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ABORIGINAL NEWSLETTER

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ABORIGINAL LEGAL ISSUES e-NEWSLETTER

Cases

Descheneaux v. Canada (Attorney General), 2017 QCCA 1238, Quebec Court of Appeal (Mainville, Hogue, and Healy JJ.A.), 18 August 2017

The Quebec Court of Appeal extended the temporary suspension of the order made by the Quebec Superior Court in August 2015 declaring that certain provisions of the *Indian Act*, R.S.C. 1985, c. I-5 are of no force or effect. The Superior Court had declared that subsections 6(1)(*a*), (*c*) and (*f*) and 6(2) of the Act infringe section 15 of the *Charter of Rights and Freedoms* due to discriminatory distinctions made on the basis of sex. The chambers judge initially held that the coming into force of the declaration of invalidity would be suspended for 18 months, up to February 2017, and this was later extended to 3 July 2017. The Superior Court refused to grant another extension in June 2017. The Court of Appeal allowed this appeal and extended the suspension of the declaration of invalidity to 22 December 2017.

In August 2015, Madam Justice Masse made a declaration that sections 6(1)(*a*), (*c*) and (*f*) and 6(2) of the *Indian Act* infringe the equality rights guaranteed in section 15 of the *Charter of Rights*: 2015 QCCS 3555. These provisions of the Act, despite amendments made in 1985 to correct historic discrimination based upon sex, contain various forms of sex-based discrimination, notably with respect to Indian status. Some forms of possible discrimination had been corrected after the British Columbia decision of *McIvor v. Canada*, 2009 BCCA 153, but many remain. For instance, descendants of some Indian women cannot be registered as Indians, or have the right to confer status on their children, whereas the descendants of Indian men in the same situation can be registered or can confer status on their children. The trial judge ordered that the effect of the declaration be suspended for a period of 18 months to allow Parliament an opportunity to adopt remedial legislation.

Canada initially commenced an appeal of the August 2015 decision, but this was discontinued in February 2016 following the federal election. In response to the Superior Court decision, the federal government proposed a two-stage approach: (1) a bill would be tabled to eliminate the discriminatory impacts identified by the Quebec court and other well-known sex-based inequities in matters of Indian registration and (2) a more comprehensive review of the rules relating to Indian status would take place in collaboration with Aboriginal peoples. Bill S-3 was tabled in the Senate in October 2016 to implement the first step of this process.

The Senate Committee was concerned that Bill S-3 would perpetuate other forms of sex-based discrimination, and that the government may not have respected its duty to consult Aboriginal peoples. Canada then sought an extension of the February 2017 deadline, and Masse J. made an order on 20 January 2017 extending the suspension of invalidity until 3 July 2017: 2017 QCCS 153.

In June 2017, the Senate adopted Bill S-3 with significant amendments. The government opposed these amendments when the Bill was debated in the House of Commons. Bill S-3 was adopted by the House of Commons, but without the amendments that had been introduced by the Senate. The government wanted to maintain the original two-stage process. Both the House of Commons and the Senate then adjourned to September 2017. The Attorney General of Canada sought a further 6-month extension of the suspension of

invalidity. Masse J. dismissed this application on 20 June 2017 (2017 QCCS 2669) and, following another application by Canada, in oral reasons pronounced on 27 June 2017. Masse J. had invited the parties to seek approval of transitional measures, that could be coupled with a request for an extension, but no transitional measures were brought forward.

The Court of Appeal held that the decision of the chambers judge should be reviewed on the standard used for constitutional remedies: whether the remedy is "appropriate and just in the circumstances". Mainville J.A. commented:

> Suspending a declaration of constitutional invalidity of a law is a serious and extraordinary measure because it allows unconstitutional legislation to remain in effect and for a state of affairs found to be contrary to the standards embodied in the *Charter* to continue for the duration of the suspension, thereby violating the constitutional rights of the affected individuals. Extending such a suspension is even more problematic. Thus, a heavy burden rests upon the AGC to demonstrate exceptional circumstances or compelling reasons justifying the extension.

The Court of Appeal identified four factors to consider in this appeal. Such factors are not exhaustive nor cumulative, and an application for an extension can be allowed even if one of the factors is not satisfied. The factors were described as:

1. whether or not a change in circumstances justifies the extension;

2. whether the circumstances that led to the initial suspension still weigh in favour of suspending the declaration of invalidity;

3. the likelihood that remedial legislation will be adopted; and,

4. whether an extension of the suspension would shake the public's confidence in the administration of justice and the the ability of the courts to acts as guardians of the Constitution.

The Court of Appeal agreed with the trial judge that there had been no change in circumstances that justified an extension, but only delays caused by disagreement among the political actors. This unfortunate delay cannot be described as a new and compelling circumstance.

The second factor weighs heavily in favour of extending the suspension. Approximately 90% of the individuals listed on the Indian Register are registered pursuant to one of the provisions declared to be constitutionally invalid by the trial judge. Although the declaration of invalidity would not immediately affect the status of these individuals, these individuals will be confronted with the threat of possible removal. Even though the Registrar will not start deleting names, judicial proceedings brought by third parties could open that "Pandora's Box". There could be disputes about Band elections, or the ability of persons to vote in such elections, due to the declaration of invalidity. Mainville J.A. also highlighted the effects of individuals not yet registered as Indians, such as newborn children, who would be deprived of the rights flowing from Indian status, as well as benefits from multiple federal programs.

In regards to the third factor, the Court of Appeal concluded that there is no true "legislative impasse" here. Bill S-3 was deferred to the autumn of 2017 due to the summer recess, and was not abandoned due to political disagreement. It is reasonable to believe that parliamentary debate will resume this autumn and Bill S-3 will be brought to a vote.

The fourth factor weighs heavily against extending the suspension of the declaration of invalidity. In other constitutional cases, such suspensions have usually not exceeded 12 months, although the total duration of the suspension in the *McIvor* case, involving similar *Indian Act* provisions, was 22 months. The Attorney General of Canada is seeking an extension to 29 months in this case. Mainville J.A. held that the delays have been very significant and cannot be deemed as reasonable. He stated:

> These delays may be perceived as an injustice by those who have now been waiting more than two years for a legislated remedy to end the discrimination judicially identified on August 3, 2015. In this context, and taking into account the fiduciary duties of

> the federal government with respect to Aboriginal peoples, before requesting another extension of the suspension it was incumbent on the AGC to seriously consider concrete interim administrative measures available to the government so as to mitigate this discrimination, at least in part, during the extension. However, despite the trial judge's repeated requests, the AGC proposed no measure whatsoever – be it temporary, transitional or permanent – to mitigate the impacts of the additional extension on those individuals who form part of the groups identified in the *Descheneaux* judgment.

The Court of Appeal held that, in light of these factors, it was "entirely legitimate and easily understandable" that the trial judge denied a further extension. However, due to the impacts on the public of the coming into effect of the declaration of invalidity before remedial legislation is adopted, the appeal would be allowed. The impacts upon the public are very real and not insignificant. The Court of Appeal also noted that 18 months have now passed since the new government discontinued the appeal of the trial judgment, which is comparable to the duration of the suspension in *McIvor*. The Court concluded:

> In this context, the appeal should be allowed and the suspension extended so that Parliament may complete the legislative process surrounding Bill S-3 as soon as it reconvenes. The overall length of the suspension should not exceed 22 months following the discontinuance of the appeal of the *Descheneaux* judgment, bringing the actual delay for adopting remedial legislation into line with that allowed in *McIvor*. Any further delay strikes me as neither appropriate nor just.

The Court of Appeal therefore allowed the appeal, and extended to 22 December 2017 the suspension of the declaration of invalidity of subections 6(1)(*a*), (*c*) and (*f*), and 6(2) of the *Indian Act*. The legal costs of the respondents, impleaded parties and intervenors would be paid by Canada.

https://www.canlii.org/en/qc/qcca/doc/2017/2017qcca1238/2017qcca1238.pdf

http://courdappelduquebec.ca/fileadmin/Fichiers_client/Jugement/PGC_c._Descheneaux_-_judgment_-_August_18__2017_-_Vang.pdf

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Morin v. Alberta Utilities Commission, File No. 37529, Supreme Court of Canada, 24 August 2017

The Supreme Court of Canada dismissed a motion filed by members of the Enoch Cree Nation for an extension of time to serve and file their application for leave to appeal. If such a motion had been granted, the application for leave to appeal the 2017 order of the Alberta Court of Appeal (2017 ABCA 20) would have been dismissed.

In 2011, the Alberta Utilities Commission approved a project to construct and rebuild transmission lines situated on Stoney Plan Indian Reserve 135. In March 2016, the AUC extended the deadline to complete the project. The Enoch Cree Nation supported that decision. The applicants are members of the Enoch Cree Nation and Certificate of Possession holders. They had not been parties in any of the proceedings before the AUC relating to the project, and had not appealed any of the AUC's previous decisions including the 2011 approval of the project. Their main complaint related to whether there was a valid permit under s. 28(2) of the *Indian Act*, and whether it could be "assigned" to AltaLink.

In January 2017, the Alberta Court of Appeal refused permission to appeal, primarily on the basis that the proposed appeal did not have arguable merit: 2017 ABCA 20. The argument about s. 28(2) of the *Indian Act* had not been raised in the proceedings before the AUC. It was noted that there was an action in the Alberta Court of Queen's Bench currently underway in which such issues were raised.

https://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/item/16762/index.do

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Case Briefly Noted

Fontaine v. Canada (Attorney General), 2017 BCSC 939, Supreme Court of British Columbia (B.J. Brown J.), 7 June 2017

The B.C. Supreme Court dismissed an application to extend the deadline for the applicant to apply for one of the two forms of compensation provided in the Indian Residential Schools Settlement Agreement. The applicant is a victim of the residential schools program, and sought to apply for additional compensation under the "Independent Assessment Process" (IAP) for survivors of physical or sexual abuse. Section 6.02 of the Settlement Agreement set a hard deadline for such applications (19 September 2012) with no provision for an extension. The Court was bound by the decision in *Myers v. Canada (Attorney General)*, 2015 BCCA 95 that the terms of the Settlement Agreement could not be overriden using the Court's inherent jurisdiction.

https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc939/2017bcsc939.pdf

ACADEMIC INTEREST AND BOOK REVIEWS

BC Studies no. 194 Summer 2017, contains the following articles:

REPORTS

BC Studies -The British Columbian Quarterly, "Indigenous Communities and Industrial Camps: Promoting Healthy Communities in Settings of Industrial Change" by The Firelight Group with Lake Babine Nation and Nak'azdli Whut'en"

ARTICLES

Dick, Francis, "A tribute to Beau Dick, 1955-2017" (The Front)

Graham, Nicolas, "State-Capital Nexus and the Making of BC Shale and Liquefied Natural Gas"

Abbott, George, "Persistence of Colonial Prejudice and Policy in British Columbia's Indigenous Relations: Did the Spirit of Joseph Trutch Haunt Twentieth-Century Resource Development?"

REVIEW ESSAY

Wickwire, Wendy, "The Quest for the "Real" Franz Boas"

NEW MEDIA REVIEW

Balcombe, Erika, "Pop Culture Confronts British Columbia's Colonial History"

Kelly, Dara, "Sq'éwlets: A Stó:lō-Coast Salish Community in the Fraser River Valley Virtual Museum"

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