COURT OF APPEAL FOR YUKON

Citation: *Ross River Dena Council v. Canada (Attorney General)*, 2013 YKCA 6

Date: 20130509
Docket: 11-YU693

Between:

Ross River Dena Council

Appellant
(Plaintiff)

And

Attorney General of Canada

Respondent
(Defendant)

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

On appeal from: Supreme Court of Yukon, January, 2012
(*Ross River Dena Council v. Attorney General of Canada*, 2012 YKSC 4,
Whitehorse Nos. 05-A0043, 06-A0092

Counsel for the Appellant:	T.R. Berger, Q.C. S.L. Walsh
Counsel for the Respondent:	S.M.Duncan J. Gorton
Place and Date of Hearing:	Whitehorse, Yukon November 7, 2012
Place and Date of Judgment:	Vancouver, British Columbia May 9, 2013

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Mr. Justice Hinkson
The Honourable Mr. Justice Harris

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] This appeal arises out of a judgment of the Yukon Supreme Court in which it purported to answer a "threshold question" in the litigation and to find that claims based on certain provisions of the *Rupert's Land and North-Western Territory Order* (reprinted in R.S.C. 1985, App. II, No. 9) (the "1870 Order") are not justiciable.

[2] When the appeal came on for hearing on November 6, 2012, we expressed concern over the manner in which the Supreme Court proceeded. We were of the view that the question that the court had set for itself did not materially advance the litigation. We also considered that the question was too closely connected to other issues in the litigation to permit it to be decided in isolation. In a ruling indexed as 2012 YKCA 10, we indicated our view that the order appealed from could not stand. In order to allow the Court to provide guidance as to the appropriate course of the litigation, however, we asked counsel for further submissions before pronouncing judgment on the appeal.

The Underlying Actions

[3] The current litigation encompasses two actions commenced by the plaintiff band against the Attorney General of Canada. The actions were commenced in 2005 and 2006. The most recent versions of the statement of claim were filed on September 30, 2011.

[4] The first action is, in essence, a land claim. The plaintiff alleges that the Crown owes constitutional and fiduciary duties to the Kaska tribe of Indians in respect of lands comprising slightly more than 7% of Yukon. It contends that the Crown has failed to abide by those duties, and claims a number of declarations, as well as injunctive relief and compensation. The constitutional and fiduciary duties are said to arise out of the historic relationship between the Crown and the Aboriginal peoples of Canada, but also out of provisions in the 1870 Order.

[5] The second action seeks declarations and damages arising out of the alleged failure of the Crown to negotiate with due diligence and in good faith to settle the

plaintiff's claims over lands comprising approximately 23% of Yukon (of which the lands claimed in the first action form a part). In the second action, the plaintiff alleges that a fiduciary relationship exists between the Crown and the plaintiff, and that the Crown has constitutional duties to the plaintiff. These duties are alleged to arise from a number of sources including the 1870 Order.

[6] The two actions were case managed together, with the intent that they be tried at the same time. On June 6, 2011, the case management judge granted a consent order directing that the following question be tried during the days that had been set aside for the trial of the actions in November 2011:

> 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?

[7] By the time the hearing took place, a second question, which asked whether any such obligations were fiduciary in nature, had been added. As no appeal is taken in respect of the second question, no more need be said about it.

The *Rupert's Land and North-Western Territory Order*

[8] When Canada was formed in 1867, it included only a small proportion of the land mass that currently makes up the country. Section 146 of the *Constitution Act, 1867* provided for its expansion, both through the entry into confederation of the colonies of Newfoundland, Prince Edward Island and British Columbia, and through the incorporation into the Dominion of Canada of Rupert's Land and the North-western Territory.

[9] The land which now constitutes Yukon was part of the North-western Territory. Section 146 contemplated its incorporation into Canada by imperial Order-in-Council following a request by the Canadian Parliament:

> 146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on … Address from the Houses of the Parliament of Canada to admit … the North-western Territory … into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve … and the Provisions of

> any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

[10] In December 1867, during the first session of the Canadian Parliament, the Senate and House of Commons agreed to send a joint address to the Queen-in-Council, seeking to have Rupert's Land and the North-western Territory made a part of Canada. Among the terms and conditions included in the address were the following:

> That in the event of your Majesty's Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company, or individual within the same shall be respected, and placed under the protection of Courts of competent jurisdiction.
>
> And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for 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.

[11] The existing rights of the Hudson's Bay Company, particularly in Rupert's Land, complicated the matter. Eventually, however, the situation was resolved and the government of the United Kingdom approved the required Order-in-Council in 1870. The Order expressly incorporated the terms of the December 1867 Parliamentary address:

> It is hereby ordered and declared by Her Majesty, by and with the advice of the Privy Council, … that … the … North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the [December 1867] Address …

[12] The 1870 Order is, pursuant to s. 52(2)(b) and the Schedule to the *Constitution Act, 1982*, part of the Constitution of Canada. The address of the Canadian Parliament to the Queen-in-Council is annexed to the Order as Schedule A.

[13] In the actions brought by the appellant, it asserts that the address of the Canadian Parliament to the Queen-in-Council, as incorporated in the 1870 Order, placed affirmative duties on the Crown in right of Canada to negotiate with the Kaska

tribe of Indians and to compensate the tribe before embarking on settlement in its traditional territory.

The Applicable Rules and the Exercise of Discretion

[14] Although the consent order setting out the "threshold" questions was silent as to the authority under which it was made, the parties agree that it was under 41(18) of the Rules of Court:

> **Trial of one question before others**
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> 41(18) The court may order that one or more questions of fact or law arising in an action be tried and determined before the others, and upon the determination a party may move for judgment, and the court, if satisfied that the determination is conclusive of all or some of the issues between the parties, may grant judgment.

[15] Rule 41(18) came into force in 2008. It is, however, identical to its predecessor, former British Columbia Rule 39(29). The purpose of the Rule is to allow proceedings to be tried efficiently. Where a particular issue of fact or law can be determined independently of other issues, its early resolution may obviate the need for protracted proceedings, either because it is decisive of the litigation, or because it encourages the parties to settle the remaining issues.

[16] An order under Rule 41(18) is discretionary. Unless the judge has erred in principle or exercised discretion on an improper basis, this Court will not interfere with such an order: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2008 BCCA 107.

[17] *Okanagan Indian Band* involved unusual circumstances, in that severance of issues was ordered following a legal concession on the part of the Crown. The Okanagan Band considered that severance of issues would deprive it of the benefit of a funding arrangement that had previously been approved by the courts. The case turned primarily on the significance of the concession to the proceedings, and the judgments on the appeal do not deal comprehensively with the considerations to be applied in determining whether severance is appropriate.

[18] In *Nguyen v. Bains*, 2001 BCSC 1130, Martinson J. summarized some of the jurisprudence under former British Columbia Rule 39(29):

> [11] Courts have considered the question of when some issues should be tried before others. These are some of the points that have been made:
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> a. A judge's discretion to sever an issue is probably not restricted to extraordinary or exceptional cases. However, it should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense.
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> b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.
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> c. Severance is most appropriate when the trial is by judge alone.
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> d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.
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> e. A party's financial circumstances are one factor to consider in the exercise of the discretion.
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> f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.

[19] Other cases suggest that severance of issues under former Rule 39(29) might be confined to "extraordinary or exceptional cases": see, for example, *Hynes v. Westfair Foods Ltd.*, 2008 BCSC 637 at para. 33.

[20] Apart from *Okanagan Indian Band*, there has been limited appellate consideration of Rule 41(18) or its predecessor, but the issue of whether an issue is suitable for separate determination has been considered on a number of occasions in respect of Rule 19 (Summary Trial) and its predecessor, former British Columbia Rule 18A. In my view, the jurisprudence that has developed in respect of the severance of issues for summary trial is generally applicable to the severance of issues under Rule 41(18).

[21] In general, the jurisprudence suggests a cautious approach to the severance of issues. Issues should only be severed where it appears that efficiencies will result

from having one issue determined in advance of others. Cases in which severance of an issue is appropriate are the exception rather than the rule.

[22] In order for an issue to be suitable for severance, it must be capable of being decided independently of other issues. An issue that is inextricably intertwined with others will not be suitable for separate determination (*Prevost v. Vetter*, 2002 BCCA 202).

[23] The mere fact that an issue can be determined independently of others, however, will not be sufficient to justify its severance. Courts must be conscious of their role in the orderly development of the law, and should not precipitously enter upon consideration of difficult legal issues where the litigation might be resolved on more mundane principles (*Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138).

[24] The 2008 Rules place increased emphasis on proportionality and efficiency in civil procedure, and use case management as a tool to promote those objectives. To some extent, this new emphasis may affect the way that the Supreme Court must approach the question of whether issues are to be severed. Rule 1 includes the following provisions:

> **Object of rules**
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> 1(6) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
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> (a) the dollar amount involved in the proceeding,
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> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
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> (c) the complexity of the proceeding.
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> …
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> **Case Management**
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> (8) The court must further the object of these rules by actively managing proceedings, and, for that purpose, may do any or all of the following:
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> …

> (b) identify the issues at an early stage;
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> …
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> (d) decide the order in which issues are to be resolved;
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> …
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> (i) deal with as many aspects of the proceeding on the same occasion as is reasonably practicable;
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> …
>
> (k) give directions to ensure that the proceeding proceeds quickly and efficiently; and
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> (l) make any other orders and give any other directions the court considers appropriate.

[25] There are cases in which it will be efficient to sever off issues for early determination. Specific defences may lend themselves to early and separate determination – for example, the question of whether a limitation period has run, or the question of whether a matter is *res judicata*. There may also be cases in which issues of liability and quantum of damages can be severed from one another, though I do not suggest that such severance will often be appropriate.

[26] Rule 1(8) mandates active case management, and encourages the case management judge to consider whether it is appropriate to sever issues for early determination. In my view, however, it does not lessen the need for the court to proceed cautiously, and to refuse severance where the issue under consideration is too closely connected with other issues to be decided independently, or where severance will not further the objects of the rules.

[27] I am not persuaded that the severing of the issue of the justiciability of claims under the 1870 Order served the interests of justice or the objects of the Rules in this case. Had the judge applied the principles on which severance must be considered, he would not have ordered the issue to be tried as a “threshold” issue.

The Trial Judge’s Analysis

[28] The trial judge embarked on an analysis of whether, when the 1870 Order was made, it was contemplated that courts would enforce the undertaking of the Crown in right of Canada to compensate First Nations for lands required for

settlement. In doing so, he placed considerable reliance on an a report prepared by Dr. Paul G. McHugh, a legal historian who was qualified to provide an expert opinion "in the areas of the historical, political, legal and social context surrounding the creation of the *1870 Order*, and the historical Crown-Aboriginal relations during that time".

[29] The judge concluded that when the Order was made, it would not have been within the contemplation of the Canadian Parliament or the government of the United Kingdom that the obligation to compensate First Nations would be a matter that could be enforced in a court.

[30] The question that the court had set for itself was:

> 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?

[31] While the question asked whether the terms were "intended to have legal force and effect" and "give rise to obligations capable of being enforced by this Court", the court equated those two concepts. Having found that it was not intended that any obligations would be enforceable in a court, the judge assumed that the obligations were not intended to have legal force and effect. He therefore answered the question in the negative.

Errors in the Procedure Adopted by the Court

[32] In my view, the court should not have proceeded in the manner in which it did. The issue that it set for itself – that of the original Parliamentary intentions underlying provisions of the 1870 Order – was not an issue that was independent of other issues in the litigation. Further, the question that was put was not decisive of any issue in the litigation, and so could not meaningfully advance the litigation.

[33] It was not possible to treat the interpretation of the 1870 Order as an independent issue. The Order can only be interpreted in light of the pre-existing

relationship of the Crown and First Nations, and in light of the philosophical and jurisprudential precepts underlying Aboriginal Title and Aboriginal Rights.

[34] As I have indicated, a court should not sever off an issue in litigation where that issue is incapable of being analysed independently of other issues. The reasons for this are obvious. Either the court will have to hear and consider all relevant evidence before deciding the first issue (in which case there will be no meaningful advantage gained by severing off the issue) or it will have to decide an important issue on incomplete evidence.

[35] In the case before us, it is evident that the court faced both of these difficulties. The court was not able to treat the interpretation of the 1870 Order as a simple matter of interpreting the language of the provision. Rather, it embarked on a detailed examination of the antecedent history and contemporary situation at the time the Order was made. It also considered, to some degree, the broader history of British colonization of North America. All of that evidence impinges on fundamental issues in the litigation extending far beyond the interpretation of the 1870 Order.

[36] The court also found itself determining issues on incomplete evidence, or with incomplete argument. The most serious flaw, in this regard, was the court's treatment of the honour of the Crown. While the court recognized the importance of the concept in interpreting the 1870 Order, it found itself unable to effectively deal with the issue:

> [144] …[T]he principle of the honour of the Crown is now so firmly entrenched in Aboriginal law that it presumably should be considered in every dispute between the Crown and Aboriginal peoples, and enforced where appropriate.
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> …
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> [147] Precisely how the honour of the Crown impacts upon the analysis of whether the relevant provision was intended to be and is currently justiciable is not entirely clear.
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> …
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> [150] In 1870, the notion of Crown prerogative and executive grace, which Dr. McHugh said imbued the nature of Crown-Aboriginal relations at that time, also involved the honour of the Crown. Dr. McHugh opined, and I accept, that the honour of the Crown would not have been considered a

> justiciable principle at that time and in the specific context of the *1870 Order.* Today, the principle of the honour of the Crown is clearly justiciable. Is the contemporary principle capable of breathing life into the relevant provision in such a way as to render it currently justiciable and enforceable in this Court? Perhaps, but the argument, if there is one, was not pursued by RRDC.

[37] The difficulty is that the effect of the honour of the Crown on the interpretation of the 1870 Order, while critically important to the litigation, was outside the scope of the question that the court set for itself. The court had artificially limited its role in interpreting the 1870 Order by confining itself to consideration of parliamentary intent at the time the Order was made.

[38] The same difficulty is evident in the court's tentative approach to progressive interpretation of constitutional documents. At paragraph 139, the trial judge said:

> [139] Having generally accepted Dr. McHugh's expert opinion evidence that the relevant provision was not intended to have justiciable legal force and effect "at that time", I am left struggling to discern any reason how or why the relevant provision could have subsequently acquired legal force and effect in order to be enforceable in this Court.
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> [Underlining in original.]

[39] Again, the judge recognized that the question that he was answering – that of the contemporary intentions at the time the 1870 Order was made – is only of importance insofar as it sheds light on how the Order should be interpreted today. The judge felt compelled to go beyond the severed issue and to stray into the more general questions raised in the litigation.

[40] This points out a fundamental flaw in the procedure adopted. The trial judge accepted the question drafted by the parties on the basis that answering it would dispose of an important issue in the litigation. He appears to have assumed that governmental intentions in 1867 and 1870 determine the Crown's current obligations pursuant to the 1870 Order. That assumption is not justified.

[41] Our legal system has consistently rejected "originalism" – the idea that the intentions of the drafters of constitutional documents forever govern their

interpretation – as a constitutional precept (*Edwards v. Canada (Attorney General)*, [1930] A.C. 124).

[42] It is particularly dangerous to assume that a matter that was not intended to be the subject of adjudication by the courts in 1870 remains outside the supervision of the courts today. The role of the courts in constitutional adjudication was completely unascertained at that time. Further, the Crown enjoyed near-complete immunity from judicial oversight in its fulfillment of obligations. Indeed, more than 100 years after the Order, the Supreme Court of Canada considered that it was precluded from ruling on an Aboriginal Land Claim without a fiat having been obtained from the Crown (*Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313).

[43] While I do not doubt that the intentions of the Canadian Parliament and the British government in 1867 and 1879 are of some moment in the interpretation of the 1870 Order, those intentions cannot be isolated from other considerations in assessing its modern effect.

[44] The litigation before us is complex and important. It goes to the heart of the constitutional jurisdiction and duties of the Government of Yukon and of the constitutional rights of First Nations. It may affect title to and rights over vast tracts of land in Yukon. In the circumstances, it was incumbent on the court to determine the issues after full consideration of all of the principles and arguments that impinged on them. It was not appropriate to hive off the issue of the historical intentions of Parliament and of the British government leading up to the 1870 Order.

[45] The Order of the Supreme Court in answering the question that is the subject of this appeal should be quashed. The litigation should be returned to the Yukon Supreme Court with a direction that the question that was posed was not appropriately severed from other issues in the litigation.

The Expert Report

[46] The appellant has, on this appeal, strongly urged the Court to provide an opinion as to whether the McHugh report was properly admissible before the trial court. In light of our decision on the procedural issue, it is unnecessary for us to do so. Further, because the issues before the trial court in future proceedings in this action will differ, in some respects, from those that it addressed in the judgment appealed from, there is no utility in providing an opinion of the sort sought by the appellant. In the circumstances, I refrain from providing any opinion on the matter.

Disposition

[47] I would allow the appeal, with each party to bear its own costs, and remit the litigation to the Yukon Supreme Court. The question that the court purported to answer was not appropriately severed from other issues in the litigation. In the result, neither the answer provided by the court nor its analysis in reaching that answer should be considered binding in its further proceedings.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Mr. Justice Hinkson"

I agree:

"The Honourable Mr. Justice Harris"