



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Federation of Newfoundland Indians Inc. v. Benoit*,
2024 NLCA 13

Date: April 10, 2024

Docket Number: 202301H0056

BETWEEN:

FEDERATION OF NEWFOUNDLAND INDIANS INC.

APPELLANT

AND:

SHAWN BENOIT, MATTHEW ANDERSON,
MARIE TAPP MELANSON, BOBBIE TAPP GOOSNEY,
PAUL BENNETT and JENNIFER SUE LE ROUX

FIRST RESPONDENTS

AND:

HIS MAJESTY THE KING (CANADA)

SECOND RESPONDENT

Coram: W.H. Goodridge J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 201801G1147
(2023 NLSC 90)

Matter Heard: February 6, 2024

Memorandum of Disposition Filed: April 10, 2024

Counsel for the Appellant: Sonia Eggerman / Riva Farrell Racette
Counsel for the First Respondents: Keith S. Morgan
Counsel for the Second Respondent: Kelly A. Peck / Corinne Bedford
Counsel for former Board members: Philip J. Buckingham

Authorities Cited:

CASES CITED: *Re: Office of the Public Trustee; Brake v. Brake*, 2019 NLCA 68; *Re: Carroll; Kent v. Kent*, 2010 NLCA 53; *Re: Power; Yetman v. Yetman*, 2015 NLCA 10; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594; *B. (S.G.) v. L. (S.J.)*, 2010 ONCA 578; *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; *Mockler v. New Brunswick et al.*, 2019 NBCA 10; *McNally v. Bass*, 2003 NLCA 15.

STATUTES CONSIDERED: *Indian Act*, RSC 1985, c. I-5; *Corporations Act*, RSNL, 1990, c. C-36, section 371; *Court of Appeal Act*, SNL 2017, c. C-37.002, sections 6(1), 7(2).

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, rules 6, 14.

MEMORANDUM OF DISPOSITION

W.H. Goodridge J.A.:

INTRODUCTION

[1] At the outset of a stay application a preliminary issue arose as to whether the application, and the appeal, should proceed. This decision addresses that preliminary issue and provides directions.

[2] The underlying issue is whether former Board members for the Federation of Newfoundland Indians Inc. (FNI), who were replaced as part of the remedy imposed at trial (to rectify an oppression) should have leave to seek standing to pursue the stay application and the appeal, or whether the FNI (now under direction of a recomposed Board) should have the right to abandon the stay application and discontinue the appeal.

[3] As the unsuccessful party in an oppression action, FNI filed a Notice of Appeal and a stay application. The day preceding the scheduled hearing of the stay application, the Board members for FNI were replaced (all but one) as part of the remedy granted at trial. The recomposed Board then dismissed former legal counsel and appointed new counsel. That newly appointed counsel appeared on the stay application and advised that FNI, now under direction of the new Board, had changed its intentions and wished to abandon the application and discontinue the appeal.

[4] Former FNI legal counsel also appeared on the stay application (with leave of the Court) and made representations on behalf of the former Board members, opposing abandonment of the application and discontinuance of the appeal. Counsel argued that the authority of the recomposed Board is at the heart of the issue under appeal. If the trial judge made legal errors, then the recomposed Board would be struck, and former Board members reinstated. In his submission, the right of appeal in this unique situation requires that both the stay application and the appeal proceed, and that the former Board members have standing.

BACKGROUND

[5] In the oppression action, the First Respondents claimed that they lost their status as members of the FNI, and ultimately lost their status under the *Indian Act*, RSC 1985, c. I-5, because of oppressive conduct by FNI.

[6] The trial judge agreed. In a decision filed June 19, 2023, the judge imposed a remedy pursuant to section 371 of the *Corporations Act*, RSNL 1990, c. C-36, that included replacement of FNI's articles and by-laws with the articles and by-laws that were in place prior to the oppressive actions. This had the effect of reinstating the First Respondents as FNI members and replacing all but one of the FNI Board members. The chronology of the relevant recent events is:

- October 5, 2023 – Order after trial filed.
- October 5, 2023 – Notice of Appeal and stay application filed by FNI (then under management of the former Board members).
- October 23, 2023 – former Board members of FNI replaced because of the Order after trial.

- October 23, 2023 – recomposed FNI Board retains new legal counsel and issues new instructions.
- October 24, 2023 – newly retained legal counsel appears on the stay application and advises that FNI wishes to abandon the stay application and discontinue the appeal.

POSITION OF THE PARTIES

[7] Counsel for the FNI submits, in a written brief, that the “appeal has been lawfully discontinued”. She further submits that the former Board members could have sought leave to file a Notice of Appeal as non-parties but choose not to do so.

[8] Counsel for the First Respondents submits that the recomposed new Board has determined that FNI’s best interests are served by abandonment of the stay application and appeal. To allow the now dismissed former Board members to challenge that decision of the new Board would be an unlawful piercing of the FNI corporate veil.

[9] Counsel for the Second Respondent submits that it would be a denial of natural justice if the former Board members were not granted standing to pursue an appeal and a stay application.

[10] Counsel for the former Board members submits that to deny his clients standing to pursue the appeal and the stay application, and to allow the FNI to unilaterally abandon the appeal, would make the lower court the forum of final determination, and deny the right of appeal from the trial decision.

ANALYSIS

[11] The FNI’s submission that the “appeal has been lawfully discontinued” is incorrect and is part of the issue under consideration here. At the appearance on October 24, 2023, counsel were asked to make submissions at a subsequent hearing on whether the appeal was effectively in the hands of the new FNI Board to continue or abandon. Following the October 24, 2023 appearance, a note was made on the Court’s case management system directing administrative staff not to accept for filing a discontinuance of the appeal, pending further directions from the Court. On December 21, 2023, administrative staff received from FNI, and mistakenly accepted for filing, a discontinuance of the appeal. On February 6, 2024, I corrected

that administrative error and ordered that the filing be vacated pending these further directions.

[12] Currently, the former Board members are non-parties in the stay application and appeal. The Court has previously recognized that a non-party may have a right of appeal (see *Re: Office of the Public Trustee; Brake v. Brake*, 2019 NLCA 68; *Re: Carroll; Kent v. Kent*, 2010 NLCA 53; *Re: Power; Yetman v. Yetman*, 2015 NLCA 10). In *Brake*, at paragraphs 6 and 7, Butler J.A. interpreted subsection 6(1) of the *Court of Appeal Act*, SNL 2017, c. C-37.002, to allow a non-party who is directly affected by an order to pursue an appeal:

[6] The consistent feature of these cases is that the non-party's legal interests were effectively finally determined by the order in question and, if they could not appeal the order directly affecting them, they were without legal recourse.

[7] Subsection 6(1) of the *Court of Appeal Act*, S.N.L. 2017, c. C-37.002, provides that an appeal lies to this court from an order of the Supreme Court or an order of a judge of the Supreme Court. It does not reference the requirement that the appeal be brought by a party to the action from which the appeal emanates. It would be reasonable however to interpret subsection 6(1) as requiring a non-party to be directly affected by the order, as the Public Trustee is here.

[13] There is nothing in the *Court of Appeal Rules*, NLR 38/16, the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, and nothing in the above referenced authorities, setting out the procedure for granting a non-party standing to pursue an appeal.

[14] This is a unique situation where the remedy imposed at trial directly affects the former Board members (by affecting their ability to serve as the directing minds of the FNI) and has the potential unintended consequence of shielding the trial order from appellate review. In addition, the authority of the current Board as the directing minds of FNI assumes the legal correctness of the decision under appeal. In the circumstances, procedural fairness dictates that the former Board members be able to seek standing to pursue an appeal and to seek a stay of the trial decision.

[15] The absence of an existing procedure for a non-party to obtain standing to pursue an appeal can be addressed by directions under rules 6 and 14 of the *Court of Appeal Rules*, and under the Court's inherent jurisdiction to control its process and ensure the appellate function is met.

[16] In *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594, the Supreme Court recognized (at 601) the authority of an appellate court to prevent proceedings pending before it from being aborted by unilateral action by one of the parties.

[17] In *B. (S.G.) v. L. (S.J.)*, 2010 ONCA 578, the Court of Appeal for Ontario, in a child parenting dispute, exercised discretion to hear (and grant) an application from a non-party for a stay of enforcement of a trial order, pending the appeal outcome.

[18] In *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, one of the issues was whether the Court of Appeal of New Brunswick had inherent jurisdiction to grant leave to appeal when the person seeking leave was not a party to the original action and was applying out of time. Although there were different views on other issues, on the question of the inherent jurisdiction, the Court unanimously held that the New Brunswick Court of Appeal had inherent jurisdiction to grant leave to appeal to a non-party. In her concurring reasons, at page 594, Wilson, J. outlined several factors which affect the exercise of a court's discretion when responding to an application from a non-party to have standing to pursue an appeal:

A review of the cases listed in the English Manual indicates that in a proper case the practice of the Court of Chancery was to permit a grant of leave to appeal to a person not a party to an action. The test applied in order to determine when a case was a proper case for leave was whether the applicant would have been a proper, if not a necessary, party to the action. A number of factors which affect the exercise of a Court's discretion on such an application are reflected in the cases. An appellant should be able to show, for example, (a) that its interest was not represented at the proceeding; (b) that it has an interest which will be adversely affected by the decision; (c) that it is, or can be, bound by the order; (d) that it has a reasonably arguable case; and (e) that the interests of justice in avoiding multiplicity of proceedings would be served by the grant of leave.

...

[19] See also *Mockler v. New Brunswick et al.*, 2019 NBCA 10, at paragraph 17, where this same issue - inherent jurisdiction to grant leave to appeal when the person seeking leave was not a party - was addressed.

[20] In *McNally v. Bass*, 2003 NLCA 15, at paragraph 24, this Court found the same inherent jurisdiction when the person seeking leave was not a party to the original action, "I would conclude then that in Newfoundland and Labrador, as in New Brunswick, the *Judicature Act* specifically preserves to the Court the original jurisdiction necessary or incidental to the determining of an appeal." That inherent

jurisdiction of this Court was preserved in the subsequently passed *Court of Appeal Act*:

7. (2) The inherent jurisdiction of the appeal division referred to as the Court of Appeal in Part I of the *Judicature Act* as it existed before the coming into force of this *Act* is continued in the court and is unaffected by the coming into force of this *Act*.

[21] Rules 6 and 14 of the *Court of Appeal Rules* provide as follows:

Gap in the rules

6. Where a procedural issue arises that is not covered by these rules, the Court may adopt and give directions regarding an appropriate procedure.

Extending or abridging time

14. The Court may extend or abridge any time prescribed by these rules before or after the expiration of that time.

[22] On the latter rule, the former Board members had a clear intention to appeal, as evident from the filing of FNI's Notice of Appeal the same day that the order after trial was settled. The exceptional circumstances here, where the trial remedy led to replacement of FNI's Board members the day preceding the stay application, created other issues and procedural delays. Fairness dictates that this Court extend the time to seek leave to apply for standing and to file a Notice of Appeal (or Cross-Appeal) as I have done in the directions below.

DIRECTIONS

[23] I give directions as follows:

- I. The former Board members have leave to apply for standing to participate as a party to pursue an appeal and stay application – the filing deadline for the standing application is April 30, 2024.
- II. The application for standing shall include an affidavit identifying the former Board members who seek standing. The affidavit will address whether such persons collectively (a) have an interest currently not represented at the proceeding; (b) have an interest which will be adversely affected if standing is denied; (c) have been impacted or bound

by the order after trial; (d) have a reasonably arguable case; and (e) the interests of justice would be served by granting leave for standing to pursue the appeal.

- III. If standing is granted to the former Board members, then the filing deadline for a Notice of Appeal by the former Board members shall be 10 days after the decision on standing is filed by this Court.
- IV. If standing is granted to the former Board members, then the filing deadline for a Notice of Appeal (or Cross-Appeal) by the Second Respondent (which deadline had been previously suspended pending this decision) shall be 15 days after the decision on standing is filed by this Court.
- V. If standing is not granted (or not sought) then the filing deadline for a Notice of Appeal (or Cross-Appeal) by the Second Respondent, shall be 10 days after the decision on standing is filed by the Court (or May 10, 2024, in the event standing is not sought).
- VI. The FNI has leave to file a Form 13 notice to discontinue the appeal it filed on October 5, 2023. The filing of this discontinuance by FNI shall be without prejudice to the existing right of the Second Respondent, and the potential right of the former Board members (pending the outcome of the standing application) to each file Notices of Appeal or Cross-Appeal.

COSTS

[24] Costs will be addressed at the end of these proceedings and for now, are costs in the cause.

W.H. Goodridge J.A.