Federal Court of Appeal  Cour d'appel fédérale

Date: 20220323

Docket: A-254-21

Citation: 2022 FCA 48

PRESENT: GLEASON J.A.

BETWEEN:

THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and THE ATTORNEY GENERAL OF CANADA

Appellants

and

ERMINESKIN CREE NATION and COALSPUR MINES (OPERATIONS) LTD).

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 23, 2022.

REASONS FOR ORDER BY: GLEASON J.A.

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REASONS FOR ORDER

GLEASON J.A.

[1] The respondent, Coalspur Mines (Operations) Ltd. (Coalspur), brings a motion, seeking to have this appeal dismissed for mootness, despite the fact that it consented to the appeal's being heard on an expedited basis and the fact that the appeal is now ready for hearing.

[2] For the reasons set out below (which are necessarily brief in light of the conclusion I have reached), this motion should be remitted to the panel seized with this appeal and the related appeal in Court file A-261-21, which is being heard consecutively with this appeal.

[3] Briefly, by way of background, in this appeal, the appellants seek to set aside the judgment of the Federal Court in *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758 (*Ermineskin FC*).

[4] In *Ermineskin FC*, the Federal Court granted the application for judicial review of the Ermineskin Cree Nation (Ermineskin) and set aside a designation order issued on July 30, 2020 by the Minister of Environment and Climate Change (the Minister) under subsection 9(1) of the *Impact Assessment Act*, S.C. 2019, c. 28, s.1 (the IAA) in respect of Coalspur's proposed coal mining projects in Alberta (the First Designation Order).

[5] Ermineskin had signed an impact benefit agreement with Coalspur under which Coalspur alleges that Ermineskin and at least some of its members were to receive significant benefits from the coal mining projects. The Federal Court concluded that the Crown had not discharged its duty to consult with Ermineskin prior to issuing the First Designation Order. As a result, it set aside the First Designation Order and remitted the matter to the Minister for reconsideration.

[6] The Federal Court also had before it an application for judicial review from Coalspur, in which it likewise sought to set aside the First Designation Order. The Federal Court dismissed Coalspur's application, finding it had been rendered moot by its decision to grant Ermineskin's application for judicial review (*Coalspur Mines (Operations) Ltd. v. Canada (Environment and Climate Change)*, 2021 FC 759). Coalspur appealed that decision to this Court in file A-261-21.

[7] On September 29, 2021, the same day as the two appeals were launched, the Minister issued a second designation order under the IAA, re-designating the same two projects under the IAA, following consultations with Ermineskin and other Indigenous groups (the Second Designation Order).

[8] Coalspur alleges that the impact of the Minister's re-designation of the projects under the IAA is to delay their commencement and postpone participation of Ermineskin and other Indigenous groups in the benefits that flow from the impact benefit agreements they have signed.

[9] Coalspur, Ermineskin and Whitefish (Goodfish) Lake First Nation #128 (Whitefish) each commenced applications for judicial review before the Federal Court, seeking to set aside the Second Designation Order. In those applications, among the grounds raised, are allegations that the Minister failed to appropriately consult with Ermineskin, Whitefish and other Indigenous groups and thus failed to comply with *Ermineskin FC*. These applications were consolidated before the Federal Court (the Consolidated Applications).

[10] On January 12, 2022, Prothonotary Ring issued an order, holding the Consolidated Applications in abeyance until after the conclusion of the appeals in this appeal and in the related file A-261-21 (Order of the Federal Court dated January 12, 2022 filed in Court File Nos. T-1651-21, T-1654-21, and T-1688-21). The Prothonotary found that there was a strong nexus between the Consolidated Applications and these appeals; that, if successful, this appeal would render the Consolidated Applications moot; and that, even if not successful, this appeal might well narrow the issues in the Consolidated Applications.

[11] Coalspur now submits that the Second Designation Order renders this appeal moot as the Second Designation Order operates to prevent it from proceeding with its proposed projects. Thus, according to Coalspur, it matters not whether this appeal proceeds as it has no practical impact. And, if it were to be dismissed, Coalspur says it will consent to an order dismissing or discontinuing its appeal in file A-261-21. Coalspur adds that it was abusive for the Minister to have issued the Second Designation Order and says that the appellants instead ought to have sought to stay the order of the Federal Court in *Ermineskin FC* pending the disposition of this appeal.

[12] The appellants dispute this and say that it was open to the Minister to have proceeded with the Second Designation Order while appealing the first and note that Coalspur does not state that it would have consented to a stay of the First Designation Order. The appellants in addition note that a stay would have further delayed the reconsideration the Minister was ordered to undertake in *Ermineskin FC*.

[13] On the issue of mootness, the appellants submit that a live controversy still exists between the parties, in large part because the applicants in the Consolidated Applications rely on the correctness of the decision of the Federal Court in *Ermineskin FC*.

[14] The appellants also assert that the rulings by this Court in this appeal and in the related appeal A-262-21 could render the Consolidated Applications moot or narrow and better define the issues that the Federal Court will be called upon to decide in the Consolidated Applications. The Minister notes that the scope of the duty to consult owed to Indigenous groups who sign

agreements like the impact benefit agreement with Ermineskin arises in this appeal and also in the Consolidated Applications.

[15] In the alternative, the Minister submits that, even if this appeal is moot, this Court should nonetheless choose to hear it under the second step of the analysis from *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, at p. 353, which provides a court discretion to hear matters that have become moot.

[16] Having reviewed the materials before me on this motion, I am of the view that this motion should be referred to the panel seized with this deciding the merits of this appeal and the related appeal in file A-261-21.

[17] The factors relevant to whether I should decide the motion or remit it to the panel seized with the appeals on the merits include consideration of whether: (1) doing so is consistent with the need to secure the just, most expeditious and least expensive outcome, as required by Rule 3 of the *Federal Courts Rules*, S.O.R./98-106; (2) whether the motion is clear cut; (3) whether the circumstances favour an immediate determination of the motion; (4) whether the motion raises novel issues; and (5) which alternative best favours judicial economy (*Coldwater First Nation v. Canada (Attorney General)*, 2019 FCA 292, at para. 10; *Amgen Canada Inc. v. Apotex Inc*., 2016 FCA 196, 487 N.R. 202, at paras. 7-10).

[18] Here, the majority of these factors favour deferral.

[19] It is not clear-cut that this appeal is moot, especially given the degree of overlap between it and the Consolidated Applications and the positions taken by the applicants in the Consolidated Applications. I also believe that the interplay of this appeal and the Minister's ability to proceed with the Second Designation Order raises issues that merit consideration by a full panel of this Court.

[20] In addition, I have before me only truncated materials. The panel seized with the full appeal on the merits will be better placed to rule on the mootness issue on the basis of the entire appeal record. Notably, in terms of the alternative of exercising discretion to hear an otherwise moot appeal, in the circumstances of the present case and in light of the overlapping proceedings, it seems to me that such discretion is better exercised by a panel after a review of the entire record.

[21] Expedition and economy also favour deferral because this appeal is ripe for hearing and can now be set down for hearing. Remitting the issue of mootness to the panel seized with the appeal will not cause much further delay, and the parties have already incurred much of their costs in perfecting this appeal. The appeal is A-261-21 is also ready for hearing. Further, if this appeal is decided on the merits, proceedings in the Consolidated Applications may well be shortened, if not rendered unnecessary.

[22] I accordingly determine that this motion should be remitted to the panel seized with this appeal and the appeal in file A-261-21.

"Mary J.L. Gleason"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-254-21
STYLE OF CAUSE:	THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and THE ATTORNEY GENERAL OF CANADA v. ERMINESKIN CREE NATION and COALSPUR MINES (OPERATIONS) LTD.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	GLEASON J.A.
DATED:	MARCH 23, 2022

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