Federal Court of Appeal | Cour d'appel fédérale

Date: 20120704

Docket: A-410-10

Citation: 2012 FCA 204

CORAM: **EVANS J.A.**
LAYDEN-STEVENSON J.A.*
STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

ANGEL SUE LARKMAN

Respondent

Heard at Toronto, Ontario, on November 30, 2011.

Judgment delivered at Ottawa, Ontario, on July 4, 2012.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: EVANS J.A.
NOT TAKING PART IN THE JUDGMENT: LAYDEN-STEVENSON J.A.*

* Layden-Stevenson J.A. was unable to participate in the Court's deliberations and died on June 27, 2012. This judgment and the reasons are issued under ss. 45(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The respondent, Ms. Larkman, intends to bring an application for judicial review in the Federal Court, seeking to set aside an Order in Council.

[2] As will be seen, that Order of Council was made under a statutory regime, now repealed, known as "enfranchisement." That statutory regime was aimed at assimilating Aboriginal peoples, eradicating their culture and folding them into what was regarded as mainstream culture.

[3] From the face of the Order in Council, it appears that Ms. Larkman's grandmother, a member of the Matchewan First Nation, applied for it.

[4] The Order in Council gave effect to the grandmother's "enfranchisement". As we shall see, it stripped the grandmother of her status of "Indian" under the *Indian Act,* S.C. 1951, c. 29. However, in accordance with this statutory regime, it did more. It denied Indian status to all of the grandmother's descendants, including Ms. Larkman.

[5] In her intended application for judicial review, Ms. Larkman alleges that the Order in Council was obtained by a fraud committed upon her grandmother. But before Ms. Larkman can proceed with her application, she must overcome a daunting obstacle.

[6] A thirty day deadline applies to applications for judicial review seeking to set aside a government order, such as the Order in Council in this case: *Federal Courts Act*, R.S.C. 1985, c. F-7, subsection 18.1(2). Here, the Order in Council was made in 1952.

[7] In the Federal Court, Ms. Larkman moved for an extension of time to bring her application for judicial review of the Order in Council.

[8] Without offering reasons, the Federal Court allowed Ms. Larkman's motion and granted her an extension of time until shortly after its Order. The Attorney General appeals to this Court. As

explained below, this Court is required to consider Ms. Larkman's motion *de novo* because it is not possible for us to discern the basis upon which the Federal Court granted the extension of time.

[9] Ms. Larkman's intended application for judicial review is not her first step to address the Order in Council and its consequences. Rather, it is the latest step in a multi-year quest, pursued in various *fora* for the benefit of herself and her descendants. On the basis of the highly unusual circumstances of this case and the criteria that guide the exercise of this Court's discretion to grant an extension of time in the interests of justice, I would grant Ms. Larkman's motion. While this is the same result reached by the Federal Court, I would allow the appeal in part in order to vary the deadline set by the Federal Court.

A. The background to Ms. Larkman's motion: "enfranchisement"

[10] "Enfranchisement" is a euphemism for one of the most oppressive policies adopted by the Canadian government in its history of dealings with Aboriginal peoples: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward,* vol. 1 (Ottawa: Canada Communication Group Publishing, 1996) at page 271.

[11] Beginning in 1857 and evolving into different forms until 1985, "enfranchisement" was aimed at assimilating Aboriginal peoples and eradicating their culture or, in the words of the 1857 Act, encouraging "the progress of [c]ivilization" among Aboriginal peoples: *An Act to Encourage the Gradual Civilization of Indian Tribes in the Province and the Amend the Laws Respecting*

Indians, S. Prov. C. 1857, 20 Vict., c. 26 (initial law); *An Act to Amend the Indian Act*, S.C. 1985, c. 27 (the abolition).

[12] Under one form of "enfranchisement" – the form at issue in this case – Aboriginal peoples received Canadian citizenship and the right to hold land in fee simple. In return, they had to renounce – on behalf of themselves and all their descendants, living and future – their legal recognition as an "Indian," their tax exemption, their membership in their Aboriginal community, their right to reside in that community, and their right to vote for their leaders in that community.

[13] The Supreme Court has noted the disadvantage, stereotyping, prejudice and discrimination associated with "enfranchisement": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. With deep reluctance or at high personal cost, and sometimes under compulsion, many spent decades cut off from communities to which they had a deep cultural and spiritual bond.

[14] On April 17, 1985, the day on which the equality provisions of the *Canadian Charter of Rights and Freedoms* came into force, amendments to the *Indian Act* also came into force, doing away with the last vestiges of "enfranchisement" and permitting those who lost Indian registration through "enfranchisement" to register and regain registration: *An Act to Amend the Indian Act*, *supra*. However, under these amendments, only some of the descendants of those who were "enfranchised" could be added to the Indian Register. In other words, only some were able to regain their recognition as an "Indian" and their membership in their Aboriginal community.

B. "Enfranchisement" and the Larkman family

[15] Ms. Larkman's grandmother purportedly "enfranchised" in 1952, affecting all of her descendants, living or future, including, of course, Ms. Larkman.

[16] By virtue of the 1985 amending Act, Ms. Larkman's mother could regain her rights. Under the terms of that Act, Ms. Larkman could not.

[17] Soon after the 1985 amending Act came into force, Ms. Larkman's mother applied under the *Indian Act* to add herself and Ms. Larkman to the Indian Register. Her application suggests that she applied for reinstatement not because she had been "enfranchised," but because she believed she had lost her status as a result of her marriage to a non-native man.

[18] In 1988, the Registrar ruled on the application. In accordance with the terms of the 1985 amending Act, Ms. Larkman's mother was added to the register, but Ms. Larkman was not. The decision letter did not disclose the grandmother's earlier "enfranchisement" as the reason why Ms. Larkman could not be added to the Indian Register.

C. Ms. Larkman's multi-year quest to regain her status as "Indian"

(1) Initial steps

[19] Seven years later, in 1995, Ms. Larkman began in earnest her quest to regain her status as "Indian." As we shall see, later decision-makers, such as the Registrar under the *Indian Act*, the Ontario Superior Court of Justice, and the Court of Appeal for Ontario, did not express any concern about the seven year delay. Likewise, the federal Crown, party to all of those proceedings, expressed no such concern.

[20] In April 1995, Ms. Larkman re-applied to the Registrar to be added to the Indian Register. On September 13, 1995, the Registrar refused the application, finding no grounds to revisit the 1988 decision and advising that the grandmother had been "enfranchised" in 1952.

[21] In an affidavit filed in the Federal Court, Ms. Larkman says that only at that time – September 13, 1995 or soon thereafter – did she know that the 1952 Order in Council had been made, understand the background to it, and appreciate its ramifications. In particular, only at that time did she learn of the circumstances of fraud that she says surrounded the "enfranchisement" of her grandmother in 1952.

[22] In 1996, Ms. Larkman applied again to the Registrar, supplying two affidavits in support of her recently-discovered allegation that "the enfranchisement…is invalid as it was fraudulently

obtained." In her new application, she asked the Registrar to provide "a decision as to the validity of the enfranchisement." She asked the Registrar to provide all records related to the "enfranchisement."

[23] In 1997, without any expression of concern about the delay that had taken place to date, the Registrar provided the records and some explanations, but ruled that the "enfranchisement" was valid.

[24] Under the *Indian Act*, Ms. Larkman had recourses from that decision. She pursued them. Her first step, taken in 1998, was a "protest" under section 14.2 of the Act. Ms. Larkman's protest fell within the three year time period permitted by that section.

[25] In her protest, Ms. Larkman asked that the Minister of Indian Affairs and Northern Development declare the Order in Council invalid and add her grandmother to the Indian Register. She raised the following grounds:

1. That the Minister of the Department of Citizenship and Immigration, as it then was, had a fiduciary duty towards Indians. That duty was breached when it enfranchised [the grandmother] in 1952.

2. That the Minister of the Department of Citizenship and Immigration, as it then was, erred in law by enfranchising [the grandmother] when the statutory preconditions for the enfranchisement were not met.

3. That the enfranchisement of [the grandmother] was processed by the Department of Citizenship and Immigration, as it then was, in bad faith and pursuant to unconscionable behaviour.

4. That the enfranchisement application of [the grandmother] was involuntary.

> 5. That the enfranchisement application of [the grandmother] was obtained by way of fraudulent misrepresentations and duress.

As shall be seen, these grounds are substantially the same Ms. Larkman later asserted in other *fora*, including in her intended application for judicial review in the Federal Court.

[26] Upon receiving Ms. Larkman's protest, the Registrar was obligated to conduct an investigation and render a decision: subsection 14.2(5) of the *Indian Act*. It is not known what investigative steps the Registrar may have taken in this case. However, the Registrar's decision, dated July 21, 2000, refers to documents and information obtained by the Registrar that were not supplied by Ms. Larkman. It is apparent that the Registrar did investigate the matter.

[27] The Registrar was also entitled to receive affidavits: subsection 14.2(6) of the *Indian Act*. The grandmother filed three affidavits in support of the claim that her "enfranchisement" was fraudulent.

[28] On July 21, 2000, the Registrar dismissed the protest.

[29] On November 13, 2000, Ms. Larkman wrote to the Registrar, asking for an oral hearing. In her view, the Registrar's letter of July 21, 2000 raised a number of issues and referred to evidence on which Ms. Larkman should have been afforded an opportunity to respond.

[30] Having heard nothing from the Registrar, Ms. Larkman exercised her right to appeal to the Ontario Superior Court of Justice under section 14.3 of the *Indian Act*. This appeal was brought within the deadline set out in that subsection. The federal Crown was a respondent.

(2) The appeal to the Ontario Superior Court of Justice

[31] In the appeal, Ms. Larkman and her grandmother contended that the Order in Council was void and that they should both be added to the Indian Register. They raised the following grounds:

> 1. That the Registrar, acting on behalf of the Minister of the Department of Indian Affairs and Northern Development, exceeded its jurisdiction by requiring that [the grandmother] meet a burden of proof greater than that on a balance of probabilities to establish her claim.
>
> 2. That the Registrar, acting on behalf of the Minister of the Department of Indian Affairs and Northern Development, erred in ignoring the fiduciary duty owed to [the grandmother].
>
> 3. That the Registrar, acting on behalf of the Minister of the Department of Indian Affairs and Northern Development, erred in finding that the statutory preconditions for the enfranchisement of [the grandmother] had been met.
>
> 4. That the Registrar, acting on behalf of the Minister of the Department of Indian Affairs and Northern Development, erred in finding that the enfranchisement application of [the grandmother] was voluntary, and that the Department of Citizenship and Immigration, as it then was, acted in good faith in processing her enfranchisement, when these findings are unsupported by the evidence.

[32] In appeals under section 14.3 of the *Indian Act*, parties are able to file evidence. Fortunately for Ms. Larkman, her grandmother, quite elderly at this time, was still alive. She was able to swear an affidavit setting out her recollections of the relevant facts. Of importance, the federal Crown, as

respondent to the appeal, had a full opportunity to submit rebutting evidence to the Court, and to cross-examine Ms. Larkman's grandmother.

[33] In her affidavit filed in the Ontario Superior Court of Justice, Ms. Larkman's grandmother detailed the background to her "enfranchisement," suggesting that it was not voluntary on her part.

[34] In 1952, the local Indian Agent received a typed letter, purporting to be from Ms. Larkman's grandmother. The letter sought "enfranchisement." Interestingly, though, Ms. Larkman's grandmother was unable to read and could only write her first and last name.

[35] The Indian Agent responded to the letter, asking for further information. Later, he received that information, through persons other than Ms. Larkman's grandmother. Based on the letter and the later information received, the Indian Agent considered her to be eligible for "enfranchisement." He sent out the necessary application.

[36] The Chief of the Matchewan First Nation and the Indian Agent placed the application in front of the grandmother and told her to sign it. It was filled in for her. She signed it. In her affidavit, the grandmother deposed that she was not informed of the consequences of signing it. She deposed that she simply "signed whatever documentation [she] was asked to sign," trusting her Chief and the Indian Agent, whom she "always obeyed."

[37] The letter to the Indian Agent and the application, purportedly from the grandmother, contained several suspicious errors, ranging from misspellings of the grandmother's name, to the omission of the names of the grandmother's sons.

[38] Before sending the application for processing, the Indian Agent wrote the grandmother a letter informing her that upon "enfranchisement" she would lose her entitlement to timber royalties. The Indian Agent received back a letter, purportedly from the grandmother, requesting that the application be sent off despite her loss of timber royalties. Off it went.

[39] The application for "enfranchisement" was approved and Order in Council P.C. 4582 was issued on December 4, 1952. It declared the grandmother to be "enfranchised." An "Enfranchisement Card" was sent to her, and she signed it. She did not know that she was signing a document that would strip her of her status as an "Indian."

[40] In the proceedings in the Ontario Superior Court of Justice, the federal Crown had the opportunity to file evidence and to cross-examine Ms. Larkman's grandmother. It did neither.

[41] In particular, the federal Crown did not seek to file evidence from any other witnesses to the events in 1952. To the extent that those witnesses had disappeared or died, the Crown did not object, nor did it seek to dismiss the proceedings on the basis of delay. Instead, the Crown was content to contest the grounds raised by Ms. Larkman's grandmother – grounds substantially the

same as she asserts in her intended application for judicial review in the Federal Court – based solely on the evidence of Ms. Larkman and her grandmother.

[42] The appeal in the Ontario Superior Court of Justice took seven years. Although it was open to the federal Crown to move to dismiss the appeal for delay, it did not do so. In addition, the record shows absolutely no concern on the part of the federal Crown about the slow pace of the proceedings.

(3) The decision of the Ontario Superior Court of Justice

[43] On March 5, 2008, the Ontario Superior Court of Justice allowed the appeal from the Registrar: *R. v. Etches* (2008), 89 O.R. (3d) 599 (S.C.J.) (*per* Justice Forestell).

[44] In the Court's view, the Registrar imposed upon Ms. Larkman and her grandmother a burden of proof greater than the balance of probabilities (at paragraphs 59-64, 70 and 76). In addition, the Registrar erred by failing to assess the evidence of the grandmother alongside all of the circumstantial evidence (at paragraphs 67, 70 and 76). The Registrar also erred in refusing to accept the grandmother's evidence without corroboration (at paragraphs 68 and 77).

[45] Another serious error on the part of the Registrar was the making of speculative and unsupported findings of fact (at paragraphs 71-75 and 78). For example, the grandmother was entitled to receive a share of band funds by cheque upon "enfranchisement." There was no evidence

of such a cheque. If no cheque were ever issued, then the remaining members of the band would benefit. This might constitute a motive for improperly procuring the grandmother's removal from the band without compensation. However, the Registrar asserted that the cheque "probably" arrived with the "Enfranchisement Card." The Court noted that there was no evidentiary basis for that statement (at paragraph 75).

[46] Finally, the Court rejected an argument that it did not have jurisdiction because the Order in Council must be attacked in the Federal Court.

[47] For present purposes, the most important aspect of the Ontario Superior Court of Justice's decision is its consideration of the evidence before it. In the course of its reasons, the Court recounted the facts set out above (at paragraphs 33-41). From this, it appears that it accepted the evidence of Ms. Larkman's grandmother. It did not express any reason for disbelieving it.

[48] Even more importantly, the Court not only quashed the Registrar's decision but also made the decision that, in its view, the Registrar should have made. Noting the presence of "a full record…on the appeal," and based on that record, it held that the grandmother's "enfranchisement" was invalid (at paragraph 82). Although not explicitly stated, it can be inferred that the Court was of the view that Ms. Larkman's "enfranchisement" was involuntary or that a fraud had been committed upon her. It ordered that the grandmother and all of her descendants, including Ms. Larkman, were entitled to registration as "Indians" under the *Indian Act*.

[49] The federal Crown appealed to the Court of Appeal for Ontario.

(4) The decision of the Court of Appeal for Ontario

[50] On February 27, 2009, the Court of Appeal for Ontario allowed the federal Crown's appeal: *Etches v. Canada (Indian and Northern Affairs)*, 2009 ONCA 182, 94 O.R. (3d) 161. It held that the Ontario Superior Court of Justice lacked jurisdiction to make the order it did. In effect, the Superior Court had invalidated the Order in Council. In the Court of Appeal's view, this could only be done by the Federal Court.

[51] The Court of Appeal did not comment on the Superior Court judge's findings of fact or observations about the evidence.

(5) Later proceedings

[52] Within the deadlines set out in the *Supreme Court Act*, R.S.C. 1985, c. S-26, Ms. Larkman and her grandmother applied for leave to appeal to the Supreme Court of Canada. On October 1, 2009, the application for leave to appeal was dismissed.

[53] In light of this, if Ms. Larkman and her grandmother were to continue their multi-year quest and pursue their challenge against the Order in Council, they had to proceed to the Federal Court.

(6) Proceedings in the Federal Court

[54] On September 10, 2010, eleven months after the Supreme Court refused leave to appeal, Ms. Larkman began proceedings in the Federal Court by bringing her motion for an extension of time to bring an application for judicial review of the Order in Council.

[55] Included in the motion record is her intended notice of application. Ms. Larkman is the only named applicant in the intended notice of application. Her grandmother died on August 8, 2010, just before Ms. Larkman brought her motion for an extension of time.

[56] The intended notice of application alleges that the Order in Council is invalid, asks that it be set aside, and raises two grounds in support. These are:

> 33. That the Registrar, acting on behalf of the Minister of the Department of Indian Affairs and Northern Development, erred in finding that the statutory pre-conditions for the enfranchisement of [the grandmother] had been met;
>
> 34. That the Registrar, acting on behalf of the Minister of the Department of Indian Affairs and Northern Development, erred in finding that the enfranchisement application of [the grandmother] was voluntary, and that the Department of Citizenship and Immigration, as it then was, acted in good faith in processing her enfranchisement when these findings are unsupported by the evidence.

[57] These grounds appear after a lengthy recital of many of the facts pertaining to the suspicious circumstances surrounding the grandmother's "enfranchisement" in 1952.

[58] The wording of these grounds is infelicitous. They smack of an effort to set aside the Registrar's decision, rather than the Order in Council. Perhaps the drafter borrowed their wording from the originating documents in earlier proceedings that were aimed at setting aside the Registrar's decision. Nevertheless, in my view, properly interpreted, these grounds do raise the issue of whether the Order in Council was procured by fraud and, thus, should be set aside. These grounds substantially overlap with those in the earlier proceedings before the Registrar and the Ontario Courts. Before us, the Attorney General conceded this.

[59] As mentioned above, the Federal Court exercised its discretion in favour of granting Ms. Larkman an extension of time to file her application for judicial review under subsection 18.1(2) of the *Federal Courts Act*.

D. Analysis

(1) The standard of review

[60] The Federal Court offered no reasons for exercising its discretion in favour of allowing Ms. Larkman an extension of time. Further, the record before it does not disclose the basis for that exercise of discretion. Accordingly, this Court is required to review the matter *de novo* and exercise its own discretion based on the law and the facts before it, without any deference to the decision of the Federal Court: *Plante v. Canada (Correctional Service)*, 2005 FCA 120 at paragraph 2; *Infonet*

Services Corp. v. Matrox Electronic Services Ltd., 2004 FCA 162 at paragraph 6; *Jukatavicius v. Canada (Attorney General)*, 2004 FCA 289 at paragraph 24.

(2) The test for an extension of time

[61] The parties agree that the following questions are relevant to this Court's exercise of discretion to allow an extension of time:

(1) Did the moving party have a continuing intention to pursue the application?

(2) Is there some potential merit to the application?

(3) Has the Crown been prejudiced from the delay?

(4) Does the moving party have a reasonable explanation for the delay?

See *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.); *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249 at paragraph 8.

[62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice: *Grewal*, *supra* at pages 277-278. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be

resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal,* at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195, 89 Admin LR (4th) 1.

(3) The period of delay to be assessed

[63] At the outset, it is necessary to identify the period of delay to be assessed.

[64] This is an unusual case. Ms. Larkman was born in 1972, approximately 20 years after the Order in Council was made. She became an adult approximately 40 years after the Order in Council was made. Further, Ms. Larkman deposed that she only became aware of the Order in Council and the circumstances surrounding it on September 13, 1995 or soon thereafter: see paragraph 21, above.

[65] The Attorney General suggests that Ms. Larkman knew of the circumstances surrounding the Order in Council at a time earlier than 1995. The Attorney General points out that in 1985, when Ms. Larkman's grandmother applied to be added to the Indian Register, she wrote "disenfranchisement 1952" as the reason for her application.

[66] In my view, this does not assist the Attorney General. The endorsement on the application form proves that Ms. Larkman's grandmother was aware of the Order in Council in 1985. But this is no evidence that Ms. Larkman was aware of the Order in 1985.

[67] The Attorney General also points out that Ms. Larkman never set out specific details about the circumstances of her discovery of the circumstances surrounding the Order in Council. Indeed, that is true. However, in my view, Ms. Larkman has put forward enough credible evidence to establish that she only became aware of the Order in Council and the circumstances surrounding it on September 13, 1995 or soon thereafter. As a tactical matter, it was incumbent on the Attorney General to cross-examine Ms. Larkman on this critical issue. No cross-examination took place.

[68] Therefore, in the circumstances of this case, I conclude that the relevant period of delay that must be considered is from September 13, 1995 to September 10, 2010, the date of Ms. Larkman's motion for an extension of time.

[69] I now turn to the four questions that guide our exercise of discretion.

(a) Continuing intention

[70] It is apparent from Ms. Larkman's multi-year quest that she had a continuing intention during the relevant period of delay to challenge the validity of her grandmother's "enfranchisement."

[71] It is true that at times she pursued her quest very slowly. But, with the exception of one period of time, there is no evidence that she ever abandoned her quest. That one period of time is from October 2009 to September 2010, the period following the Supreme Court's dismissal of her application for leave to appeal, when it was incumbent on her to start proceedings in the Federal Court, but she did not. I shall return to this later in these reasons.

(b) Potential merit to the application

[72] As to the merit of Ms. Larkman's application, the Ontario Superior Court of Justice had "a full record" before it (see paragraph 48, above), assessed the evidence concerning the application for the Order in Council in 1952, and, based on that evidence, ruled that the grandmother's "enfranchisement" was invalid. The Court of Appeal for Ontario reversed that ruling, but only on jurisdictional grounds.

[73] The evidence concerning the application for the Order in Council in 1952 came from Ms. Larkman's grandmother. Does her death in 2010 mean that the Federal Court is deprived of that

evidence, with the result that the intended application for judicial review is now utterly devoid of merit? I think not.

[74] The application for judicial review in the Federal Court raises issues substantially similar to those canvassed by the Ontario Superior Court of Justice. The parties in the Ontario Superior Court of Justice had a full opportunity to adduce and test the evidence on those issues. Although the federal Crown was the responding party in the Ontario Superior Court of Justice and the Attorney General is the responding party in the Federal Court, the Attorney General rightly draws no significance from that difference. In circumstances such as these, evidence admitted in the Ontario Superior Court of Justice, including the prior evidence of the deceased grandmother, might well be admissible in the Federal Court: *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; see also *R. v. Khan*, [1990] 2 S.C.R. 531 and *R. v. Smith*, [1992] 2 S.C.R. 915 and later cases applying these authorities. Further, the Crown might not be able to challenge the factual findings underlying the Ontario Superior Court of Justice's overall ruling: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77. Here, it bears repeating that the Court of Appeal for Ontario did not question those factual findings and allowed the federal Crown's appeal only for jurisdictional reasons.

[75] It will be for the Federal Court applications judge to assess these issues. As a result, my comments should be seen as relevant only to my assessment here, namely whether Ms. Larkman's application for judicial review has sufficient merit to warrant the granting of an extension of time. In my view, it does.

(c) Prejudice

[76] Ms. Larkman's main ground in the application for judicial review is that there was a fundamental defect in the process leading to the issuance of the Order in Council. In her submission, this renders the Order in Council invalid.

[77] Here, the Attorney General points to the fact that this process happened sixty years ago. Many witnesses have died. To the extent that anyone is still alive, memories have surely faded. Documents may no longer be available.

[78] This would be an important consideration in a normal case. But this case is far from normal. As mentioned above, the federal Crown had a full opportunity to adduce evidence in the Ontario Superior Court of Justice and to test any opposing evidence. In that Court, it did not complain that the passage of time prejudiced it. From that emerged a series of factual findings and conclusions based on a full evidentiary hearing – findings, conclusions, and evidence that may well be admissible in the Federal Court proceedings.

[79] In effect, as things have turned out many years later, the parties took the opportunity in the Ontario Superior Court of Justice to create a time capsule of evidence and findings. No one complained at the time that the time capsule was incomplete because of the disappearance of witnesses and documents over time. Now we have Federal Court proceedings in which the same allegations are being made. The contents of the time capsule are still available for use in the Federal

Court proceedings, subject to any decisions on admissibility by that Court. In my view, there is no prejudice that should factor into our assessment as to whether Ms. Larkman should receive an extension of time.

(d) A reasonable explanation for the delay

[80] Ms. Larkman's primary explanation is that from September 1995 until the Supreme Court's dismissal of her leave application in October 2009, she was pursuing her rights in *fora* that she believed had the jurisdiction to grant her the relief she sought. Only in October 2009 did it become clear to her that she had to proceed in Federal Court.

[81] There are many cases where the Federal Court has granted an extension of time for bringing an application for judicial review on the basis that a party wrongly, but in good faith, proceeded in another court. I also note that there is no evidence that the federal Crown ever complained about the delay from September 1995 to October 2009. I am prepared, in these circumstances and for the "interests of justice" considerations below, to regard her multi-year quest from September 1995 to October 2009, albeit in the wrong *fora*, to be a satisfactory explanation for that delay.

[82] On this basis, Ms. Larkman should have started proceedings in the Federal Court in November 2009. But she did not do so until September 2010. Earlier, I mentioned that her inaction during this period also suggests that she might have abandoned her intention to challenge the Order in Council.

[83] Ms. Larkman offers explanations for the delay during the period from November 2009 to September 2010, such as a change in counsel, a lack of financial resources, and her residence in Timmins. These do not explain the delay.

[84] Ms. Larkman also notes that her grandmother died in August 2010 and the court documents had to be redrafted. This does not explain the delay up until that point. There is no evidence that her grandmother was ill before that time or that Ms. Larkman faced demanding responsibilities to care for her.

(e) Overall assessment

[85] As mentioned above, the overriding consideration is that the interests of justice be served.

[86] In considering this, I am mindful that the Federal Court and this Court have underscored the importance of the thirty day deadline in subsection 18.1(2) of the *Federal Courts Act*. Many authorities suggest that unexplained periods of delay, even short ones, can justify the refusal of an extension of time: *Powell v. United Parcel Service*, 2010 FCA 286 at paragraph 3; *Kobek v. Canada (Attorney General)*, 2009 FCA 220 at paragraphs 2 and 5; *McBean v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1149; and many others.

[87] The need for finality and certainty underlies the thirty day deadline. When the thirty day deadline expires and no judicial review has been launched against a decision or order, parties ought to be able to proceed on the basis that the decision or order will stand. Finality and certainty must form part of our assessment of the interests of justice.

[88] Often decisions or orders resolve important questions that impact many members of the public. Often decisions or orders make it possible for other matters to go ahead in the public interest. In these situations, the need for finality and certainty is heightened. For example, soon after a decision on an environmental assessment is made, the government, the proponent of the project and the wider public need to know quickly whether the decision is final. An all-too-liberal approach to the granting of an extension of time can interfere with this, allowing applications for judicial review to pop up like a jack-in-the-box, long after the parties have received the decision and have relied upon it.

[89] In this case, the rationale for a strict approach to the thirty day deadline carries less force. This is a most unusual case. The Order in Council is very narrow. It affects only Ms. Larkman and any descendants she might have. The ground for challenge is very narrow. It concerns particular actions by particular people at a particular time. Finality and certainty do not deserve as much prominence in a case such as this. A late judicial review will not disrupt the administration of justice or detrimentally affect the public interest.

[90] The overall question is this: is it in the interests of justice that the extension of time be granted and the application for judicial review be permitted to proceed?

[91] This question can be rephrased, incorporating many of the circumstances and considerations discussed in these reasons. Although Ms. Larkman cannot satisfactorily explain several months of delay, should she be permitted to continue her multi-year quest – a quest with some potential merit that, if successful, will affect only her and any descendants she may have, undo serious misconduct, and reverse the effects of a policy condemned by a Royal Commission and our highest Court as oppressive and discriminatory?

[92] I answer this in the affirmative.

F. Proposed disposition

[93] Therefore, like the Federal Court, I would grant Ms. Larkman's motion for an extension of time.

[94] The Federal Court ordered that Ms. Larkman may file her notice of application for judicial review within fifteen days of its order. I would vary that part of the Order to provide that Ms. Larkman may file her notice of application for judicial review within fifteen days of the judgment of this Court. I would otherwise affirm the Federal Court's Order. I would grant Ms. Larkman her costs.

"David Stratas"
J.A.

"I agree
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-410-10
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HUGHES DATED OCTOBER 18, 2010, NO. 10-T-31	
STYLE OF CAUSE:	Attorney General of Canada v. Angel Sue Larkman
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 30, 2011
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Evans J.A.
NOT TAKING PART IN THE JUDGMENT:	Layden-Stevenson J.A.
DATED:	July 4, 2012

APPEARANCES:

Michael Beggs Gary Penner	FOR THE APPELLANT
Sunil Mathai	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Falconer Charney LLP Toronto, Ontario	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT