File number: 41131

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

MOHAWK COUNCIL OF KANESATAKE

APPLICANT
(Appellant)

- and -

LOUIS-VICTOR SYLVESTRE
GORDON EDWARDS
1648-4404 QUÉBEC INC.
JEAN DEMERS
PAUL BOISSONNAULT
MARC CHÉNIER

RESPONDENTS
(Respondents)

REPLY OF THE APPLICANT
MOHAWK COUNCIL OF KANESATAKE
TO THE RESPONSE OF THE RESPONDENTS
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I - Issues of Public Importance and Statement of Fact 1
A. Issues of Public Importance 1
(i) The Issue of Public Importance Raised by the Court of Appeal's Reliance on the Exemption from Seizure to Decide the Case 1
(ii) The Application to Other Debtors with Exempt Property 3
B. ISSUES OF FACT 4
PART II - Order Sought 5
PART III - Table of authorities 7

PART I - ISSUES OF PUBLIC IMPORTANCE AND STATEMENT OF FACT

A. ISSUES OF PUBLIC IMPORTANCE

1. The Respondents allege that the Applicant has made misleading and exaggerated arguments in an attempt to turn the Court of Appeal's decision into something that it is not.[1] However, the Respondents' submissions, rather than demonstrating that the Applicant is misleading this Court, in fact confirm and support *the* two key assertions made by the Applicant in its application for leave: first, that the case should not have turned on the *Indian Act* exemption from seizure; and, second, that the Court of Appeal's decision can be applied to all debtors whose property is protected by some sort of exemption. The Respondents' submissions on these points serve to underline the public importance of this case.

(i) The Issue of Public Importance Raised by the Court of Appeal's Reliance on the Exemption from Seizure to Decide the Case

2. The Respondents produce the memorandum filed by the Applicant on appeal[2] in support of their argument that the Applicant, by focusing in its application for leave on the significant public policy consequences of the Court of Appeal's reliance on the *Indian Act* exemption from seizure to determine the extent of the Applicant's procedural rights, is attempting to raise a new issue or to distort the nature of the debate that took place before the courts below.[3] But this is exactly the problem: at no point in the courts below did the Applicant plead that s. 89 of the *Indian Act* had any bearing on the primary issue.

3. As can be seen from its memorandum, the Applicant's focus on appeal was on the fundamental conceptual problems raised by the trial judge's decision that an undocumented decision of a bailiff could constitute a "judicial application" that interrupts prescription. The Applicant's arguments centered on the provisions of the *Civil Code of Québec* (CCQ) respecting prescription, the provisions of the *Code of Civil Procedure*

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[1] Respondents' Memorandum of Argument, para 75, **Respondents' Response (hereinafter "R.R")**, p 18.
[2] Applicant's Brief, **R.R.**, p 26.
[3] Respondents' Memorandum of Argument, para 19-22, **R.R.**, p 5-6.

(CCP) respecting forced execution of judgments, and existing Quebec jurisprudence on the validity of execution proceedings and the interruption of prescription. As correctly pointed out by the Respondents, the Applicant only mentioned the *Indian Act* exemption from seizure twice in its memorandum, and then only in passing.[4]

4. This is exactly what makes the Court of Appeal's judgment so concerning from a public policy perspective. Instead of addressing the risks for the legal system if undocumented "unsuccessful seizures" are considered "judicial applications" for the purposes of articles 2892, 2894, and 2896 of the CCQ (including the conceptual problem of how there can be a "judicial application" that cannot be dismissed), the Court of Appeal decided that these issues were academic because the exemption from seizure means that the Applicant enjoys no procedural rights in an execution proceeding. The Court's decision is saying to *Indian Act* band councils that "there is no point in letting you know what happened here because your exemption means that you have no procedural rights anyway."[5]

5. The Respondent asserts that the Court of Appeal recognized other means for the Applicant to challenge what took place: that it could have contested the seizure under articles 701 or 735 CCP, alleged an abuse of right, or alleged a serious prejudice.[6] But at least the first and third of these requires, under article 736, the service of minutes of seizure to bring the matter to court, since the article is clear that the right to contest opens upon the service of such minutes.[7] This is all the Applicant has been asking for this entire time: the right to receive a document that would describe what happened when the bailiff visited, so that it could understand how its rights had been affected and so it could contest the matter in court if it believed its rights had been infringed.

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[4] Respondents' Memorandum of Argument, para 19, **R.R.**, p 5.

[5] Court of Appeal judgment, para 31-32, **Applicant's Application for Leave to Appeal (hereinafter "A.L.A")**, p 31-32.

[6] Respondents' Memorandum of Argument, para 67, **R.R.**, p 17.

[7] Art. 735 C.C.P. lays out the grounds for annulling a seizure, including that property is exempt from seizure or that the proceedings "are affected by an irregularity resulting in serious prejudice" but art. 736 notes that such a claim must be brought "within 15 days after notification of the minutes of seizure."

6. Regarding the Respondents' idea that the Court of Appeal recognized that there was some "other" proceeding to allege abuse of right in execution proceedings that the Applicant should or could have brought, the Applicant submits that the Court of Appeal has not created some new procedural mechanism that is not found in the CCP and that it was entitled to rely on the CCP as written when determining whether there was anything it could do to respond when it received service of the notice of execution (we note in addition that the notice of execution itself also states that the right to contest measures taken under it opens on service of the minutes of seizure).[8]

7. The Applicant would have been happy if the Court of Appeal had decided this case without raising the *Indian Act* exemption. Unfortunately, the decision relies on the perceived effect of the exemption to determine the Applicant's procedural rights. This approach is unacceptable, and it puts at risk the procedural rights in execution proceedings of all *Indian Act* bands in Canada. It also raises the conceptual problems that the Applicant raised in its memorandum on appeal regarding the nature of judicial applications and basic rights of notice.

(ii) <u>The Application to Other Debtors with Exempt Property</u>

8. In their submissions, the Respondents are categorical: the Court of Appeal's finding that there is no legal duty for a bailiff to record an unsuccessful seizure applies in any case where a debtors' property is exempt from seizure.[9] As aptly put by the Respondents, the Court's conclusion is that "en matière des biens insaissisables, la signification d'un procès verbal est inutile (*moot*)."[10]

9. As a result, if a creditor or a bailiff believes you have exempt property, they simply have to serve you a notice of execution and they do not need to inform you that, by doing so, they have attempted a seizure against you that renews the life of their claim for another 10 years. How are unrepresented parties to know that this is the case? The notice of execution that they receive does not advise them of any of these potential consequences.

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[8] Notice of Execution, ADM-D-8, **R.R.**, p 102.
[9] Respondents' Memorandum of Argument, para 55-61, **R.R.**, p 14-15.
[10] Respondents' Memorandum of Argument, para 13, **R.R.**, p 3.

Indeed, based on the drafting of the notice of execution, a debtor would be fully within their rights to assume that, because the bailiff did not take any of their property and did not prepare any minutes of seizure, that nothing had in fact happened.[11]

10. The Respondents' arguments on this point reaffirm the arguments that the Applicant made regarding the dangers this judgment creates for multiple categories of debtors, many of whom are already in a vulnerable position.[12]

11. The Respondents accuse the Applicant of making "incoherent" arguments by arguing both that the Court of Appeal's judgment has a specific effect on the rights of registered Indians and *Indian Act* band councils and that it has a more general effect on the rights of all debtors with exempt property.[13] But the Applicant's submissions were clear that there are two ways of reading the judgment but that, whichever way is the "correct" one, the result is unacceptable from a public policy perspective.[14]

B. ISSUES OF FACT

12. The Respondents rely heavily on the Court of Appeal's statement that "the absence of minutes reflecting the fact that no assets were seized because of the exemption provided by the *Indian Act*, did not cause harm to the [Applicant]."[15] In fact, the absence of minutes prevented the Applicant from:

a. knowing that an alleged unsuccessful seizure of its moveable property had taken place in November 2016;

b. taking any measures to oppose this alleged unsuccessful seizure;

c. knowing that crippling claims against it had been given a further ten years of life,

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[11] See the Section III of the notice of execution, entitled "Avis à la personne contre qui des mesures d'exécution sont prises", ADM-D-8, **R.R.**, p 102.
[12] Applicant's Memorandum of Argument, para 49-50, **A.L.A**, p 47-48.
[13] Respondents' Memorandum of Argument, para 66, **R.R.**, p 17.
[14] Applicant's Memorandum of Argument, para 51, **A.L.A.**, p 48.
[15] Court of Appeal judgment, para 31, **A.L.A**, p 31; Respondents' Memorandum of Argument, para 3, 60, **R.R.**, p 1, 14.

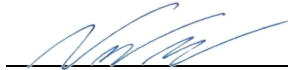
and forced it to engage in years of litigation to regarding the legal consequences of the bailiff's visit. To state that there was no harm from the lack of notice defies all common sense. To the extent that this was a finding of fact by the Court of Appeal, it is tainted by palpable and overriding error.

13. The Respondents allege that the Applicants have misled this Court by arguing that the Court of Appeal's judgment endorses the possibility of seizures as purely intellectual exercises.[16] In support of their allegation, the Respondents incorrectly collapse two events into one: events which took place in November 2016 and events that took place in February 2017.[17] But what happened in November 2016, when prescription is said to be interrupted, is this: the bailiff came to Kanesatake and left a notice of execution: no conversation took place, no notice of any seizure was given, no assessment of property was made.[18] The bailiff simply thought "I would like to do a seizure, but I don't think I can, so I'll just leave" and did not communicate this to the Applicant. This is the undocumented intellectual exercise which the Applicant only found out about at trial six years after the fact and which the Court of Appeal turns into a judicial proceeding.

PART II - ORDER SOUGHT

14. The Applicant seeks leave to appeal to this Honourable Court, the whole in accordance with the relief sought in its application for leave to appeal.

Montreal, April 2, 2024



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[16] Respondents' Memorandum of Argument, para 17, 23-27, **R.R.**, p 5-8.
[17] Respondents' Memorandum of Argument, para 26, **R.R.**, p 7. For a correct recitation of events see Court of Appeal judgment, para 11-12, **A.L.A.**, p 28.
[18] Court of Appeal judgment, para 11-12, **A.L.A.**, p 28

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PART III - TABLE OF AUTHORITIES

Paragraph(s)

SECONDARY SOURCES

Authority	Paragraph(s)
Civil Code of Québec, CQLR c. CCQ-1991, 2892, 2894, 2896	4
Code civil du Québec, RLRQ c. CCQ-1991, 2892, 2894, 2896	
Civil Code of Procedure, CQLR c. C-25.01, art. 701, 735, 736	5
Code de procedure civile, RLRQ c. C-25.01, art 701, 735, 736	