revised and corrected appeal book that conforms to this Court's Order of June 15, 2020. They should do so within 30 days to avoid further delay.

[5] To put the remaining issues into context, it is necessary to briefly review their factual background.

[6] In the order under appeal, the Federal Court approved the settlement of and fees to be awarded to class counsel in a class action brought to compensate survivors of Indian Day Schools (2019 FC 1076; see also Reasons for approval of the settlement, 2019 FC 1075 and for approval of fees payable to class counsel, 2019 FC 1077). The appellants were proposed class counsel in a previous proposed class action before the Manitoba Court of Queen's Bench in respect of what appears to be the same or similar issues and class. They sought leave to intervene in the settlement approval hearing of the class action before the Federal Court, and on May 9, 2019, that Court denied their motion. They appealed the denial of their motion to intervene to this Court. In a brief Order issued June 15, 2020, this Court dismissed their appeal for mootness.

[7] Despite the denial of their intervention motion, the Federal Court permitted the appellants to appear during the settlement approval hearing to make brief submissions regarding their request for compensation pursuant to an undertaking regarding compensation they allege current class counsel gave to them when the appellants transferred their files to current class counsel.

[8] In its reasons for judgment issued in connection with the order under appeal, the Federal Court found that the appellants' request for compensation should be pursued before the Manitoba courts. In their appeal, the appellants contend that the Federal Court erred in reaching this conclusion and seek, among other things, compensation for the work they say they performed on behalf of class members.

[9] The individual respondents assert that the materials in the second category that they wish to add to the appeal book (which were before the Federal Court) provide background and highlight the nature of some of the work undertaken by current class counsel, which they allege are relevant to the appellants' request for compensation. The materials in the third category include orders and reasons for order of the Federal Court and of the Manitoba Court of Queen's Bench as well as various exchanges between the appellants and class counsel regarding the alleged undertaking. The individual respondents assert that the materials in the third category (which were not before the Federal Court) provide background and establish that the class counsel did not breach their undertaking to counsel for the appellants. The appellants, in response, allege that the materials the individual respondents wish to add do not paint a full picture and say that their claim for compensation would require much more fulsome evidence to be fairly adjudicated, despite their request for such adjudication in their notice of appeal.

[10] The principles governing the admission of fresh evidence on appeal were set out at paragraph 3 of *Coady v. Canada (Royal Mounted Police)*, 2019 FCA 102, which provides:

> The test governing such requests is well-established and requires that the party seeking to adduce fresh evidence establish that the evidence: (1) could not have been adduced at trial with the exercise of due diligence; (2) is relevant in that it bears on a decisive or potentially decisive issue on appeal; (3) is credible in the

> sense that it is reasonably capable of belief; and (4) is such that, if believed, could reasonably have affected the result in the court below: *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759 at p. 775, (1979) 30 N.R. 181; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 at para. 107. This test has been regularly applied by single judges of this Court when deciding motions seeking the admission of new evidence on appeal: see *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10 at para. 17, 414 N.R. 270 (*Shire*); *Brace v. Canada*, 2014 FCA 92 at para. 11, 68 C.P.C. (7th) 81 (*Brace*). If the evidence fails to meet the foregoing criteria, the Court still possesses a residual discretion to admit the evidence on appeal. However, such discretion should be exercised sparingly and only in the "clearest of cases", where the interests of justice so require: *Shire* at para. 18; *Brace* at para. 12

[11] The additional evidence in the second category cannot be considered as fresh as it was part of the record before the Federal Court. Thus, the sole issue for determination in respect of the request to add such evidence to the appeal book is whether the second category of evidence is relevant to the issues on appeal. While it appears to be of tangential relevance at best, without the benefit of the individual respondents' arguments, I am not prepared to dismiss this portion of the motion. Rather, I believe that determining the relevance of the evidence in the second category should be left to the panel hearing the appeal. Therefore, the individual respondents shall file a fresh motion, within 30 days, to be placed before the panel seized with the appeal, to add to the appeal book only the evidence in the second category, namely, the affidavits of Dr. Baldwin and Ms. Ford and Exhibits D and E to the affidavit of Jeremy Bouchard, sworn September 14, 2020. They may refer to such evidence in their memorandum of fact and law, which should be filed within 30 days of the date of these Reasons. It will be up to the panel seized with the appeal to determine the relevance of any arguments made in respect of such evidence.

[12] Turning to the third category, as noted, the individual respondents wish to add several court orders and reasons for order as well as exchanges of correspondence and other materials

they say demonstrate that the appellants are not entitled to compensation from the settlement funds.

[13] The court orders and reasons are not evidence *per se* and may be included either in the joint book of authorities or in a compendium, as the appellants have chosen to do with other such orders and reasons. There is no need to add them to the appeal book.

[14] The other items in this category are evidentiary in nature, but they fail to meet the test set out in *Coady* for two reasons. First, the majority of these items pre-date the hearing before the Federal Court and could have easily been adduced before that Court by the individual respondents. Second, and perhaps more importantly, such evidence is not relevant to this appeal. On appeal, this Court will be required to determine whether the Federal Court erred in declining to consider the appellants' request for compensation, based on the materials that were before that Court. I fail to see how consideration of whether class counsel breached their undertaking to the appellants is relevant to such determination as the Federal Court did not rule on whether there was a breach of the alleged undertaking. Thus, there is no basis to add these materials to the appeal book, and, contrary to what the individual respondents assert, it is not in the interests of justice to place irrelevant material before the Court.

[15] The individual respondents' motion will therefore be granted in part, in accordance with these Reasons. As success is divided, no order will be made in respect of costs.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-340-19
STYLE OF CAUSE:	JOAN JACK AND LOUAY ALGHOUL v. GARRY LESLIE MCLEAN, et al. and HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	GLEASON J.A.
DATED:	OCTOBER 23, 2020

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