SUPREME COURT OF YUKON

Citation: *R.R.D.C.* v. *The Attorney General of Canada*, 2009 YKSC 38

Date: 20090507
S.C. No. 05-A0043
Registry: Whitehorse

Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

THE ATTORNEY GENERAL OF CANADA

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Stephen L. Walsh — Counsel for the Plaintiff
Suzanne M. Duncan — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This matter began as an application by the Attorney General of Canada ("Canada") to strike certain amendments to the plaintiff's statement of claim in which it purports to sue on its own behalf "and on behalf of and as the representative for" the Kaska Nation. However, through the course of the hearing, and at a subsequent case management conference, the parties were able to resolve a number of the points at issue, with one exception. The remaining issue to be decided is whether the Ross River Indian Band, now known as the Ross River Dena Council ("RRDC"), the plaintiff herein, is appropriately named as the sole representative for the Kaska Nation and its members, in what has

become a representative action under *Rule* 5(11) of the Yukon *Rules of Court*. More particularly, Canada submits that an individual representative plaintiff should be added and the style cause amended accordingly.

POSITIONS OF THE PARTIES

[2] Canada's position is that a band council does not have the authority under the *Indian Act*, R.S.C, 1985, c. I-5, as amended, to bring claims of aboriginal rights or title, which it says are claimed in this case. Although Canada concedes that a band council has the authority to bring actions on behalf of the band, it submits that a band council does not have the authority to bring actions on behalf of the band members. Rather, authority to bring an action for aboriginal rights or title can only be conferred by a majority of band members. Finally, Canada argues that, because of the uncertainty about the extent of a band's capacity to sue, in this representative action an individual member of the Kaska Nation should be added to the style of cause as a named representative plaintiff. In support of this argument, Canada chiefly relies on the following authorities: *Gitxaala Nation Council* v. *Gitxaala Treaty Society*, 2007 BCSC 1845; *Montana Band* v. *Canada* [1998] 2 F.C. 3; *West Moberly First Nations* v. *British Columbia*, 2007 BCSC 1324; *Nemaiah Valley Indian Band* v. *Riverside Forest Products Ltd.*, [1999] B.C.J. No. 2459 (S.C.); and *Papaschase Indian Band No. 136* v. *Canada (Atty. Gen.)* [2004] 4 C.N.L.R. 110.

[3] RRDC's response to this argument is as follows:

1. The law has evolved to the point that Indian bands, such as RRDC, are now accepted as "juridical persons" which have the capacity to sue and be sued in their own names.

2. Further, RRDC says that it is a proper representative plaintiff in this action for two reasons:

a) Canada has admitted that RRDC is known to it "as one of the constituent bands of the Kaska Nation."

b) RRDC is most closely associated with the lands at issue, namely the Ross River Group Trapline and the Ross River Community Trapline.

3. Individuals purporting to sue on behalf of a class must have standing in the same manner that would be required if they were suing in an individual action. Accordingly, an individual would not be a proper representative plaintiff in the circumstances of this case because he or she would not have standing to commence an individual action to seek much of the relief sought. For example, submits RRDC, an individual would not have standing to advance a personal claim for the damages or compensation sought in this case, or for an accounting of the revenues extracted from the lands at issue. In support of this argument, RRDC's counsel relies upon two authorities: *Soldier* v. *Canada* (Atty. Gen.), 2006 MBQB 50; 2009 MBCA 12; and *Queackar-Komoyue Nation* v. *British Columbia (Atty. Gen.)* [2007] 1 C.N.LR. 286 (BCSC).

4. Although Canada and RRDC agree that the rights at issue here are "communal rights", as referred to in case law, RRDC argues that this litigation is not about aboriginal rights or aboriginal title *per se*.

5. Canada's concerns about the status of RRDC as the sole representative plaintiff in this action are premature, because they relate primarily to the question of damages, which will not be dealt with until after a determination of liability.

ANALYSIS

[4] The leading case on class actions in Canada is *Western Canadian Shopping Centers Inc.* v. *Dutton*, 2001 SCC 46. The case stands for the general proposition that class actions should be allowed to proceed where the following conditions are met:

1. The class is capable of clear definition;
2. There are issues of law or fact common to all class members;
3. Success for one class member means success for all; and
4. The proposed representative adequately represents the interests of the class.

Western Canadian Shopping Centers Inc. has also been applied to representative actions.

[5] Canada states that it is important to acknowledge that Indian bands under the *Indian Act* post-date the creation of the communal rights at issue in this litigation. Those rights, says Canada, belong collectively to the individual members of the Kaska Nation, and not to RRDC, which as an Indian band, is only a creature of statute. Therefore, an individual member of the Kaska Nation should be the representative of all of the other members of the Kaska Nation, on whose behalf this action is being prosecuted, because that individual member would have the same interests and rights as all of the other individuals who are being represented. In other words, Canada says the representative must have the same interests as those he or she claims to represent. Canada submits that RRDC, as an Indian band, would not have the same interests and rights as all of the other individuals being represented.

[6] In support of this argument, Canada referred to two additional authorities: *Heron Seismic Services Ltd.* v. *Muscowpetung Indian Band* (1990), 74 D.L.R. (4th) 308 (Sask. Q.B.) and *Pasap* v. *White Bear Band No. 70* (1992), 110 Sask. R. 241 (Q.B.)

[7] *Heron* held that an Indian band under the *Indian Act* "is a creature of statute and as such has only the powers given to it by such statute." However, I agree with RRDC's counsel that *Heron* is a relatively old case, and that recent authorities have moved beyond this position, as I will come to shortly, in recognizing that there are many things which Indian bands have the legal capacity to do, which are not expressly addressed in the *Indian Act*. Rather, *Heron* should be viewed as authority for the proposition that when an Indian band is undertaking activities or exercising authority specified under the *Indian Act*, it is bound to conduct its affairs within the guidelines under that *Act*.

[8] As for *Pasap,* it too is a relatively old case and one which turns on its particular facts, i.e. the terms of the agreement at issue. *Pasap* says nothing about the legal capacity of an Indian band.

[9] Returning to the other authorities Canada relies upon, in *Gitxaala,* there was an internal dispute over which entity had the authority to represent the members of the Gitxaala Nation in treaty negotiations with the Crown. One of the plaintiffs, the Gitxaala Nation Council, was the governing authority of the Gitxaala Indian Band; the other, Clifford White, was the elected chief of the Gitxaala Indian Band and a member of the Gitxaala Nation. The Council alleged, among other things, that the defendant Gitxaala Treaty Society wrongfully purported to usurp the authority of the Gitxaala Nation Council. The main point of dispute in the case was whether the Council had been properly authorized by the Gitxaala Nation to sue the defendants on behalf of the Nation.

[10] Interestingly, at para. 22, Halfyard J. noted that all the parties seemed to agree that "the authority to conduct treaty negotiations and to receive government funding for treaty negotiations" did not reside in the Gitxaala Nation Council simply by reason of the

powers granted to a band council by the *Indian Act.* Rather, it appeared to be accepted that no person or body of persons could acquire authority to represent the Gitxaala Nation for those purposes, except in accordance with traditional Gitxaala law. It is also interesting that, at para. 27, Halfyard J. observed that it was common ground that a representative proceeding on behalf of a nation of aboriginal people is the proper way to make claims relating to the assertion or enforcement of aboriginal title and rights; this latter point was based upon the decision of the British Columbia Court of Appeal in *Oregon Jack Creek Indian Band* v. *C.N.R.* (1989), 34 B.C.L.R. (2d) 344.

[11] One of the issues in *Gitxaala* was whether the action was personal or derivative in nature. Halfyard J. held, at paras. 52-55, that the plaintiffs could bring the action on behalf of the band, i.e. the Gitxaala Nation as an entity, but could not do so on behalf of the members of the band. However, as I understand the decision, this was because the claims made against the defendants in the action were “in their essential character” based on alleged violations of rights possessed by the band/Nation, and did not include assertions of aboriginal rights. Rather, to the extent that the plaintiffs sought to advance claims of aboriginal rights, they would have had to establish that they had the authority to do so from a majority of the members of the band/Nation.

[12] With respect, I found the *Gitxaala* decision somewhat difficult to follow. However, it does not appear to be as helpful to Canada’s position on this application, as Canada's counsel seems to suggest.

[13] I pause here to observe that, to the extent this action involves claims of aboriginal title and aboriginal rights, a point which I will address further below, it appears that the majority of the Kaska Nation do support RRDC as the representative plaintiff for the

members of the Kaska Nation, either implicitly or explicitly. I say this because a letter dated August 11, 2008, from the Kaska Dena Council to RRDC's counsel has been filed which confirms that the Kaska Dena Council has notice of this representative action, and is being kept apprised of the progress of the action. The letter implicitly supports RRDC as the representative plaintiff. Further, a letter from the Chief of the Liard First Nation to the Chief of the Ross River Dena Council dated March 27, 2009, expressly states that the Liard First Nation has no objection to RRDC acting as the representative plaintiff in the within action and wishes RRDC "the best of luck." As the Kaska Nation is principally comprised of the Ross River Dena Council, the Liard First Nation, and the Kaska Dena Council (although there may be a relatively small number of individuals who claim to be Kaska, but are not associated with any of these three entities), these letters suggest the support for RRDC acting as the representative plaintiff comes from a majority of the members of the Kaska Nation.

[14] *Montana Band,* cited above*,* is another older case, dating from 1997. At that time, the capacity of an Indian band to sue or be sued was still somewhat uncertain. Accordingly, when considering an action commenced by a band, the Federal Court endorsed the practice of naming the band as well as certain band members, as acting on their own behalf and also on behalf of all other members of the band. The relevant passages from the decision are at paras. 20-22, 26 and 32:

> "[20] Neither a band nor a band Council have corporate status; nor is either a natural person in the eyes of the law...
>
> [21] The nature of a band as a party has been described:
>
> > The band, as an enduring entity with its own government, is a unique type of legal entity under Canadian law. The rights and obligations of the band

> are quite distinct from the accumulated rights and obligations of the members of the band... In law of band is in a class by itself.
>
> [22] I turn then to the jurisprudence respecting the capacity of a band (band council) to sue or be sued. The jurisprudence establishes that because of the particular powers and obligations imposed by statute on the band council there must exist an implied capacity to sue and be sued with respect to the exercise of those powers and the meeting of those obligations.
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> ...
>
> [26] Because the capacity of a band (band council) to sue or be sued arises by implication from and is tied to the statutory powers and obligations conferred on it, the extent of its capacity to sue or be sued has uncertain boundaries.
>
> ...
>
> [32] The manner in which the parties have been named, that is naming band first and then stating that certain band members (usually the elected councillors) are acting on their own behalf as well as on behalf of all other members of the band covers any uncertainties about legal status that might exist. As I have noted, this is a normal way of proceeding. ..." [citations omitted]

[15] In my view, *Montana Band* simply explains the origins of the practice of naming, as co-plaintiffs in the style of cause, individuals along with the particular Indian band commencing the lawsuit. Indeed, that has been referred to as the "preferred practice" in the other case relied upon by the Crown, *West Moberly First Nations* v. *British Columbia*, cited above.

[16] In *West Moberly,* Johnston J. of the British Columbia Supreme Court, was addressing the issue of when a band of Indians can sue or be sued in its own name. At para. 50, he set out a helpful list of a variety of contexts in which an Indian band has been held to be legally capable:

> "An Indian Band has been considered to be legally capable as:
>
> - *an employer for the purposes of the *Canada Labour Code* (see *P.S.A.C. v. Francis,* [1982] 2 S.C.R. 72);
> - *a juridical person for the purpose of suing to determine the validity of surrender of reserve lands (see *Montana Indian Band v. Canada,* [1998] 2 F.C. 3 (T.D.));
> - *capable of contracting, and suing and being sued in contract (see *Clow Darling Ltd. v. Big Trout Indian Band* (1989), 70 O.R. (2d) 56 (Ont. Dist. Ct.));
> - *capable of executing a contract of guarantee (see *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135,* [1993] 1 W.W.R. 373 (Alta. Q.B.));
> - *competent to sue and defend actions between Indian bands, to determine which of two bands is entitled to possession and enjoyment of a reserve (see *Wewayakum Indian Band v. Wewayakai Indian Band,* [1991] 3 F.C. 420 (T.D.));
> - *competent to sue for a declaration that certain amendments to the *Indian Act,* R.S.C. 1985, c. I-5, were unconstitutional (see *Sawridge Band v. Canada* [2003] 3 C.N.L.R. 358 (F.C.T.D.)); and
> - *the proper parties to an action commenced by a corporation formed by 7 First Nations to claim aboriginal fishing rights, in place of the corporation, so that the First Nations were substituted for their corporate vehicle (see *Anishinaabeg of Kabapikotawangag Resource Council Inc. v. Canada (Attorney General)*, [1998] 4 C.N.L.R. 1 (Ont. Ct. J.)).

[17] The last case cited above*, Anishinaabeg,* is very relevant to the issue on this application. There, the corporate plaintiff alleged that Canada had a special fiduciary responsibility with respect to the aboriginal fishing rights of the plaintiff in the Lake of the Woods, and that a breach of that relationship constituted a breach of the plaintiff's aboriginal rights. The statement of claim was framed as a class action. Canada applied to strike the corporate plaintiff on the ground that the statement of claim showed no reasonable cause of action relative to the plaintiff. The motion was granted; however, in allowing it, McCartney J., of the Ontario Court of Justice (General Division), substituted

as plaintiffs the seven First Nations bordering on the Lake of the Woods, which were the incorporators of the corporate plaintiff. Thus, the case stands as an early example of one where a First Nation (there, more than one First Nation) was allowed to prosecute at claim of aboriginal rights without additionally naming an individual representative plaintiff as acting on behalf of the members of the First Nation.

[18] Returning to *West Moberly,* Johnston J. concluded that in British Columbia, Indian bands do have the capacity to sue. At paras. 54 and 55, he stated:

> "[54] I agree with those authorities that say that Indian bands ought not to continue under legal disabilities. In my view, neither bands nor their advisors ought to have to concern themselves with whether litigation in contemplation is one of the types where action might be permitted by the band, nor should bands have to continue to vex individuals to act in a representative capacity in order that a band's collective legal interest can be protected.
>
> [55] I conclude, therefore, that Indian bands have the capacity to sue and to be sued in British Columbia. The plaintiffs' application to add the bands for which they already act in a representative capacity will not be denied on the ground that the bands lack the capacity to sue. I point out that there is no application to substitute the bands for existing representational parties, and this finding has the advantage of maintaining the preferred practice of representative proceedings for the time being."

[19] It is interesting to note that Johnston J. specifically referred to a band's capacity to sue to protect its "collective" legal interest, i.e. same type of legal interest at issue in the case at bar. This would seem to run counter to Canada's proposition that the representative plaintiff must have the same interests as those he or she claims to represent.

[20] In any event, Canada places significant weight on the fact that Johnston J. referred to the "preferred practice" in representative pleadings to name individual representative parties in addition to the Indian band concerned. However, Johnston J.

was careful not to say that this was a required practice, and added the words “for the time being” at the end of that sentence. That suggests to me, in the context of his other comments at paras. 54 and 55, that Johnston J. envisioned an evolution in the law in how these matters might be pleaded in the future.

[21] *Nemaiah,* cited above*,* also involved a motion to strike a representative claim, in that case, for aboriginal title*.* At para. 12, Vickers J. stated that the communal interests of the members of aboriginal groups “can and should be asserted a member of the group” (my emphasis). He continued at para. 14 :

> “Finally, there is no requirement that the representative plaintiff be a chief. He or she need only be a member of the class. Even in the face of active opposition by other members of the group, the plaintiff asserting membership is entitled to bring the representative action.”

Canada relies on these comments as authority for its proposition that the members of the Kaska Nation collectively must be represented by a representative plaintiff from among those members. On the other hand, counsel for RRDC emphasizes the words “the plaintiff asserting membership” and, since RRDC is admitted to be known by Canada as “one of the constituent bands of the Kaska Nation”, then that is sufficient qualification for “membership.” In any event, it is also important to acknowledge that *Nemaiah* is a case from 1999, when the law in this area was still in the early stages of development.

[22] In *Papaschase*, cited above*,* Slatter J. of the Alberta Court of Queen’s Bench, was addressing the issue of the legal status of aboriginal communities. Similar to *Anishinaabeg,* he held that bands can sue with respect to aboriginal rights. At para. 166, he stated:

> “There remains some doubt as to whether a Band has the capacity to sue in its own name: *Oregon Jack Creek Indian*

> *Band* v. *Canadian National Railway* (1989), 56 D.L.R. (4th) 404 [34 B.C.L.R. (2d) 344, [1990] 2 C.N.L.R. 85] (B.C.C.A.) at pp. 409-10 [D.L.R.; pp. 88-89 C.N.L.R.]; *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, [2001] 4 F.C. 451 [[2001] 3 C.N.L.R. 72] (C.A.) at para. 15; *Sawridge Band* v. Canada, [2003] 3 C.N.L.R. 358 (F.C.T.D.) at paras. 9-10. Given that uncertainty, it is customary for the Chief and Councillors to sue in a representative capacity on behalf of a Band. They usually plead that they are "representatives of all of the members of the Band", advancing a representative or class proceeding. This is something of a misnomer, as the claim is really "on behalf of the Band" not its individual members. The law has now evolved to the point where it is increasingly recognized that a Band does have the capacity to sue and be sued, at least with respect to Aboriginal rights: *Wewaykum Indian Band* v. *Wewayakai Indian Band*, [1991] 3 F.C. 420 [[1992] 2 C.N.L.R. 177]; *Montana Band* v. *Canada*, [1998] 2 F.C. 4. If a band has a sufficient existence to sign a treaty, why can it not sue to enforce the treaty? Nevertheless, old habits die hard, and it is still the custom to describe the Band in litigation by naming the Chief and Councillors, and indicating that they sue on behalf of the Band and all of its members; *Montana Band* v. *Canada*, supra. This is something of an anachronism, and in my view the better practice is now just to name the Band as the plaintiff. It should now be accepted that Bands have a sufficient statutory existence to sue to protect the rights that are clearly Band rights. In this case both parties proceeded on the assumption that a band cannot sue in its own name, and I will do likewise, although in this case the result would be the same either way.”

[23] I repeat, Canada's position in this application is that the representative plaintiff should be an individual member of the Kaska Nation, because that person would have the same interests and rights as all of the other individual members of the Kaska Nation who are being represented. Further, Canada submits that the interests and rights of the individual members are different from those of the RRDC as an Indian band. In other words, as I understand the argument, there cannot be differences between the category or class of parties being represented and the category or class of the party seeking to act

as the representative. A similar argument was raised in *Western Canadian Shopping Centers Inc.* There, the defendants argued that the proposed suit in that case was not amenable to prosecution as a class action because there were multiple classes of plaintiffs against whom the defendants would raise multiple defenses. However, McLachlin C.J. summarily dismissed that argument and stated, at para. 54-56:

> "[54] The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times, in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.
>
> [55] The defendants' contention that the investors should not be permitted to sue as a class because each must show actual reliance to establish breach of fiduciary duty also fails to convince. In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined. The fiduciary duty issues raised here are common to all the investors. A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.
>
> [56] The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class." (My emphasis)

[24] Turning to the authorities relied upon by RRDC, in *Soldier,* cited above*,* the Manitoba Court of Appeal seems to suggest, as recently as February 6, 2009, that in claims involving "collective" rights, it is only where the collective entity does not itself have the legal capacity to sue its own name, that the claim must be asserted by some individual members suing in a representative capacity. Rather, the Court would appear to have concluded that if the "collective entity" has the legal capacity to sue its own name, then it may do so. In particular, the court stated at para. 47:

> "It is true that aboriginal claims usually deal with collective rights. They generally assert rights that belong to the Band as a whole, and not to any individual member. See *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655, 365 A.R. 1, [2004] 4 C.N.L.R. 110 at para. 181 (*sub nom. Lameman et al. v. Canada (Attorney General) et al.*), var'd 2006 ABCA 392, 404 A.R. 349, aff'd 2008 SCC 14, [2008] 1 S.C.R. 372. Where the collective entity does not itself have the legal capacity to sue in its own name, then collective claims must be asserted by some individual members suing in a representative capacity. As was explained in *Papaschase*, these collective rights do not vest in any particular individual, they cannot be sold or transferred, and they do not devolve on descendants under wills or by intestacy (at para. 173). They are owned by and enjoyed by the community as it exists from time to time."

[25] RRDC relies on *Soldier* and *Queackar-Komoyue Nation,* cited above*,* in support of the proposition that individuals purporting to sue on behalf of the class must have "standing" in the same manner that would be required if they were suing in an individual action. Accordingly, says RRDC, an individual would not be a proper plaintiff in the circumstances of the case at bar, because an individual would not have standing to commence an individual action to seek much of the relief sought in this case. Perhaps I misunderstood this submission, but with respect, I disagree. In the case at bar, as in

almost all of the authorities which counsel have submitted, the rights being pursued are "collective" rights. Therefore, it makes no sense to me to say that an individual would not have standing to commence an "individual action" claiming "collective rights." To the contrary, the case law is replete with examples where individuals, acting as representatives of larger communal entities, have claimed collective rights on behalf of those entities. That has particularly been the case, as noted in *Soldier*, where the "collective entity" did not itself have the legal capacity to sue its own name.

[26] In *Queackar-Komoyue*, Davies J., of the British Columbia Supreme Court, held that "self-appointed" aboriginal persons should not be allowed standing as individuals to assert collective aboriginal rights on behalf of an aboriginal community: see para. 35. However, providing such individuals are "duly authorized representatives" (see para. 34 and the reference to *Oregon Jack Creek*), and otherwise meet the four criteria in *Western Canadian Shopping Centers Inc.*, then they should be allowed to pursue representative actions. Therefore, I fail to see how this case assists RRDC in its argument about standing.

[27] As I noted above, another argument raised by RRDC's counsel, somewhat surprisingly, is that the within action does not involve aboriginal rights or aboriginal title. Presumably, although it was not made entirely clear to me, the rationale for that proposition is that it is yet another reason why RRDC, as an Indian band, should be allowed to act as the sole representative plaintiff for the other members of the Kaska Nation, i.e. an individual representative plaintiff is not required, as Canada suggests, because aboriginal rights or title are not at issue. Regardless of the purpose of the submission, the explanation for it is that the rights sought by the Kaska Nation in this

action are those under the 1870 Order, which are not “existing aboriginal... rights” under s. 35 of the *Constitution Act, 1982.* RRDC’s counsel says that s. 35 aboriginal rights are clearly “pre-contact”, as explained by the Supreme Court of Canada in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 152. Rather, the rights under the 1870 Order are “post-contact.”

[28] Once again, I may have misunderstood this submission, but it seems at odds with how RRDC has pleaded its Further Amended Writ of Summons, at paras. 22(a) and 43(a). In general terms, RRDC has pleaded that the 1870 Order gives rise to constitutional and fiduciary duties owed by Canada to the Kaska Nation, which include “the duty to protect the aboriginal title, rights and interests of the Kaska, including the plaintiff and its members, in and to the lands” at issue, and that Canada has breached that duty. I also fail to understand how RRDC can claim for compensation for lands which it says have been improperly alienated from within the lands at issue, unless such a claim is somehow based upon an underlying assertion of aboriginal title to those lands, which existed prior to the 1870 Order. However, I wish to make it clear that my comments about this issue are not central to my reasoning on the application before me and are therefore *obiter dicta*. Whether the rights at issue are s. 35 aboriginal rights or not, both sides agree that they are “collective rights” respecting a community of aboriginal people, i.e. the members of the Kaska Nation.

[29] The final argument raised by RRDC’s counsel on this motion arises from the severing of liability from damages ordered by consent on October 24, 2008. As I understand it, RRDC submits that Canada’s position, that one of the representative plaintiffs must have the same interests and rights as those he or she claims to represent,

goes mainly to the issue of damages. In particular, Canada questions whether an Indian band, such as RRDC, can act in the capacity of a trustee in holding any settlement funds or damage awards for the benefit of the individual members of the Kaska Nation. RRDC's initial response to this question is that it is an internal matter for the Kaska Nation to sort out, and is therefore none of Canada's concern. In that regard, RRDC relies upon *Laichkwiltach Enterprises Ltd*. v. *Pacific Faith (The)*, 2008 BCSC 282, at para. 28. Furthermore, RRDC says the concern is premature at this stage, since damages and compensation will not be dealt with until liability is determined. Finally, RRDC's counsel points to *Western Canadian Shopping Centers Inc.*, at paras. 53-56 (quoted above), as authority for the proposition that if problems emerge with the status of the representative plaintiff during the course of litigation, then this Court can deal with those problems as they arise. Canada's reply to this last point is that it may not be appropriate to amend style of cause after liability has been determined in order to add an individual representative plaintiff. Rather, the proper representative plaintiff should be determined from the outset.

[30] I prefer RRDC's reasoning here. While I appreciate Canada's concern that, in the event RRDC is successful in this action, it may have certain fiduciary responsibilities, with respect to the distribution or management of any damage awards, to the beneficiary members of the Kaska Nation, that is not a concern that needs to be addressed at this time. Indeed, even if an individual representative plaintiff were to be named now in the style of cause, along with RRDC, should that individual be a Chief, as is commonly the case, and should that person be replaced in office by someone else following a band

election during the course of this litigation, then the style of cause would have to be amended to reflect that change in any event.

CONCLUSION

[31] I find RRDC is a juridical person with the legal capacity to commence and prosecute the within lawsuit. Further, as one of the constituent bands of the Kaska Nation, and indeed the band most closely connected with the lands at issue, RRDC is an appropriate plaintiff to act on behalf of and as representative for the members of the Kaska Nation. It is unnecessary in these circumstances to require RRDC to name a further individual Kaska member as a co-plaintiff in the style of cause. Accordingly, Canada's application for an order amending the style of cause to add the name of appropriate individual representative plaintiff is dismissed. RRDC shall have its costs in the cause.

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Gower J.