



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

**Citation:** *Barker v. Federation of Newfoundland Indians Inc.*,  
2024 NLCA 31

**Date:** August 30, 2024

**Docket Number:** 202401H0033

**BETWEEN:**

ANDREW BARKER and JENNIFER BRAKE

APPLICANTS/  
INTENDED APPELLANTS

**AND:**

FEDERATION OF NEWFOUNDLAND INDIANS INC.

FIRST RESPONDENT/  
INTENDED FIRST RESPONDENT

**AND:**

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

SECOND RESPONDENTS/  
INTENDED SECOND RESPONDENTS

**AND:**

HIS MAJESTY THE KING (CANADA)

THIRD RESPONDENT/  
INTENDED THIRD RESPONDENT

**Coram:** W.H. Goodridge J.A.

**Court Appealed From:**

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

**Application Heard:** May 21, 2024  
**Memorandum of Disposition Filed:** August 30, 2024

**Counsel for the Applicants/  
Intended Appellants:** Philip J. Buckingham K.C. and  
Adam G. Ronan

**Counsel for the First Respondent/  
Intended First Respondent:** Sonia Eggerman and Riva F. Racette

**Counsel for the Second Respondents/  
Intended Second Respondents:** Keith S. Morgan and Anna Morgan

**Counsel for the Third Respondent/  
Intended Third Respondent:** Kelly A. Peck and Corinne Bedford

**Authorities Cited:**

**CASES CITED:** *Benoit v. Federation of Newfoundland Indians Inc.*, 2023 NLSC 90; *Federation of Newfoundland Indians Inc. v. Benoit*, 2024 NLCA 13; *Swanson Construction Co. v. Manitoba*, 1963 CanLII 503 (MBCA); *Bass v. McNally*, 2003 NLCA 15; *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549; *Re: Office of the Public Trustee; Brake v. Brake*, 2019 NLCA 68; *Aubin v. Quantiam Technologies Inc.*, 2018 ABCA 440; *Condominium Corporation No 022 5899 v. 499430 Alberta Ltd.*, 2019 ABQB 905.

**STATUTES CONSIDERED:** *Indian Act*, RSC 1985, c. I-5.

**MEMORANDUM OF DISPOSITION**

**W.H. Goodridge J.A.:**

**INTRODUCTION**

[1] The Applicants are former members of the board of directors of the Federation of Newfoundland Indians Inc. (“FNI”) and were replaced as part of the remedy imposed in the matter of *Benoit v. Federation of Newfoundland Indians Inc.*, 2023 NLSC 90 (the “Decision”). They apply for standing to file a Notice of Appeal of the Decision even though they were not parties at trial. The circumstances giving rise to

this unusual application are set out in an earlier decision of this Court in *Federation of Newfoundland Indians Inc. v. Benoit*, 2024 NLCA 13.

[2] For the reasons set out below, the application is granted.

## **BACKGROUND**

[3] At trial, the Second Respondents established that oppressive conduct by FNI caused them to be stripped of their membership in FNI, with the resulting loss of status under the *Indian Act*, RSC 1985, c. I-5. As part of the remedy to rectify the oppression, the trial judge voided the FNI's then existing by-laws and reinstated the FNI's original by-laws. That forced the removal of the FNI board of directors' members who were in office during the trial (the "Trial Board Members"). This remedy had a similar effect to an order directing those Trial Board Members to refrain from serving as the directing minds of the FNI. Despite that remedy, the Trial Board Members filed a Notice of Appeal as soon as the Order was filed. The new board members, who assumed office a few weeks later, authorized the filing of a discontinuance of that Notice of Appeal.

[4] The Applicants argue that the change in the FNI board of directors' membership, which arose directly from the remedy imposed at trial, has frustrated the usual right of appeal by an unsuccessful party, and that it is necessary, in these unique circumstances, to grant the Applicants the right to pursue the appeal.

## **ANALYSIS**

[5] In *Swanson Construction Co. v. Manitoba*, 1963 CanLII 503 (MBCA), Freedman J.A., for a unanimous court, held that there was inherent jurisdiction at the Court of Appeal to hear additional parties on an appeal where the interests of justice require it:

[18] ...even with those which hold that there is no right in a third party to appeal, there are distinct affirmations that it would be inequitable to deny the third party a right to be heard before the appellate Court. To overcome any possibility of injustice to such a third party, leave to be heard either as a party appellant or in some other manner is accordingly usually granted.

[19] ...There is inherent jurisdiction in the court to hear additional parties on an appeal where the interests of justice require it ...

[6] In *Bass v. McNally*, 2003 NLCA 15, Cameron J.A. referred to the decision in *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, to recognize the existence of the Court of Appeal's inherent jurisdiction to grant leave for a non-party to file a Notice of Appeal. At paragraph 22 she stated:

[22] In [*Société des Acadiens*] though there were different views on other issues, on the question of the inherent jurisdiction of the New Brunswick Court of Appeal the Court unanimously held that court to have inherent jurisdiction to grant leave to appeal to a non-party.

[7] In *Société des Acadiens*, Wilson J. (in separate concurring reasons) adopted a general framework from the cases and practice in the Court of Chancery in England for the discretionary invocation of the Court's jurisdiction to grant leave for a non-party to file a Notice of Appeal. At page 594, Wilson J. set out factors to guide courts when exercising discretion whether to allow a non-party to file a Notice of Appeal:

A number of factors which affect the exercise of a Court's discretion on such an application [to grant leave to appeal to a non-party] 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.

[8] More recently, in *Re: Office of the Public Trustee; Brake v. Brake*, 2019 NLCA 68, this Court again recognized the inherent jurisdiction to grant leave to appeal to a non-party and discussed the factors to consider in the exercise of that discretion. Butler J.A., writing for the Court, stated:

[4] ... this appeal addresses, in part, the ability of a non-party to appeal an Order to this Court.

[5] This Court has previously recognized that a non-party may have a right of appeal. See *Re: Carroll; Kent v. Kent*, 2010 NLCA 53 (N.L. C.A.), where a witness appealed an order that she produce personal records in family law litigation to which she was not a party and *Re: Power; Yetman v. Yetman*, 2015 NLCA 10 (N.L. C.A.), where a solicitor was permitted to appeal a costs order made against her.

[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.

[8] I would conclude that subsection 6(1) of the *Court of Appeal Act* supports the Public Trustee's ability to appeal paragraph 2(b) of the Order to this Court.

[9] The Order was, vis-à-vis the Public Trustee, final; the Public Trustee was directly affected and the Public Trustee should not be left without any appellate recourse.

[9] Many of the factors discussed in *Société des Acadiens* and *Re: Office of the Public Trustee* support a conclusion that this is one of those rare and exceptional circumstances where non-parties, the Applicants, should be granted leave to file a Notice of Appeal and participate in the appeal to the same extent as a party.

[10] The Applicants' status as directors is a private interest adversely affected by the decision. The trial remedy had the same effect as an order directing the Applicants to refrain from serving as the directing minds of the FNI. In that way, the trial remedy directly affected an important private interest of the Applicants. Wakeling J.A. observed in *Aubin v. Quantiam Technologies Inc.*, 2018 ABCA 440, at paragraph 7:

One exception [to the general rule that a non-party cannot appeal] arises where the decision sought to be appealed orders the person to do or refrain from doing something.

[11] The Applicants are bound by the order to the extent that the effect is to force their removal from office.

[12] The proposed arguments on appeal (legal issues regarding the proper procedure for passing a Special Resolution by a corporate body) meet the threshold for a reasonably arguable case.

[13] The interests of justice in avoiding multiplicity of proceedings would be served by the granting of leave. I do not accept the Second Respondents' argument that it would be preferable to allow the Applicants to pursue separate proceedings for reinstatement as Directors, as was occurring in *Condominium Corporation No 022 5899 v. 499430 Alberta Ltd.*, 2019 ABQB 905. In that matter, Lema J. denied

standing for a non-party to pursue an appeal, but the ongoing separate proceeding was a minor factor in the decision to deny standing.

[14] In addition to these factors from *Société des Acadiens*, an important justification for my conclusion is that the failure to grant leave to the Applicants would insulate the Decision from appellate review, and that would be contrary to the interests of justice. The remedy imposed at trial had the effect of replacing the directing mind (the Trial Board Members) of the FNI, and in that way has frustrated the unsuccessful party (FNI while under direction of Trial Board Members) from pursuing the appeal. If the trial judge erred, then there is a possibility that the trial remedy will be reversed, and the Trial Board Members reinstated.

## **DISPOSITION**

[15] The Application is granted and the Applicants are granted standing to file a Notice of Appeal and participate in the appeal to the same extent as a party (including the right to seek a stay).

## **COSTS**

[16] Costs of this application shall be included in the costs of the appeal.

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W.H. Goodridge J.A.