COURT OF APPEAL FOR YUKON

Citation: *Ross River Dena Council* v. *Canada (Attorney General)*
2012 YKCA 10

Date: 20121106
Docket: CA11-YU693

Between:

ROSS RIVER DENA COUNCIL

Appellant

And

ATTORNEY GENERAL OF CANADA

Respondent

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hinkson
The Honourable Mr. Justice Harris

On appeal from: Supreme Court of the Yukon Territory, January 31, 2012
(*Ross River Dena Council v. Attorney General of Canada*, 2012 YKSC 4,
Whitehorse Registry No. 05-A0043, 06-A0092)

Oral Ruling

Counsel for the Appellant:	T.R. Berger QC S.L. Walsh
Counsel for the Respondent:	S.M. Duncan J. Gorton
Place and Date of Hearing:	Whitehorse, Yukon Territory November 6, 2012
Place and Date of Ruling:	Whitehorse, Yukon Territory November 6, 2012

[1] **GROBERMAN J.A.**: This is an appeal from a judgment of the Yukon Supreme Court which purported to answer two questions described as "threshold questions" in the litigation. The questions were as follows:

> 1. Were the terms and conditions referred to in the *Rupert's Land and North-western Territory Order* of June 23, 1870 concerning "the claims of the Indian tribes to compensation for lands required for purposes of settlement" intended to have legal force and effect and give rise to obligations capable of being enforced by this Court?
>
> 2. If the terms and conditions referred to in the *Rupert's Land and North-western Territory Order* of June 23, 1870 concerning "the claims of the Indian tribes to compensation for lands required for purposes of settlement", gave rise to obligations capable of being enforced by this Court, are those enforceable obligations of a fiduciary nature?

The Court answered those two questions in the negative. An appeal is taken only from the answer to the first question.

[2] At the outset of proceedings today, we inquired of counsel as to the authority of the Supreme Court to proceed as it did, that is, by hiving off particular questions and answering them. While neither party has pointed to any rule of the court that allows it to formulate questions of this sort, Mr. Berger says there is precedent for this manner of proceeding.

[3] It has quickly become apparent that answering the question as it was put to the trial judge does not advance the litigation. The question that must ultimately be answered in the litigation is whether the provisions of the *Rupert's Land and North-western Territory Order*, 1870 are enforceable in the Yukon Supreme Court, and, in particular, whether the following provision is enforceable at the behest of the plaintiff:

> [U]pon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for the purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.

The parties are divided on whether the provision requires the Government of Canada to negotiate compensation with the Ross River Dena Council.

[4] The question of whether any such obligation could have been enforced in the courts in 1870 is of limited importance, and will not necessarily be decisive.

[5] The trial judge's reasons are directed primarily at answering the question of whether the provision in question was enforceable in 1870. He also strayed into consideration of whether the provision might be enforceable today, though the parties differ in their recollection of the extent to which that issue was argued before him. Certainly, some crucial aspects of the issue - such as the extent to which the honour of the Crown might impinge on the obligations - were not fully developed.

[6] The parties suggest this Court approach the appeal by changing the question under consideration, so that it would become:

> Do the terms and conditions referred to in the *Rupert's Land and North-western Territory Order* of June 23, 1870 concerning "the claims of the Indian tribes to compensation for lands required for purposes of settlement" have legal force and effect and give rise to obligations capable of being enforced by the Supreme Court of Yukon?

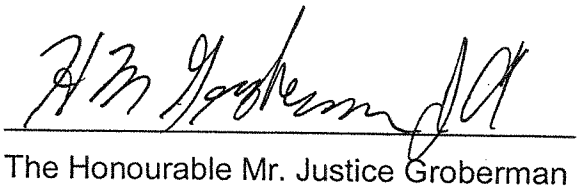
[7] We are not prepared to approach the appeal on that footing. The Crown, while agreeing to revised wording, contends that the appellant should not be allowed to address all aspects of the question, as it did not address them below. It is not apparent that the trial judge heard all of the arguments. Certainly, we do not have the benefit of a complete analysis by him.

[8] Further, we are not, at present, convinced that in the absence of a statutory procedure for having the court respond to questions, it is appropriate to slice up the litigation into a series of propositions put to the court for response. The court is wary of dividing up cases into a series of issues and it is even more concerned about proceeding by dividing up individual issues into a series of questions.

[9] It is apparent to us, in the circumstances of this case, that the order of the trial judge cannot stand. It does not deal with anything that can properly be called a threshold issue. We are, however, concerned about the procedures adopted by the court below, and before determining precisely what order we will make, we wish to hear the parties on the propriety of the procedure adopted below, i.e., the putting of specific so-called threshold questions, to the court.

[10] **HINKSON J.A.:** I agree

[11] **HARRIS J.A.:** I agree



The Honourable Mr. Justice Groberman