



Original

**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Federation of Newfoundland Indians Inc. v. Benoit*,
2019 NLCA 60

Date: September 19, 2019

Docket Number: 201901H0055

BETWEEN:

FEDERATION OF NEWFOUNDLAND
INDIANS INC.

APPLICANT/APPELLANT

AND:

SHAWN BENOIT, MATTHEW ANDERSON,
MARIE TAPP MELANSON, BOBBIE
TAPP GOOSNEY, PAUL BENNETT,
AND JENNIFER SUE LE ROUX

FIRST RESPONDENTS

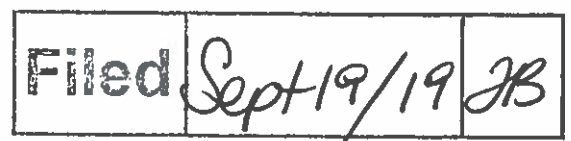
AND:

HER MAJESTY THE QUEEN (CANADA)

SECOND RESPONDENT

Coram: Hoegg J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General 201801G1147
(2019 NLSC 116)



Application Heard: September 10, 2019
Judgment Rendered: September 19, 2019

Counsel for the Applicant/Appellant: Philip J. Buckingham
Counsel for the First Respondents: Keith Morgan
Counsel for the Second Respondent: Kelly A. Peck¹

MEMORANDUM OF DISPOSITION

Hoegg J.A.:

[1] *Federation* applied to the Court to amend its Notice of Appeal to allow it to raise and argue the additional issue of joint interest privilege in its appeal of an Applications Judge's decision in 2019 NLSC 116. The Applications Judge had ruled that two documents, obtained by *Benoit* from the Internet and filed by *Benoit* in its List of Documents, had been privileged, but that *Federation* had waived its privilege over them. *Federation* appealed the Applications Judge's decision respecting waiver, and subsequently applied to this Court to stay it pending determination of the appeal.

[2] At the hearing of *Federation's* application for a stay, *Benoit* argued that *Federation* should not be granted a stay because *Federation* had not exhausted all of its remedies. In this regard *Benoit* advised that it had argued the issue of joint interest privilege before the Applications Judge, but that she did not find the issue necessary to decide given her decision on waiver.

[3] On July 3, 2019, I granted *Federation's* application for a stay of the Judge's decision respecting waiver (2019 NLCA 52). Delay of the litigation being of concern, I also set the appeal to be heard on November 13 and 14, 2019, with factum filing dates of September 13, 2019 for *Federation* and October 15, 2019 for *Benoit*, with the parties' consent.

[4] On August 19, 2019, I filed my reasons for granting the stay, and referenced *Benoit's* arguments therein. On August 27th, 2019, *Federation* applied to the Court to amend its Notice of Appeal so as to be able to argue the issue of joint interest privilege on appeal. On September 10, 2019, I heard *Federation's* application and dismissed it.

¹ Counsel for Her Majesty the Queen (Canada) did not attend or participate in this application.

[5] *Benoit* had opposed *Federation's* application to amend its Notice of Appeal and argue the issue on appeal. Both *Federation* and *Benoit* submitted authorities respecting circumstances when a party may introduce a new issue on appeal. However, none of the authorities was on the point raised by *Federation's* application.

[6] What *Federation* was asking was for this Court to sit as a court of first instance and decide the issue of joint issue privilege on the basis of the transcript of evidence adduced at the hearing before the Applications Judge. Of note, the affiants in the court below had been cross-examined on their affidavits. As already noted, the Applications Judge did not decide the issue. If this Court were to decide the issue on the appeal, it would be making factual findings on the basis of a sterile transcript, without the benefit of hearing and observing the witnesses, and without the benefit of the Applications Judge's analysis and reasons for decision drawn from her consideration of the whole of the evidence before her.

[7] Absent unusual circumstances, it is not the role of an appellate court to decide factual issues without the benefit of a lower court's reasoned decisions drawn from consideration of the evidence and argument respecting the applicable law.

[8] The parties are scheduled to proceed with *Federation's* appeal relating to waiver in November, 2019. This schedule would have been delayed by several months if I had granted *Federation's* application to amend.

[9] I add that resolution of *Federation's* appeal may render the issue moot. If it does not, it may nevertheless touch on the joint interest privilege issue in the sense that it may shed light on whether *Benoit* would need or desire to proceed with an application to have the issue of joint interest privilege determined. In any case, whether *Benoit* applies for judicial determination of the joint privilege issue is up to *Benoit*.

[10] In all of the circumstances, I exercised my discretion to deny the application.


L. R. Hoegg J.A.