Federal Court of Appeal  Cour d'appel fédérale

Date: 20190620

Docket: A-162-19

Citation: 2019 FCA 185

CORAM: **BOIVIN J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

GRAND COUNCIL OF THE CREES (EEYOU ISTCHEE)

Appellant

and

GARRY LESLIE MCLEAN, ROGER AUGUSTINE, CLAUDETTE COMMANDA, ANGELA ELIZABETH SIMONE SAMPSON, MARGARET ANNE SWAN AND MARIETTE BUCKSHOT

Respondents

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on June 18, 2019.

Judgment delivered at Ottawa, Ontario, on June 20, 2019.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] Appeals are brought by Grand Council of the Crees (Eeyou Istchee) [Grand Council] (A-162-19), Nunavut Tunngavik Incorporated [Nunavut] (A-166-19) and Whapmagoostui First Nation and Emma Sandy Mamianskum [Whapmagoostui /Mamianskum] (A-168-19), arising

from the settlement approval process in a certified class action for survivors of Federal Indian Day Schools (the "McLean Action"). By Order of this Court these three appeals were heard together, on an expedited basis. These reasons will issue in each appeal file.

[2] Each appellant moved under Rule 109 of the *Federal Courts Rules*, SOR/98-106 to intervene in the settlement approval process, seeking, amongst other relief, to make submissions during the settlement approval hearing. The motions were dismissed by Phelan J. of the Federal Court (2019 FC 513; 2019 FC 515; 2019 FC 517; 2019 FC 518). While brief reasons were issued in each motion, the Court principally relied on its reasons for decision in a related earlier intervention motion: *McLean et al v. The Attorney General of Canada*, 2019 FC 511 [*McLean*]. In considering the arguments before us, and in understanding the judge's disposition of the motions, the reasons issued in all motions must be read together.

[3] Leave to intervene under Rule 109 is discretionary and the standard of review applicable to a discretionary order of a motions judge is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. This Court's intervention will only be warranted on an error of law or a palpable and overriding error regarding a question of fact or mixed fact and law.

[4] In *McLean* the judge referred to the "non-exhaustive and flexible" criteria to be considered in Rule 109 motions, as reaffirmed by this Court in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3 [*Sport Maska*]. The judge acknowledged that the weight afforded each criterion will vary depending on the context which, in the case before him, he described as, "a tort claim about the damages to be awarded individual class members and the

establishment of a fund for class members to assist in the healing process flowing from their own injuries" (at paras. 12, 13).

[5] The judge found that neither Grand Council nor Whapmagoostui were directly affected by the settlement proceedings. Nor was he satisfied that the concerns advanced by these organizations could not be raised in the established objection process available to their members that are class members. The judge dismissed the Grand Council request on the basis that only a few of its members were affected by the settlement, and it too had not shown how its class members cannot articulate the concerns of the Crees through the class membership (paras. 24-25). The judge likewise dismissed the motion of Ms. Mamianskum on the basis that she was herself a class member.

[6] In respect of Nunavut, the judge found that despite there being no class member supporting its intervention, some of its concerns had already been expressed by other organizations that have class members among their respective memberships. Insofar as class members supported Nunavut's concerns, including the scope of the settlement in relation to the Inuit of Nunavut, the judge concluded that the objection process provided a reasonable and efficient forum for their resolution.

[7] The judge cited the objection process as a complete answer to the third, fourth, fifth and sixth factors of the intervention test set forth in *Sport Maska*. The judge concluded that the interests of justice were not furthered by the intervention.

[8] On appeal, Grand Council, Whapmagoostui and Mamianskum take issue with the judge's application of the "directly affected" criterion for intervener status under Rule 109. They submit that the judge erred by interpreting this criterion as a strict prerequisite rather than as one factor among many to be considered. In any event, they contend that they are, in fact, directly affected by the settlement due to, among other things, Grand Council and Whapmagoostui's role in supporting class members and their communities through the settlement process, and in particular, the implementation. Nunavut, for its part, argues that in construing the action as a private law tort matter, the judge erred and did not appreciate the public character of the settlement and the relevant context of its proposed intervention. The appellant Nunavut argues, amongst other points, that the judge erred in this respect, failing to appreciate that the action was about collective constitutional and aboriginal rights. This, in part, led the judge to err in his assessment of the efficacy of the objection process, particularly in addressing Nunavut's concerns on the scope of the settlement agreement.

[9] In my view, the dismissals must stand. The judge identified the correct test for intervenor status under Rule 109, including the criteria governing its application. While the reasons are terse and at times conclusionary, given the discretionary standard of review of a decision under Rule 109, the appellants have not identified a palpable and overriding error in the exercise of his discretion.

[10] Even if the judge in fact applied the test of directly affected equivalent to joining a party (as per Rule 303), as opposed to the more flexible application urged by the appellant, it is an error of no consequence. The judge's principle reason for rejecting the motions was the

availability of an adequate forum whereby the concerns of the interveners were nevertheless brought to the attention of the Court. While this Court might well have come to a different conclusion as to the utility of having submissions from the interveners, it is not our role to do so, and it cannot be said that the judge committed a reviewable error in the exercise of his discretion.

[11] As noted, Grand Council argued that the judge erred in assessing the nature of their interest in the context of a private action asserting tort, fiduciary duty and aboriginal and treaty rights. Whatever ambiguity there may have been on this point was resolved in the course of the hearing as counsel for the Attorney General confirmed that the settlement did not affect constitutional or collective rights.

[12] I would therefore dismiss the appeals with costs.

"Donald J. Rennie"
J.A.

"I agree
Richard Boivin J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED APRIL 25, 2019, DOCKET NO. T-2169-16 (2019 FC 517)

DOCKET:	A-162-19
STYLE OF CAUSE:	GRAND COUNCIL OF THE CREES (EEYOU ISTCHEE) v. GARRY LESLIE MCLEAN et al and HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	JUNE 18, 2019
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	BOIVIN J.A. GLEASON J.A.
DATED:	JUNE 20, 2019

APPEARANCES:

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