Federal Court  Cour fédérale

Date: 20130625

Docket: T-340-99

Citation: 2013 FC 704

Montréal, Quebec, June 25, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

**KAINAIWA NATION (BLOOD TRIBE)
AND CHIEF CHRIS SHADE, SUING ON HIS
OWN BEHALF AND ON BEHALF OF
THE MEMBERS OF THE
KAINAI WA/BLOOD TRIBE**

**PEIGAN NATION AND CHIEF PETER
STRIKES WITH A GUN, SUING ON HIS OWN
BEHALF AND ON BEHALF OF THE
MEMBERS OF THE PEIGAN NATION**

**SIKSIKA NATION AND CHIEF DARLENE
YELLOW OLD WOMAN MUNROE, SUING
ON HER OWN BEHALF AND ON BEHALF OF
THE MEMBERS OF THE SIKSIKA NATION**

**TSUU T'INA NATION AND CHIEF ROY
WHITNEY SUING ON HIS OWN BEHALF
AND ON BEHALF OF THE MEMBERS OF
THE TSUU T'INA NATION**

**BEARSPAW BAND AND CHIEF DARCY
DIXON, SUING ON HIS OWN BEHALF AND
ON BEHALF OF THE MEMBERS OF
THE BEARSPAW BAND**

**CHINIKI BAND AND CHIEF PAUL
CHINIQUAY, SUING ON HIS OWN BEHALF
AND ON BEHALF OF THE MEMBERS
OF THE CHINIKI BAND**

WESLEY BAND AND CHIEF JOHN SNOW SR., SUING ON HIS BEHALF AND ON BEHALF OF THE MEMBERS OF THE WESLEY BAND

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] The plaintiffs lay claim to all of Alberta from Edmonton south. In their action as originally filed, they allege that both Her Majesty in Right of Canada and Her Majesty in Right of Alberta breached various trusts and fiduciary obligations arising from the *Royal Proclamation of 1793*, the *Rupert's Land and North-Western Territory Order*, the Constitution Acts of 1867, 1930 and 1982, the *Indian Act* and *Treaty 7* of 1877. They deny that they gave up aboriginal title of *Treaty 7* territory, including mines and minerals, and say that both Canada and Alberta continue to hold resources for them notwithstanding the transfer from Canada to Alberta under the *National Resources Transfer Agreement* of 1930.

[2] Alberta successfully moved to have the action dismissed as against it on the grounds that this Court does not have jurisdiction over the plaintiffs' claim against it. Prothonotary Hargrave's decision is reported at 2001 FCT 1067, 211 FTR 288, [2001] FCJ No 1502 (QL). Canada took no position. The decision was not appealed.

[3] Without discontinuing their action in this Court, the last three groups of plaintiffs, often referred to as Wesley or Stoney Band, then sued both Alberta and Canada in the Court of Queen's Bench of Alberta. That case is ongoing.

[4] Nine years later, Canada moved to have this action stayed as against it. It claimed that Alberta was a necessary party, that it was desirous of claiming contribution or indemnity from it, but that this Court lacked jurisdiction. In accordance with s. 50.1 of the *Federal Courts Act*, if those two requirements are met, this Court is obliged to grant a stay.

[5] In the alternative, it also sought a stay on what can be broadly termed *forum non conveniens*, in accordance with s. 50 of the *Federal Courts Act*. The Court of Queen's Bench of Alberta is said to be a more convenient forum in that it has jurisdiction over all the parties, and some of the plaintiffs have already filed suit there.

[6] Before the stay motion was heard by the case manager, Prothonotary Milczynski, two further events occurred. Canada, in fact, filed suit in the Court of Queen's Bench of Alberta against Her Majesty in Right of Alberta seeking indemnity or contribution should it be condemned in this action. It also had made tentative arrangements with the plaintiffs, except Tsuu T'ina Nation and Chief Roy Whitney, to have their actions transferred to the Court of Queen's Bench.

[7] By order dated 24 July 2012, Prothonotary Milczynski dismissed the motion. She found it unnecessary to consider whether this Court has jurisdiction over a claim by Canada against Alberta,

for contribution or indemnity, because the "desirous" aspect of s. 50.1 of the *Federal Courts Act* was not met. After taking into account factors to be considered in granting a stay under s. 50, as set out in *Tractor Supply Co of Texas et al v TSC Stores LP*, 2010 FC 883, 376 FTR 218, [2010] FCJ No 1102 (QL), and *White v E.B.F. Manufacturing Ltd*, 2001 FCT 713, [2001] FCJ No 1073 (QL), she determined that Canada had not met its burden of establishing that continuation of these proceedings would cause it prejudice or injustice.

[8] This is Canada's appeal from that decision. For the reasons that follow, the appeal shall be dismissed.

DISCUSSION

[9] The action was filed 14 years ago. Although there was some finger pointing before me, the proceedings have been under special case management almost from the outset. For the most part, the parties appear to have been satisfied to leave the case in abeyance. Certainly, I am not prepared to cast aspersions on anyone. Nevertheless, a brief timeline will help put matters into perspective:

a. 26 February 1999: action filed in the Federal Court.

b. 10 October 1999: action put under case management.

c. 29 October 2001: Prothonotary Hargrave granted Alberta's motion to strike the action as against it on the grounds of lack of jurisdiction.

d. 10 December 2003: the last three groups of plaintiffs (Wesley or Stoney Band) took action in the Court of Queen's Bench of Alberta against both Canada and Alberta.

e. April 2009: Stoney Band called upon Canada to file a statement of defence in this action.

f. 31 March 2010: Canada moved to have the Federal Court action stayed.

g. 9 April 2010: Canada sued Alberta in the Court of Queen's Bench claiming indemnity should it be found liable to the plaintiffs. If liable, which it denies, Canada asserts that Alberta is liable to contribute or to indemnify, in that if there are trusts, by taking Crown lands, Alberta has become a constructive trustee or a trustee de son tort, and if the Crown lands were subject to interests of the plaintiffs then by agreeing to the terms of the *National Resource Transfer Agreement* of 1930, Alberta accepted the transfer subject to those interests.

h. 12 February 2012: although the evidence is not perfectly clear, it may well be that the plaintiffs with the exception of Tsuu T'ina Nation and its Chief Roy Whitney were prepared to consent to an order to reconstitute their actions in Alberta, one provision being that Canada's motion under s. 50.1 of the *Federal Courts Act* be granted.

i. 17 February 2012: stay motion argued before Prothonotary Milczynski.

j. 24 July 2012: Prothonotary Milczynski's refused to grant a stay.

[10] At the hearing before me, Canada did not advance the proposition that the action should be stayed in virtue of s. 50.1 of the *Federal Courts Act*. The reason given is that although it has always been somewhat ambivalent as to whether this Court has jurisdiction over a claim by it against Alberta for contribution or indemnity, it failed to draw to Prothonotary Milczynski's attention the

unappealed decision of Mr. Justice Phelan in *Lac Seul Band of Indians v Canada*, 2011 FC 351, 386 FTR 265, [2011] FCJ No 561 (QL)). More shall be said about this.

[11] The stage was set by Prothonotary Hargrave in his dismissal of the plaintiffs' action against Her Majesty in Right of Alberta. He pointed out that s. 17(1) of the *Federal Courts Act* grants this Court jurisdiction over claims against the "Crown". However, "Crown" means Her Majesty in Right of Canada, not Her Majesty in Right of a province.

[12] He also referred to s. 17(4) of the *Federal Courts Act* which gives the Court jurisdiction with respect to conflicting claims against the Crown. However, there was nothing in the record before him to indicate there were such claims.

[13] Finally, Prothonotary Hargrave considered inter-government disputes. He said at paragraph 29 of his reasons:

> The issue here is whether section 19 of the *Federal Court Act*, which provides that:
>
> > 19. Inter-governmental disputes - Where the legislature of a province has passed an Act agreeing that the Court, whether referred to in that Act by its present name or by its former name of the Exchequer Court of Canada, has jurisdiction in cases of controversies.
> >
> > (a) between Canada and that province, or
> >
> > (b) between that province and any other province or provinces that have passed a like Act,
>
> the Court has jurisdiction to determine the controversies and the Trial Division shall deal with any such matter in the first instance.

in tandem with section 28 of the *Judicature Act* of Alberta:

> 28 The Supreme Court of Canada and the Federal Court of Canada, or the Supreme Court of Canada alone, according to the Supreme Court Act (Canada) and the Federal Court Act (Canada) have jurisdiction
>
> (a) in controversies between Canada and Alberta;
>
> (b) in controversies between Alberta and any other province of Canada in which an Act similar to this Act is in force;
>
> (c) in proceedings in which the parties by their pleadings have raised the question of the validity of an Act of Parliament of Canada or of an Act of the Legislature of Alberta, when in the opinion of a judge of the court in which they are pending the question is material, and in that case the judge shall, at the request of the parties, and may without request if he thinks fit, order the case to be removed to the Supreme Court of Canada in order that the question may be decided.

grant jurisdiction in this instance. Certainly the jurisdiction granted is broad, section 19 of the *Federal Court Act* being phrased in terms of controversies. Indeed, the term controversies ". . . is broad enough to encompass any kind of legal right, obligation or liability that may exist between governments": see the reasons of Mr. Justice of Appeal Le Dain in *The Queen (Canada) v. The Queen (P.E.I.)* [1978] 1 F.C. 533 at 583. In this instance the Plaintiffs submit that the two actions represent precisely the type of cases that are contemplated by section 19 of the *Federal Court Act* and which are facilitated by subsections (a) and (c) of section 28 of the *Judicature Act*.

[14] However, there was no evidence before him that there was a controversy. He said that he ought not to speculate as to what subsequent pleadings might put in issue, and what controversies might conceivably arise.

[15] Twelve years later, still no evidence of a controversy between Canada and Alberta has been put before this Court. Consequently, I am at a loss as to why Canada referred to Mr. Justice Phelan's opinion in *Lac Seul*, above, which dealt with a dispute between Canada and Manitoba.

[16] Prothonotary Hargrave's decision is *res judicata*, but does not determine whether or not this Court has jurisdiction over a claim by Canada against Alberta for contribution or indemnity. Prothonotary Milczynski found it unnecessary to determine that issue, as s. 50.1 of the *Federal Courts Act* requires, among other things, that the Crown "desires" to institute a counter-claim or third party proceedings." Note the present tense. She was not satisfied that the Crown was desirous of taking action in this Court due to the passage of time and due to the fact that it had already instituted contribution or indemnity proceedings in Alberta.

[17] The Federal Court is a statutory court enacted pursuant to s. 101 of the *Constitution Act*. The parties cannot, by consent, confer jurisdiction upon it. Should Canada claim against Alberta in this Court, by way of third party proceedings, or by a fresh action, Alberta would be entitled to make representations with respect to jurisdiction. The parties would obviously have to deal with whether there is a body of federal law arising from the *sui generis* relationship between the Crown and First Nations. See *Gottfriedson v Canada*, 2013 FC 546, currently under appeal.

PROTHONOTARY MILCZYNSKI'S DECISION

[18] I need only deal with the prothonotary's reasons with respect to s. 50 of the *Federal Courts Act* which provides:

50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter	50. (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :
(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or	a) au motif que la demande est en instance devant un autre tribunal;
(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.
(2) The Federal Court of Appeal or the Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown if it appears that the claimant has an action or a proceeding in respect of the same claim pending in another court against a person who, at the time when the cause of action alleged in the action or proceeding arose, was, in respect of that matter, acting so as to engage the liability of the Crown.	(2) Sur demande du procureur général du Canada, la Cour d'appel fédérale ou la Cour fédérale, selon le cas, suspend les procédures dans toute affaire relative à une demande contre la Couronne s'il apparaît que le demandeur a intenté, devant un autre tribunal, une procédure relative à la même demande contre une personne qui, à la survenance du fait générateur allégué dans la procédure, agissait en l'occurrence de telle façon qu'elle engageait la responsabilité de la Couronne.
(3) A court that orders a stay under this section may subsequently, in its discretion, lift the stay.	(3) Le tribunal qui a ordonné la suspension peut, à son appréciation, ultérieurement la lever.

[19] It is to be noted that the Tsuu T'ina Nation's claim is not being pursued in Alberta. Thus, there is not an identity of parties. Section 50(2) is not applicable.

[20] Furthermore, as regards the other plaintiffs, they appear to have signed a consent order to be presented to the Court. It provided that they would transfer their actions to the Alberta courts. One of the requirements was that the Court grant the Crown's application under s. 50.1 of the *Federal Courts Act* which requires a finding that this Court lacks jurisdiction over a claim by Canada against Alberta. I certainly would not be prepared to sign such a consent order. That is a matter which should be properly litigated.

[21] The other plaintiffs were all present at the hearing. Although invited to do so, they declined to make any representation as to whether they were still prepared to transfer their actions to Alberta. As far as I am concerned, the draft consent order is a dead issue, not relevant to the present proceedings.

[22] Basing herself upon *Tractor Supply Co*, above, Prothonotary Milczynski set out at pages 10 and 11 of her decision the considerations to be taken into account in guiding her discretion:

> (i) Would the continuation of the action cause prejudice or injustice (not merely inconvenience or extra expense) to the defendant?
>
> (ii) Would the stay work an injustice to the plaintiff?
>
> (iii) The onus is on the party which seeks the stay to establish that the two conditions are met.
>
> (iv) The grant or refusal of the stay is within the discretionary power of the court.
>
> (v) The power to grant a stay may only be exercised sparingly and in the clearest of cases.

(vi) Consideration of whether the facts alleged, the legal issues raised and the relief sought are similar or the same in the both proceedings.

(vii) What are the possibilities of inconsistent findings in both courts?

(viii) Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to justice and adjudication of claims.

(ix) Priority ought not to be necessarily given to the first proceeding over the second, or vice versa.

[23] She concluded that the Crown had not met its burden that the stay would cause prejudice or injustice to it. Rather, she was of the view that a stay would grant a prejudice or injustice to at least the Tsuu T'ina Nation, if not all the plaintiffs.

[24] She noted that the Wesley action in Alberta involved different parties, and that it was not clear that the subject lands of the two actions are the same, although there is some overlap. She concluded that the motion did not give rise to the "clearest of cases" as per *White*, above.

[25] As the decision was discretionary, before interfering the Court has to determine whether the matter should be considered *de novo* on the basis that the questions raised are vital to the final issue of the case or that the decision is clearly wrong in the sense that the exercise of discretion was based upon a wrong principle or upon a misrepresentation of the facts (*Merck & Co v Apotex Inc*, 2003 FCA 488, [2004] 2 FCR 459, [2003] FCJ No 1925 (QL)).

[26] I do not consider granting or denying this stay to be vital. Nor do I consider that the Prothonotary misdirected herself in any way. It was submitted that it was not open to her to find that there would be a prejudice to the Tsuu T'ina Nation, as no affidavit had been filed in support of that proposition. However, the prejudice is inherent in the motion itself. In accordance with s. 17 of the *Federal Courts Act*, this Court and provincial courts have concurrent jurisdiction over actions against the Crown. The choice lies with the plaintiffs. The prejudice to them is that they would be driven from their choice of forum because of the actions of others.

[27] Although there is some overlapping with the Alberta action, it must be emphasized that in their statement of claim in Alberta, the Wesley Band claims traditional lands but they specifically "[…] do not include Indian Reserves and the natural resources thereof set aside for other Indian nations and Aboriginal Peoples." (Action number 0301-19586, Court of Queen's Bench of Alberta, Judicial District of Calgary, Amended Statement of Claim, paragraph 10 d.)

[28] Should I be wrong in holding that the matter was not vital, in the exercise of my discretion I dismiss the appeal for the same reasons expressed by Prothonotary Milczynski. The issue of this Court's jurisdiction over an indemnity claim is open. I do not consider it to be in the interests of justice to grant a stay on a motion which could have been moved a decade earlier. Nor do we know that Tsuu T'ina Nation is the last band standing. All the plaintiffs are in this Court. Only one group is in the Alberta courts.

[29] The factors set out in *Tractor Supply Co* and *White* serve as a good guideline. They do not serve to fetter the Court's discretion. I agree that the power to grant a stay should only be exercised

sparingly and in the clearest of cases. Although the possibility of inconsistent findings in both Courts exists, there is no risk of eminent adjudication. I was told that the Wesley action in Alberta is now at the discovery stage. In this case, the Crown has yet to file a statement of defence.

[30] Perhaps at some future date, a fresh motion may be considered. The Court is being asked to act in too much of a factual vacuum. If Her Majesty in Right of Alberta must be in this court in order for a final resolution of the issues, why did Her Majesty in Right of Canada wait nine years after Prothonotary Hargrave's action to file proceedings in Alberta? Even if Alberta is not a party, the *Federal Courts Rules* allow for production of documents and even discovery of a non-party.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT JUDGMENT is that the appeal is dismissed, with costs in favour of Tsuu T'ina Nation and Chief Roy Whitney only.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-340-99
STYLE OF CAUSE:	KAINAIWA NATION (BLOOD TRIBE) ET AL v HER MAJESTY THE QUEEN
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APPEARANCES:

Raymond Lee David Shiroky (articling students)	FOR THE DEFENDANT, MOVING PARTY
Terry Braun	FOR THE PLAINTIFFS (TSUU T'INA NATION AND CHIEF ROY WHITNEY SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE TSUU T'INA NATION)
Johanne Crook	FOR THE PLAINTIFFS (KAINAIWA NATION (BLOOD TRIBE) AND CHIEF CHRIS SHADE, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE KAINAI WA/BLOOD TRIBE)
Brooke Barett	FOR THE PLAINTIFFS (BEARSPAW BAND AND CHIEF DARCY DIXON, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE BEARSPAW BAND)

(CHINIKI BAND AND CHIEF PAUL CHINIQUAY, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CHINIKI BAND)

(WESLEY BAND AND CHIEF JOHN SNOW SR., SUING ON HIS BEHALF AND ON BEHALF OF THE MEMBERS OF THE WESLEY BAND)

Clarine Ostrove — FOR THE PLAINTIFFS

(SIKSIKA NATION AND CHIEF DARLENE YELLOW OLD WOMAN MUNROE, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE SIKSIKA NATION)

Faye Morningbull — FOR THE PLAINTIFFS

(PEIGAN NATION AND CHIEF PETER STRIKES WITH A GUN, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE PEIGAN NATION)

SOLICITORS OF RECORD

Walsh Wilkins Creighton LLP
Barristers & Solicitors — FOR THE PLAINTIFFS

(KAINAIWA NATION (BLOOD TRIBE) AND CHIEF CHRIS SHADE, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE KAINAI WA/BLOOD TRIBE)

Rae & Company
Barristers & Solicitors — FOR THE PLAINTIFFS

(BEARSPAW BAND AND CHIEF DARCY DIXON, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE BEARSPAW BAND)

(CHINIKI BAND AND CHIEF PAUL CHINIQUAY, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CHINIKI BAND)

(WESLEY BAND AND CHIEF JOHN SNOW SR., SUING ON HIS BEHALF AND ON BEHALF OF

THE MEMBERS OF THE WESLEY BAND)

Mandell Pinder LLP
Barristers & Solicitors

FOR THE PLAINTIFFS

(SIKSIKA NATION AND CHIEF DARLENE YELLOW OLD WOMAN MUNROE, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE SIKSIKA NATION)

Scott Venturo LLP
Barristers & Solicitors

FOR THE PLAINTIFFS

(TSUU T'INA NATION AND CHIEF ROY WHITNEY SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE TSUU T'INA NATION)

Indigenious Law

FOR THE PLAINTIFFS

(PEIGAN NATION AND CHIEF PETER STRIKES WITH A GUN, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE PEIGAN NATION)

William F. Pentney
Deputy Attorney General of Canada
Calgary, Alberta

FOR THE DEFENDANT