In the Court of Appeal of the Northwest Territories

Citation: Lafferty v. Tlicho Government, 2010 NWTCA 4

Date: 2010 04 27
Docket: A-1-AP-2009-000007
Registry: Yellowknife, N.W.T.

Between:

Chief Leon Lafferty, Chief Henry Gon and Chief Charlie J. Nitsiza, on their own behalf and in their capacities as Tlicho Chiefs, Members of the Chiefs Executive Council and Members of the Tlicho Assembly

Respondents
(Appellants)

- and -

The Tlicho Government

Applicant
(Respondent)

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Application to Dismiss the Appeal
from the Order by
The Honourable Mr. Justice J.E. Richard
Dated the 27th day of May, 2009
(Action No: SICV2009000011)

Memorandum of Judgment

The Court:

[1] The respondent applies to dismiss this appeal on the ground that it has become moot. The appellants challenged the constitutional validity of a law, the *Future Chiefs Executive Council Meetings Law, 2007*, which was enacted by the respondent. The impugned law provided that there would be no more meetings of the Chief's Executive Council ("CEC") to which the appellants belonged. The appellants' constitutional challenge was heard at first instance by way of an appeal to the Tlicho Assembly as required by s. 13.3 of the Tlicho Constitution which provides, in part, that "...a challenge to the validity of a Tlicho law...shall be by way of appeal to the Tlicho Assembly". The Assembly dismissed the appeal. The decision of the Assembly is final pursuant to s. 13.4 of the Constitution.

[2] The appellants applied by Originating Notice to the Supreme Court of the Northwest Territories for an order declaring the impugned law to be of no force and effect on the ground that the law was *ultra vires*. The Originating Notice did not seek judicial review or allege any impropriety or unfairness in the appeal to the Assembly. In essence, the Originating Notice sought a hearing *de novo*.

[3] The respondent brought a preliminary application to strike the Originating Notice on the ground that it was an abuse of process because it sought to re-litigate issues finally determined by the Assembly. The Chambers Judge struck the Originating Notice on the basis that the relief sought was barred by the operation of the doctrines of issue estoppel and abuse of process: ***Lafferty v. Tlicho Government***, 2009 NWTSC 35, [2009] 3 C.N.L.R. 151 ("***Lafferty***"). Accordingly, the Chambers Judge did not consider the constitutionality of the impugned law.

[4] It is implicit in the Chambers Judge's decision that the Originating Notice was barred because it sought a hearing *de novo*. It is common ground that the Court had jurisdiction to entertain an application for judicial review of the Assembly's decision. An application for judicial review may not have been subject to the same considerations.

[5] The appellants appealed the Chambers Judge's decision to strike the Originating Notice. After the Notice of Appeal was filed, the respondent repealed the impugned law by enacting the *Repeal of the Future Chiefs Executive Council Meetings Law, 2007*.

[6] In support of the application to dismiss the appeal, the respondent filed an affidavit, sworn by the Tlicho Executive Officer, which deposes that since the enactment of the repealing law, "the Chief's Executive Council ("CEC") has resumed its previous responsibilities and delegated authorities, and the CEC and the Assembly are once again operating in an orderly, functional and co-operative way".

[7] The appellants filed an affidavit in opposition to the application to dismiss. That affidavit deposes that the appellants are no longer members of the CEC because they were all unsuccessful in their efforts to seek re-election as Chiefs. The affidavit alleges that the impugned law had a material effect on the re-election process. It asserts that "damage to our reputations, careers, and career prospects will continue into the future unless we are ultimately vindicated by the courts." It also alleges that a decision not to hear the appeal because it is moot will "cause harm to the public interest and the ability of Tlicho citizens to seek recourse to the courts where a law may be unconstitutional or invalid".

[8] We decided to consider the application to dismiss before hearing the appeal. To determine whether the appeal is moot, we must conduct a two step analysis: has the appeal become moot and, if so, should we nonetheless exercise our discretion to hear the appeal: ***Borowski v. Canada (Attorney General)***, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 ("***Borowski***").

[9] The appeal is moot. Although the appeal is from a preliminary determination, if the appeal succeeds the matter will be returned to the Supreme Court of the Northwest Territories to consider the merits of the challenge to the constitutional validity of the impugned law. As the impugned law has ceased to exist, there is no longer a live controversy between the parties because the substratum of the litigation has disappeared: ***Borowski*** at para. 26. The fact that the appellants are no longer members of the CEC reinforces this conclusion. A challenge to the constitutional validity of a law is moot if the law is repealed before the challenge is heard: ***Borowski*** at para. 19. Vague allegations of damage to reputation, not advanced in the Originating Notice nor linked to the remedy sought therein, can not breathe life into this extinct controversy.

[10] The appellants argue that we should exercise our discretion to hear the appeal in any event. They argue that there is a continuing adversarial context because there are continuing collateral issues relating to damage to their reputations and because the appeal raises issues relating to the constitutional power of the Assembly and access to the courts. They say we should hear the appeal because the issue is of public importance and may evade review in the future. They argue that the appeal does not relate to an academic or abstract question.

[11] This is not an appropriate case to exercise our discretion to hear a moot appeal. There is no continuing issue as to the constitutional validity of the impugned law. Should a challenge to the constitutionality of some future law arise, that challenge will have to be considered on its own facts. Damage to reputation is irrelevant to the issues raised in this constitutional challenge. Nor does the decision under appeal deny access to the courts to review a future decision by the Assembly. There is no reason to assume that a future challenge to a future law would be pursued in the same fashion as the challenge underlying this appeal. Moreover, the decision under appeal does not purport to deny access to the court. It is common ground that judicial review of a future decision of the Assembly may be available. There is no reason to conclude that the issues relating to review of a future decision of the Assembly will evade review. Therefore, there is no public interest to be served by hearing the appeal.

[12] The application to dismiss the appeal is allowed and the appeal is dismissed.

Application decided without oral arguments

Memorandum filed at Yellowknife, N.W.T.
this day of , 2010

Costigan J.A.

Authorized to sign for: Paperny J.A.

Authorized to sign for: Rowbotham J.A.

Appearances:

R.S. Maurice
for the Respondent (Appellant)

A. Pape
for the Applicant (Respondent)

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