

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20190131**

**Docket: A-250-17**

**Citation: 2019 FCA 23**

**CORAM: WEBB J.A.  
NEAR J.A.  
WOODS J.A.**

**BETWEEN:**

**CLIFF CALLIOU ACTING ON HIS OWN BEHALF AND ON  
BEHALF OF ALL OTHER MEMBERS OF THE KELLY LAKE  
CREE NATION WHO ARE OF THE BEAVER, CREE AND  
IROQUOIS PEOPLES AND KELLY LAKE CREE NATION**

**Appellants**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS  
REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND  
NORTHERN DEVELOPMENT**

**Respondent**

Heard at Edmonton, Alberta, on November 8, 2018.

Judgment delivered at Ottawa, Ontario, on January 31, 2019.

**REASONS FOR JUDGMENT BY:**

**NEAR J.A.**

**CONCURRED IN BY:**

**WEBB J.A.  
WOODS J.A.**

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**REASONS FOR JUDGMENT**

**NEAR J.A.**

I. Overview

[1] The Appellants, Cliff Calliou acting on his own behalf and on behalf of members of the Kelly Lake Cree Nation, appeal from the decision of the Federal Court dated August 31, 2017

(2017 FC 791), which dismissed the Appellants' motion for an appeal of an Order of the Prothonotary dated February 7, 2017 (T-1685-96) granting a stay of proceedings under subsection 50(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act).

[2] As a small preliminary matter, it is necessary to correct an error in the original style of cause for this appeal. While the Appellants list Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian Affairs and Northern Development as the plural "Respondents" in this matter, there is only one proper Respondent to the appeal, Her Majesty the Queen. Accordingly, this Court has corrected the style of cause to the singular form. This change has no impact on the merits or outcome of this appeal.

## II. Background

[3] In 1996, the Appellants commenced an action against the Respondent seeking a declaration of existing aboriginal title, Indian title, and aboriginal rights over certain lands located in the provinces of British Columbia and Alberta, in an area known as the Peace River Block (the Lands). Specifically, the Lands are bounded on the north by the Peace River, on the west by a portion of the Rocky Mountains in British Columbia, on the south by the boundary between Treaty No. 6 of 1876 and Treaty No. 8, and on the east in Alberta by the sixth meridian. In the action, the Appellants also seek various ancillary remedies including, among other things: a declaration that their claimed title has been infringed by permits, authorizations, leases, contracts, works and activities on the Lands; a permanent injunction against the Respondent to cease exploiting the Lands; and a declaration that the Respondent has breached its trust, fiduciary, constitutional, statutory, common law and equitable obligations owed to the

Appellants. The Appellants claim damages in the amount of five billion dollars flowing from the alleged unlawful conduct of the Respondent.

[4] On July 9, 2010, the Appellants and other plaintiffs commenced another action in the Supreme Court of British Columbia, seeking aboriginal title and rights to carry on various traditional activities on the same Lands as those claimed in this Court (the BC Action). The BC Action is ongoing. Another action also in relation to the Lands, brought in the name of Mr. Calliou and the Kelly Lake First Nations Society, had previously been filed in the Alberta Court of Queen's Bench but was discontinued on July 25, 1996.

### III. Order of the Prothonotary

[5] On the motion of the Respondent, the Prothonotary found that it was in the interests of justice to stay the proceeding given that there was a concurrent proceeding before the Supreme Court of British Columbia and that there was a concern that there may be inconsistent findings should the matter proceed in both the Federal Court and in the Supreme Court of British Columbia. The Prothonotary also determined that some of the Appellants' claims fell outside the jurisdiction of the Federal Court since they sought remedies affecting the provincial land rights of British Columbia and Alberta. The Prothonotary further concluded that any elements of the action over which the Federal Court may have jurisdiction ultimately would flow from the provincial land-related claims of the Appellants. It is only upon successful recognition of these claims that the Appellants may seek the further relief that they claim.

[6] Accordingly, the Prothonotary determined that it was in the interests of justice to stay the action and allow the land-related claims to be determined by the provincial superior courts. The Prothonotary further ordered that, following the conclusion of the BC Action or any other provincial action the Appellants may choose to revive in Alberta, either of the parties may apply to lift the stay to address any outstanding elements of the Appellants' claims that properly fall within the jurisdiction of the Federal Court, if necessary.

#### IV. Decision of the Federal Court

[7] The Federal Court dismissed the Appellants' appeal of the Prothonotary's Order, finding no error in the Prothonotary's decision to stay the action. The Federal Court agreed with the Prothonotary that the essence of the action is land-related, and that the Federal Court lacks jurisdiction to make declarations or apply remedies that impact the land rights of a province. It rejected the Appellants' attempts to distinguish the cases that relate to the provinces of Quebec and Newfoundland and Labrador. The Federal Court further clarified that all of the provinces have jurisdiction over lands and natural resources located within their boundaries, subject to any First Nations existing aboriginal or treaty rights. It dismissed as unsupported the Appellants' claim that the Lands are not provincial lands by virtue of the 1870 *Rupert's Land and North-Western Territory Order* (U.K.) (reprinted in R.S.C. 1985, App. II, No. 9), and the *Constitution Act, 1930* (U.K.), 20-21 Geo. V., c. 26.

[8] The Federal Court also found that the Prothonotary properly determined that following the resolution of the BC Action or any other provincial action that the Appellants' may seek to pursue in respect of the Lands, the Appellants can apply to lift the stay, allowing any ancillary

land-related claims over which the Federal Court may have jurisdiction to proceed. In response to the Appellants' arguments that the Prothonotary erred by failing to consider sections 19 and 25 of the Act, the Federal Court stated that these sections have no application. Section 25 only applies if no other court has jurisdiction, which it found is not the case in this matter as the Appellants' claims are proceeding in the BC Action. It likewise found that section 19 does not grant the Federal Court jurisdiction as that provision can only be relied upon if Canada commences a third party action against a provincial Crown, which it has not done in this matter.

#### V. Standard of Review

[9] The discretionary decisions of prothonotaries are reviewable in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras. 66-79, [2017] 1 F.C.R. 331 [*Hospira*]). Where the Federal Court upholds a discretionary decision of a prothonotary, this Court must examine the decision of the prothonotary to determine whether the Federal Court erred in law or made a palpable and overriding error in refusing to intervene (*Sikes v. Encana Corp.*, 2017 FCA 37 at para. 12, [2017] F.C.J. No. 196; *Hospira* at paras. 83-84).

#### VI. Issue

[10] The sole issue on appeal is whether the Federal Court erred in upholding the Prothonotary's Order to stay proceedings under subsection 50(1) of the Act.

VII. Analysis

[11] Subsection 50(1) of the Act provides that the Federal Court has the discretion to stay proceedings as follows:

**Stay of proceedings authorized**

50(1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.

[12] In my view, the Federal Court committed no palpable and overriding error in upholding the discretionary decision of the Prothonotary to stay the proceeding on the basis that the interests of justice dictate that the action be stayed to prevent the possibility of conflicting decisions stemming from parallel proceedings under paragraph 50(1)(b) of the Act (*Innu of Uashat Mak Manu-Utenam v. Canada*, 2016 FCA 156 at para. 9, 267 A.C.W.S. (3d) 610). As a result, in my view, this Court is not required to consider whether the Federal Court had jurisdiction to determine matters affecting provincial lands under subsection 50(1) of the Act. However, it seems to me that when a party seeks a stay on the basis that the Federal Court lacks jurisdiction, the determination of which would generally end the proceeding, a motion to strike parts of the claim would be more appropriate as it is preferable in the circumstances to decide the matter of jurisdiction with finality rather than to allow the matter to be re-argued if the stay is lifted and the matter proceeds.

VIII. Conclusion

[13] I would dismiss the appeal with costs.

"D. G. Near"

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J.A.

"I agree  
Wyman W. Webb J.A."

"I agree  
Judith Woods J.A."



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED  
AUGUST 31, 2017, CITATION NO. 2017 FC 791 (DOCKET NO. T-1685-96)**

**DOCKET:** A-250-17

**STYLE OF CAUSE:** CLIFF CALLIOU ET AL. v.  
HER MAJESTY THE QUEEN IN  
RIGHT OF CANADA AS  
REPRESENTED BY THE  
MINISTER OF INDIAN AFFAIRS  
AND NORTHERN  
DEVELOPMENT

**PLACE OF HEARING:** EDMONTON, ALBERTA

**DATE OF HEARING:** NOVEMBER 8, 2018

**REASONS FOR JUDGMENT BY:** NEAR J.A.

**CONCURRED IN BY:** WEBB J.A.  
WOODS J.A.

**DATED:** JANUARY 31, 2019

**APPEARANCES:**

Priscilla Kennedy FOR THE APPELLANTS

Cynthia J. Dickins FOR THE RESPONDENT  
Kathleen Pinno

**SOLICITORS OF RECORD:**

DLA Piper (Canada) LLP FOR THE APPELLANTS  
Edmonton, Alberta

Nathalie G. Drouin FOR THE RESPONDENT  
Deputy Attorney General of Canada