Federal Court of Appeal

Cour d'appel fédérale

Date: 20231128

Docket: A-278-23

Citation: 2023 FCA 233

Present: STRATAS J.A.

BETWEEN:

KYRA WILSON, ALLEN DENNIS MYRAN and KEELY ASSINIBOINE

Appellants

and

DAVID MEECHES, MARVIN DANIELS and GARNET MEECHES

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 28, 2023.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The appellants move for an order:

- staying the decision of the Federal Court dated September 25, 2023 in file T-1015-222; and

- expediting the appeal from that decision.

[2] The motion will be dismissed. As will be explained, the stay cannot be granted because the relief sought in the stay (and, for that matter, the appeal) is no longer possible or available: written representations of David Meeches, at para. 27; written representations of Marvin Daniels and Garnet Meeches at paras. 8 and 12-15. As for the order expediting the appeal, it too cannot be granted: there is nothing live left to expedite.

[3] Thus, the motion fails at the first branch of the test for a stay, the requirement of arguability: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385; and for a situation analogous to this case, see *Guillaume v. Chief Animal Welfare Inspector*, 2023 ONSC 5782 at paras. 10-11.

A. Analysis

[4] The respondent, David Meeches, ran for election as Chief of the Long Plain First Nation in April 2022. He was unsuccessful.

[5] The *Long Plain First Nation Custom Election Act*, as ratified by the Tribal Citizens, governed the election. Under this Act, an aggrieved party who feels there has been an irregularity in the election can appeal to an election appeal committee. After the decision of the election appeal committee, the party may then apply to the Federal Court for judicial review.

[6] The respondents, citing an irregularity, appealed to the appeal committee. The appeal committee dismissed their appeal. The respondents then applied for judicial review in the Federal Court.

[7] On September 25, 2023, the Federal Court (*per* Strickland J.) ruled in favour of the respondents. It granted the application and remitted the matter to a differently constituted election appeal committee for redetermination: 2023 FC 1289.

[8] The Federal Court laid down short deadlines for the redetermination: the appointment of the differently constituted election appeal committee had to take place within one month and the redetermination had to be conducted within two weeks after the appointment.

[9] For three weeks, nothing happened in this Court. Then, on October 16, 2023, the three appellants (the successful candidate for Chief and two elected band councillors), filed a notice of appeal in this Court. They did not file a motion to stay the Federal Court decision. Rather, they requested a case conference to schedule a motion for a stay that they had not yet brought but intended to bring.

[10] This Court reacted to the appellants’ request within two days. It held that a case conference was unnecessary. Instead, this Court set a tight schedule for the exchange of records for the stay motion.

[11] The last filing on the stay motion took place on October 23, 2023. On the next day, this Court dismissed the motion for a stay. It found that the appellants had not established irreparable harm: 2023 FCA 212. However, it invited the appellants to apply again for a stay if circumstances changed.

[12] This Court also observed that no one asked it for an expedited schedule for the procedural steps in the appeal. But it said it was willing to entertain such a request, noting that "[t]his Court can respond positively to such a request in appropriate circumstances" (at para. 14).

[13] In this Court, nothing further was happening; in the First Nation, plenty was happening.

[14] The election appeal committee was reconstituted. It held its redetermination. In just a few days, on November 8, 2023, it declared the election invalid and required that a new election take place shortly. With that, the Federal Court's September 25, 2023 decision had been fully implemented and was spent.

[15] Nine days later, on November 17, 2023, the appellants brought a new motion to stay the Federal Court's decision, *i.e.*, to stop it from being implemented. But it is too late. The same appears to be true for this appeal from the decision, which was aimed at setting aside the decision so it is never implemented. In effect, at this point, the new motion and the appeal seek to close a barn door after the horses have left.

[16] The new November 8, 2023 decision of the election appeal committee is legal and binding until and unless it is set aside. The pending appeal in this Court does not seek to set aside that decision. Rather, it seeks to set aside the original September 25, 2023 decision of the Federal Court and the initial decision of the election appeal committee, not the new November 8, 2023 decision. Nor can the pending appeal set aside the new decision: in these circumstances, this Court only has appellate jurisdiction, not original jurisdiction to set it aside. The Federal Court has original jurisdiction to do that. And the appellants have now invoked that jurisdiction by starting a fresh judicial review of the new November 8, 2023 decision (file T-2442-23).

[17] The appellants gamely try in their written representations on this motion, both in chief and in reply, to focus on the new November 8, 2023 decision and the upcoming new election, but, to reiterate, neither their motion nor this appeal are directed to them and this Court does not have original jurisdiction to deal with them.

[18] If the appellants want to stay the new November 8, 2023 decision of the appeal committee and the upcoming election, they will have to prosecute a stay motion in the Federal Court in file T-2442-23.

B. Postscript

[19] This case does not stand alone. Sometimes fast-moving events render important matters moot: for a recent, prominent example, see *Peckford v. Canada (Attorney General)*, 2023 FCA 219.

[20] As a result, some occasionally blame courts. They say that questionable, harmful and fast-moving conduct can happen before the courts can stop it. They say that relief in courts is slow and unavailable. On occasion, others say similar things about the Federal Courts system based on assertions, not credible evidence: see, *e.g.*, *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467 at para. 66 and *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409 at paras. 57-61, both roundly criticized by this Court in *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130, [2021] 1 F.C.R. 53 at paras. 157-159 and *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108, 174 C.P.R. (4th) 85 at para. 22.

[21] These statements are untrue. In the Federal Courts system, things can and do move fast, especially when a party asks us to go fast. For us, “access to justice” is much more than an attractive slogan in a tweet or a lofty phrase in a news release. It has been a call to action. And, for a long time, plenty of action there has been. See the article by Professor Gerard Kennedy, “The Federal Courts Advantage in Civil Procedure” (October 31, 2023), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4619359.

[22] To this end, for the benefit of the profession and to further access to justice, some practical observations might now assist.

[23] In a case like this, two fundamental principles, oft-forgotten, are the starting point:

- A decision of a first instance court or an administrative decision-maker takes effect as soon as it is rendered, unless the decision or legislation says otherwise; and

- Absent an order staying, enjoining or suspending the decision, it can be implemented, even in the face of an appeal or judicial review.

[24] These principles mean that, absent agreement, a party challenging the decision on appeal or judicial review who wants to prevent the decision from being implemented must bring a motion for a stay or injunction to the court where the decision is being challenged.

[25] In some cases, the decision can be implemented quickly; thus, the party must move right away, asking for expedited determination and proposing an expedited schedule both for the motion and the appeal or judicial review itself. Doing otherwise—such as not seeking expedition, not proposing a schedule, or asking for a case conference—slows things down.

[26] If a request to expedite seems, at least at first glance, arguable, often the Court will issue procedural directions for the stay and expedite motion to hurry it along. And once the filings for the motion are complete, the Court tries to act quickly: see for example the prompt response to the stay motion discussed in paragraphs 10 and 11, above.

[27] Sometimes a party might suffer serious harm before we can decide the motion. To address that, the party should seek an interim stay: a short-term, temporary, emergency stay

designed to preserve matters before the court decides the stay and expedite motion. If the period of restraint proposed in the interim stay is brief—and it usually is—often the supporting affidavit and the written representations for the interim stay can be short and to the point. As well, the brevity of the restraint can often tip the balance of convenience in favour of granting the interim stay.

[28] In rare circumstances of extreme urgency, an even faster measure is possible: the interim interim stay. Interim interim stays preserve the *status quo* during the brief time before an interim stay can be put in place. For an example, see the Order dated July 2, 2017 in *Bell Canada et al. v. Lackman*, file A-202-17. Because the stay sought is exceedingly short, the supporting affidavit and the written representations can sometimes be even shorter and more to the point. In fact, in the highly unusual circumstances of *Lackman*, including the nature of the decision sought to be restrained, the credible representations and undertakings of counsel in a letter persuaded this Court to grant the interim interim stay.

[29] This Court is "accessible 24 hours a day, [every day of the] year, from coast to coast for urgent applications, in both official languages": *Brown* at para. 159. When necessary, this Court can act quickly outside of normal working hours, even on the evening of a quiet public holiday: see Order dated January 1, 2023 in *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, file A-286-22 (prompted by submissions on the evening of December 31, 2022); see also Order dated July 2, 2021 (issued at 1:45 a.m. after a two hour hearing) in *Canada* (*Commissioner of Competition) v. Secure Energy Services Inc. et al.*, file A-185-21. "When necessary" is key: urgency must be demonstrated.

[30] Sometimes litigants seek directions from the Court on how to proceed. This is futile. Motions for directions, available in narrow circumstances in Rule 54 of the *Federal Courts Rules*, S.O.R./98-106, are not a means of getting free legal advice from the Court. The parties themselves must figure out the civil procedure and the litigation strategy: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189 at paras. 37-47; *Olumide v. Canada*, 2016 FCA 287 at paras. 14-23. Smart parties go one step further: they prepare their stay and expedite material before the first-instance decision comes down, just in case it goes against them and they have to act right away.

C. Disposition

[31] Therefore, for the foregoing reasons, the appellants' motion to stay and expedite will be dismissed with costs.

[32] Given the dismissal of this motion and the reasons for it, it appears that this appeal should also be dismissed for mootness.

[33] Only a panel of this Court can dismiss an appeal: section 16 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Therefore, we shall now constitute a panel to determine whether this appeal should be dismissed for mootness. The panel will consider the filings in this motion and any

other written submissions the parties wish to file. The Court's Order on this motion will set a schedule for the exchange of written submissions.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-278-23
STYLE OF CAUSE:	KYRA WILSON, ALLEN DENNIS MYRAN and KEELY ASSINIBOINE, v. DAVID MEECHES, MARVIN DANIELS AND GARNET MEECHES

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	NOVEMBER 28, 2023

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