Federal Court of Appeal | Cour d'appel fédérale

Date: 20210113

Docket: A-186-20

Citation: 2021 FCA 1

CORAM: **STRATAS J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

MARGUERITE MARY (MARGARET) BUCK, DOROTHY ANNE SAVARD, SYLVIA M. MCGILLIS, FRANCES JUNE MCGILLIS, FLORENCE JOYCE L'HIRONDELLE, AND MARILYN MCGILLIS

Appellants

and

ATTORNEY GENERAL OF CANADA and ENOCH CREE NATION

Respondents

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on January 13, 2021.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: STRATAS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] The appellants are members of the Enoch Cree Nation. They appeal from an order of the Federal Court refusing to grant an interlocutory injunction enjoining the Minister of Crown-

Indigenous Relations and Northern Affairs from executing a settlement agreement between the Crown and the Enoch Cree Nation. The agreement was intended to resolve a specific claim brought by the Enoch Cree Nation in relation to the use of their lands as a bombing range by the Department of National Defence.

[2] The appellants sought to prevent the finalization of the settlement agreement until the Federal Court rendered its judgment in an action commenced by the appellants (as holders of Certificates of Possession with respect to some of the affected lands) against the Attorney General of Canada and the Enoch Cree Nation.

[3] In a decision reported as 2020 FC 769, the Federal Court dismissed the appellants' motion. The Court found that while injunctive relief is available against federal boards, commissions and officers in applications for judicial review, section 22 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 precludes such relief being granted against the federal Crown in the context of an action such as this.

[4] The Federal Court also stated that it would have dismissed the appellants' motion, even if it had jurisdiction to grant the relief sought. While the Court accepted that the appellants had met the low threshold necessary to establish the existence of a serious issue in this case, they had failed to demonstrate that they would suffer irreparable harm if the proposed settlement agreement were to be finalized prior to the determination of the appellants' action. The Court further found that preventing the finalization of the settlement — and the step toward

reconciliation that it represented — was not in the public interest, and that this tipped the balance of convenience in favour of Enoch Cree Nation and the Crown.

I. The Appellants' Appeal

[5] The appellants assert in their Notice of Appeal that the Federal Court erred in finding that it lacked the requisite jurisdiction to grant the relief sought. The Court further erred in finding that, in any event, the appellants had not satisfied all three parts of the injunction test. Finally, the appellants say that the Federal Court misunderstood the legal rights that accrue to the appellants as holders of Certificates of Possession with respect to some of the affected lands.

II. The Motions before the Court

[6] There are three motions now before the Court:

1. The Enoch Cree Nation seeks to have the appeal dismissed as moot, as the Minister of Crown-Indigenous Relations and Northern Affairs has now signed the settlement agreement, with the result that the injunctive relief sought by the appellants is now incapable of being granted;

2. The appellants seek leave to adduce fresh evidence on the appeal; and

3. The Attorney General of Canada seeks an order that certain material in the appeal book be treated as confidential.

[7] As will be explained below, I am satisfied that this appeal is indeed moot, and that this is not a case where the Court should exercise its discretion to determine this appeal notwithstanding that it is now moot. In light of my conclusion with respect to the mootness issue, and subject to the comments in the next section of these reasons, it is unnecessary to deal with the appellants' motion to adduce fresh evidence. The Attorney General's motion for a confidentiality order will be dealt with in a separate order.

III. The Record on the Mootness Motion

[8] As noted earlier, there is a motion before the Court brought by the appellants for leave to adduce fresh evidence on the appeal. The evidence that the appellants seek to adduce includes a factum filed by the Attorney General some five years ago in a different proceeding involving a different First Nation, as well as the Attorney General's Directive on Civil Litigation Involving Indigenous Peoples. The appellants seek to rely on this evidence to impugn the conduct of the Attorney General in this matter.

[9] These documents were not included in the materials filed by the appellants in response to the mootness motion. However, their motion record includes substantial extracts from the documents, which are relied upon by the appellants in support of their argument that this appeal should not be dismissed as moot. The appellants have also provided detailed arguments as to what they say is the significance of these documents.

[10] While I have concluded that it is unnecessary to determine whether the appellants' fresh evidence should be admitted in relation to the merits of the appeal, I have considered the extracts from the documents that are relied upon by the appellants in support of their arguments on the mootness issue. I have also taken their arguments as to the significance of this evidence into account in deciding the mootness question.

IV. Is the Appeal Moot?

[11] The doctrine of mootness is engaged in cases where intervening events lead to the conclusion that a court's decision will no longer have the effect of resolving a controversy that affects, or may affect, the rights of the parties. If a decision will have no practical effect on such rights, courts may decline to decide the case on the basis that it is moot: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 at para. 15.

[12] The appellants have identified a number of issues that they say constitute live issues for the purposes of this appeal, including whether the Enoch Cree Nation will be unjustly enriched if it receives money from the Crown in relation to the use of lands held by the appellants under their Certificates of Possession. The appellants submit that there is also a live issue as to whether the Attorney General has abused the court process by taking inconsistent positions in different cases as to the rights of individuals holding Certificates of Possession. Other issues identified by the appellants include whether the Attorney General has committed the tort of conversion, or has acted in bad faith in relation to the appellants.

[13] While the underlying action may well involve live controversies between the parties as to the nature and extent of the appellants' rights as holders of Certificates of Possession with respect to Enoch Cree lands, those rights are not the focus of this appeal. The focus of this appeal is the refusal of the Federal Court to enjoin the Minister of Crown-Indigenous Relations and Northern Affairs from signing the settlement agreement.

[14] The relief sought by the appellants in the Federal Court was an interlocutory order preventing the Minister from executing the proposed settlement agreement between the Crown and the Enoch Cree Nation. The appellants' injunction motion was dismissed by the Federal Court on July 17, 2020, and the Minister signed the settlement agreement on November 6, 2020. As a result, there is no longer a live controversy between the parties as to whether or not the settlement agreement should be finalized, and the injunctive relief sought by the appellants is now incapable of being granted. The appeal is therefore moot.

V. Should the Court Exercise its Discretion to hear the Appeal Notwithstanding that it is Now Moot?

[15] The fact that this appeal is now moot is not the end of the inquiry, however. As the Supreme Court noted in *Borowski*, courts have the discretion to hear cases that fail to meet the "live controversy" test if the circumstances warrant it: above, at para. 16. In my view, this is not such a case.

[16] There is still an adversarial context between the parties, as the appellants have an action pending in the Federal Court. That said, the issues that have been now been raised by the

appellants in the context of this appeal were not raised before the Federal Court in their injunction motion, they were not decided by the Federal Court in its decision dismissing the motion, and they were not raised in the appellants' Notice of Appeal. They are thus not "live controversies" that would be appropriate for determination by this Court in the context of this appeal. While they may be important issues for the appellants, assuming that they are properly pleaded, the proper forum for their resolution is the Federal Court, in the context of the appellants' action, where the issues may be determined based upon a full evidentiary record.

VI. Conclusion

[17] I would therefore grant the Enoch Cree Nation's motion and dismiss this appeal as moot, with costs of the motion to dismiss and of the appeal to both the Enoch Cree Nation and the Attorney General of Canada.

"Anne L. Mactavish"
J.A.

"I agree.
David Stratas J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-186-20
STYLE OF CAUSE:	MARGUERITE MARY (MARGARET) BUCK et al. v. ATTORNEY GENERAL OF CANADA and ENOCH CREE NATION
MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES	
REASONS FOR JUDGMENT BY:	MACTAVISH J.A.
CONCURRED IN BY:	STRATAS J.A. LASKIN J.A.
DATED:	JANUARY 13, 2021

WRITTEN REPRESENTATIONS BY:

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