Federal Court of Appeal | Cour d'appel fédérale

Date: 20221014

Docket: A-286-18

Citation: 2022 FCA 168

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
RIVOALEN J.A.
ROUSSEL J.A.

BETWEEN:

RENÉ SIMON, ÉRIC CANAPÉ, GÉRALD HERVIEUX, DIANE RIVERIN, JEAN-NOËL RIVERIN, RAYMOND ROUSSELOT, MARIELLE VACHON and THE CONSEIL DES INNUS DE PESSAMIT

Appellants

and

JÉROME BACON ST-ONGE

Respondent

Heard by videoconference hosted by the registry on October 12, 2022.

Judgment delivered at Ottawa, Ontario, on October 14, 2022.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: RIVOALEN J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The appellants (excluding the Council) were all members of the Conseil des Innus de Pessamit (the Council) elected on August 17, 2016. That election was cancelled by a Federal Court judgment dated December 21, 2017 (Justice St-Louis). The appellants are appealing a

Federal Court order dated August 10, 2018 (Justice Roger Lafrenière) finding the appellants (except the Council) in contempt of court for not complying with the 2017 judgment. Hereafter, the word “appellants” does not include the Council unless indicated otherwise.

[2] This appeal was heard at the same time as those in files A-285-18 and A-258-19, which involve two other Federal Court orders: one dated August 15, 2018, that, among other things, set the next election date for September 17, 2018, and another dated June 7, 2019, that determined the sentences for each of the appellants found in contempt on August 10, 2018.

[3] While the contempt decision under appeal was delivered from the bench, more detailed reasons were to follow and were included in the reasons for order dated June 7, 2019.

[4] Following these decisions, other contempt and sentencing orders were rendered against some of the appellants (2021 FC 217 and 2021 FC 1093), including one that is the subject of another appeal (A-319-21). It is therefore important to decide this appeal promptly, especially given that the hearing for the three cases before us has already been delayed following an adjournment in October 2021.

[5] I am of the view that the appeal must be dismissed with costs.

[6] In their memorandum in this case, the appellants argue that the Federal Court made several errors warranting our intervention. First, they claim that the Court did not consider their due diligence defence. In this respect, they claim that the Federal Court erred in consulting the

Rules of the Supreme Court of Canada, SOR/2002-156 (the Rules) instead of the *Supreme Court Act*, R.S.C. 1985, c. S-26 (the Act) and in concluding that section 65.1 of the Act, which they focused on, no longer existed in August 2018. According to the appellants, the Court should have taken into account their motion to stay filed on July 20, 2018, with the Supreme Court of Canada. They maintain that the Federal Court could not reasonably have been expected to make a ruling on contempt before the Supreme Court of Canada ruled on their motion to stay the December 2017 judgment. I note here that, while this was a stay motion, it sought to obtain [TRANSLATION] "extraordinary" relief since its purpose was not to stay the April 23, 2018 order, but rather to obtain the relief that order had denied (section 62 of the Rules). I should also mention that, on July 6, 2018, Justice Locke issued an *ex parte* order compelling the appellants to appear in order to hear evidence for the contempt-of-court charges made against them and to present their defence. One may wonder about the appellants' motivation, given the delay in filing the leave request and motion to stay with the Supreme Court.

[7] The appellants also claim that the December 21, 2017 judgment was not sufficiently clear and was simply a declaratory judgment, and therefore it could not be used as the basis for a finding of contempt. They add other arguments against that finding in their memorandum of fact and law submitted in file A-258-19. Evidently, all the arguments against the finding of contempt should have been submitted under the same file. That said, this Court considered all the arguments relating to the finding of contempt in order to address them together and to simplify things.

[8] The appellants also submit that the Federal Court could not find them in contempt without also finding the Council in contempt. They maintain that the Federal Court did not sufficiently consider that, as of June 27, 2018, when the respondent's *ex parte* motion was presented (order by Justice Locke dated July 6, 2018), they had not yet committed irreversible acts that could amount to contempt. According to them, the Federal Court should have also considered that, after August 10, 2018, they attempted to execute the 2017 judgment by setting the election date for September 17, 2018, by resolution adopted on August 13, 2018. The appellants add that the Court did not adequately consider the evidence or justify certain findings of fact, including as regards Chief Simon's comment that Justice St-Louis was "Auassiu". The latter issue is more relevant to sentencing than to finding someone guilty of contempt and will be addressed in file A-258-19.

[9] As I stated at the hearing, it is well established that, as a general rule, appellants cannot raise on appeal questions of mixed fact and law that they did not raise before the Federal Court. Nor can they ask this Court to intervene on appeal on the ground that the trial court did not exercise its discretion following the sentencing hearing to set aside its own decision finding them in contempt (*Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79 at para. 65 (*Carey*)). They never asked the Federal Court to exercise this discretion, stating only that the August 13, 2018 resolution was a mitigating factor warranting a suspended sentence or very small fine.

[10] I note that the Federal Court's jurisdiction extends to both the Council and the Chief and councillors acting, or purporting to act, in their official capacity (*Horseman v. Horse Lake First Nation*, 2013 FCA 159 at para. 6). In this case, the Chief and councillors were respondents

before the Federal Court when the December 2017 judgment was rendered. The criteria applicable to contempt were reviewed in 2018 with respect to their actions as persons specifically described in the December 2017 judgment as being responsible for executing it. The appellants were allowed to continue in their positions so that they could execute the judgment.

[11] In this case, the standards established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, apply. Whether there were grounds to find the appellants guilty of contempt of court is a question of mixed fact and law subject to the standard of palpable and overriding error. Even if the Federal Court's comments as to the existence of section 65.1 of the Act should be considered an extricable error of law subject to the correctness standard, such an error would not warrant our intervention unless it could have an impact on the outcome. This is not the case here.

[12] While it is evident that section 65.1 exists in the Act rather than the Rules, this in itself has no impact on this case because the law is clear. Like any other motion to stay, a motion under section 65.1 does not nullify a duly rendered order. A stay is simply the remedy sought, and the appellants fully understood this distinction since they were duly represented by counsel. The December 21, 2017 judgment remained valid and binding until overturned or currently stayed (*Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at 974).

[13] In addition, in this case, filing a motion to stay and appealing the judgment cannot be relied on to support a [TRANSLATION] "due diligence [defence] to comply with the Court's judgment", as the appellants claim. This defence is used for actions taken to comply with a court order (for example, starting the process required to hold an election and being prevented from

holding the election by events out of their control). In this case, the purpose of all the actions taken, namely, appealing the December 2017 judgment and filing the three motions to obtain a stay, was to avoid having to comply with the December 21, 2017 judgment. Therefore, the error related to applying section 65.1 can in no way warrant our intervention.

[14] The appellants' other arguments also cannot be accepted. There is no doubt that the Federal Court considered the three elements that must be established beyond a reasonable doubt before a finding of contempt is made (*Carey* at paras. 32–35). The Court concluded that the order was very clear, that it had been properly understood by all the respondents and that the respondents had intentionally ignored the order. The chronology of the facts established before the Federal Court supports this conclusion. There is no doubt that the 1994 Electoral Code had not been amended and that therefore an election should have been held on August 17, 2018. The Federal Court described the evidence in respect of those elements as overwhelming evidence warranting a decision from the bench. After carefully reviewing the evidence on the record, I am not persuaded that the Federal Court made a palpable and overriding error warranting our intervention.

[15] The appeal must therefore be dismissed with costs. The respondent has requested that costs be once again fixed on a solicitor-and-client basis, as was the case at trial. In this respect, I note that the appellants were willing to discontinue on a without-costs basis, but the respondent insisted on the requested costs. In light of all the circumstances, I propose that the costs of the appeal be fixed at $2,000.00.

"Johanne Gauthier"

J.A.

"I agree.
Marianne Rivoalen J.A."

"I agree.
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE LAFRENIÈRE DATED AUGUST 10, 2018,DOCKET NO. T-2135-16

DOCKET:	A-286-18
STYLE OF CAUSE:	RENÉ SIMON, ÉRIC CANAPÉ, GÉRALD HERVIEUX, DIANE RIVERIN, JEAN-NOËL RIVERIN, RAYMOND ROUSSELOT, MARIELLE VACHON and THE CONSEIL DES INNUS DE PESSAMIT v. JÉROME BACON ST-ONGE
PLACE OF HEARING:	BY ONLINE VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 12, 2022
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	RIVOALEN J.A. ROUSSEL J.A.
DATED:	OCTOBER 14, 2022

APPEARANCES:

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