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NOVA SCOTIA COURT OF APPEAL

[Cite as: Union of Nova Scotia Indians v. Nova Scotia (Attorney General), 1999 NSCA 160]

Glube, C.J.N.S.; Chipman and Cromwell, JJ.A.

BETWEEN:

UNION OF NOVA SCOTIA INDIANS, a body corporate, on behalf of itself and its members and the Acadia, Chapel Island, Eskasoni, Membertou, Shubenacadie, Wagmatcook, and Waycobah (Whycocomagh) Indian Bands, and their members, and CONFEDERACY OF MAINLAND MI'KMAQ, a body corporate, on behalf of itself and its members and the Afton, Annapolis Valley, Bear River, Horton, Millbrook and Pictou Landing Indian Bands, and their members, and the ASSEMBLY OF NOVA SCOTIA MI'KMAQ CHIEFS Appellants - and - ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in Right of the Province of Nova Scotia, HIS HONOUR THE LIEUTENANT GOVERNOR OF NOVA SCOTIA IN COUNCIL, HONOURABLE KENNETH MacASKILL, in his capacity as Minister of Natural Resources (Nova Scotia), ATTORNEY GENERAL OF CANADA, representing Her Majesty the Queen in right of Canada and the Minister of Indian Affairs and Northern Development (Canada), and MARITIMES AND NORTHEAST PIPELINE MANAGEMENT LIMITED, a body corporate, and	Bruce H. Wildsmith, Q.C. for the appellants Reinhold M. Endres, Q.C. for the respondents Appeal Heard: December 7th, 1999 Judgment Delivered: December 17th, 1999

MARITIMES AND NORTHEAST PIPE-LINE LIMITED PARTNERSHIP, a limited partnership Respondents	)

THE COURT: Appeal allowed in part per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Chipman, J.A. concurring.

CROMWELL J.A.:

[1] This is an appeal from the decision and Order of Hood, J. striking out an Originating Notice (Application) *Inter Partes* and an Originating Notice (Action) and statement of claim as against the Attorney General of Nova Scotia, His Honour the Lieutenant-Governor of Nova Scotia and Council and the Minister of Natural Resources. This result followed from the learned judge's determination that the appellants were required to give notice of their intention to commence these proceedings pursuant to the **Proceedings Against the Crown Act**, R.S.N.S. 1989, c. 360 and that having failed to do so, the proceedings were nullities. The issue on appeal is whether the learned Chambers judge erred in so holding.

[2] The pertinent facts, and many of the relevant authorities are set out in the reasons of the learned Chambers judge and need not be repeated here. Briefly put, the essential claim in both the Action and the Application is that there is a duty to consult the Mi'kmaq, which was not observed, in exercising the statutory power to grant, convey, sell or dispose of Crown lands under the **Crown Lands Act,** R.S.N.S. 1989, c. 114. The basis of the Application is that the duty to consult arises from existing jurisprudence relating to Mi'kmaq Aboriginal and treaty rights to harvest resources from Crown lands coupled with the known claims of the Mi'kmaq to Aboriginal title. The basis of the Action is more extensive in that it asserts that if established rights and known claims are not sufficient to give rise to a duty to consult, there is actual and unextinguished Aboriginal title which, it is claimed, gives rise to such a duty.

[3] Following the Chambers judge's decision, the appellants gave notice under the **Proceedings Against the Crown Act** and commenced a new Action. It is submitted by the respondents that the appeal is, therefore, moot.

[4] The general principle is that "... when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties, ... [i]f the decision of the court will have no practical effect on such rights, the court will decline to decide the case." (see: **Borowski v. Canada (Attorney General)**, [1989] 1 S.C.R. 342 per Sopinka, J. at p. 353) .

[5] I have concluded that the appeal, insofar as it relates to the Order striking out the Originating Notice (Action) and statement of claim, is moot and that we should not exercise our discretion to hear it. While Mr. Wildsmith submitted that there is a risk that he will be deprived, on procedural grounds, of the remedy of *certiorari* in the recently commenced action, he conceded that there is no similar concern with respect to the claimed declaration of invalidity. In the circumstances of this case, I see no practical benefit to ruling on the issue of whether notice was, in fact, required for the action now that notice has been given and another action commenced.

[6] However, as regards the Originating Notice (Application), I have concluded that the matter is not moot. The newly commenced proceeding is by way of Action. The proceeding commenced by way of Application might afford a more expeditious

resolution of the issues raised in it than will the new proceedings being advanced by way of Action. Failure to consider the appeal in respect of the Application on its merits could have the effect of depriving the appellants of prompter access to a resolution of the narrower claim asserted in the Application. There may be, therefore, some practical benefit in determining the appeal in relation to the Application on its merits.

[7] In my opinion, and with respect, the learned Chambers judge erred in her characterization of the proceedings commenced by way of Application. In my view, the appellants are asserting in that proceeding that they have interests requiring consideration in the exercise of the statutory authority to dispose of Crown land. The proceeding is essentially in the nature of an administrative law challenge to the exercise of the statutory authority conferred under the **Crown Lands Act**. It is not a proceeding in which "the estate of the Crown is directly affected" (see **Dyson v. Attorney-General**, [1911] 1 K.B. 410 (C.A.) per Farwell, L.J. at 421) or in which a person claims against the Crown that land, goods or money of the subject are in the possession of the Crown within the meaning of s. 4(a) of the **Proceedings Against the Crown Act**. It follows that this is not the type of proceeding for which notice must be given pursuant to the **Proceedings Against the Crown Act**.

[8] As the issue of the proper characterization of the claim asserted in the Application was controversial in the hearing before us, I should record that Mr. Wildsmith accepted the following excerpt from his Factum filed on this appeal as an accurate statement of the scope of the Application and agreed that he would be bound by that statement:

> ... the premise of the Application is that **existing jurisprudence** establishing Mi'kmaq Aboriginal and treaty rights to harvest resources from Crown lands for

> food, social and ceremonial purposes, coupled with the **known claims** of the Mi'kmaq to Aboriginal title in Nova Scotia, are sufficient to give rise to the duty to consult. [emphasis in the original]

[9] I would also emphasize that only the issue of whether notice was required under the **Proceedings Against the Crown Act** was before us on this appeal; the merits of the appellants' position on the substance of the Application itself are not in issue and I make no comment about them.

[10] I would allow the appeal to the extent of setting aside that portion of the Chambers judge's Order striking out the Originating Notice (Application). As success on appeal is divided, I would make no order as to costs.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Chipman, J.A.