COURT OF APPEAL OF YUKON

Citation: *Ross River Dena Council v. Canada (Attorney General)*, 2015 YKCA 16

Date: 20150916
Docket: 15-YU760

Between:

Ross River Dena Council

Appellant
(Plaintiff)

And

Attorney General of Canada

Respondent
(Defendant)

Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson
The Honourable Mr. Justice Savage

On appeal from: an order of the Supreme Court of Yukon dated dated July 14, 2015 (*Ross River Dena Council v. The Attorney General of Canada*, 2015 YKSC 33, Whitehorse Registry 05-A0043)

Oral Reasons for Judgment

Counsel for the Appellant:	S.L. Walsh (via teleconference)
Counsel for the Respondent:	S.M. Duncan and G. Chabot (via teleconference
Place and Date of Hearing:	Vancouver, British Columbia September 16, 2015
Place and Date of Judgment:	Vancouver, British Columbia September 16, 2015

Summary:

The respondent (applicant in this case) moves to quash or dismiss an appeal of an order postponing a trial judge's decision until a related action is heard. The notice of appeal includes a number of other grounds which essentially seek substantive relief for all of the claims made in the underlying cause of action. The appellant argues that the Court of Appeal has jurisdiction to decide the case. The respondent argues that the appeal is premature. Held: Application allowed, in part. An appeal is taken from the order, not the reasons expressed by the court granting the order. The Court of Appeal has no jurisdiction to decide matters of original jurisdiction unless they are necessary or incidental to the hearing and determination of an appeal. Except for the trial judge's order, the appellant's other grounds do not constitute a proper basis for an appeal.

[1] **BENNETT J.A.**: Canada brings an application to quash or dismiss an appeal of a ruling by Mr. Justice Gower (2015 YKSC 33) brought by the Ross River Dena Council ("Ross River").

Background

[2] The Ross River Dena Council commenced two actions in the Yukon Supreme Court. The first, commenced in 2005, and referred to as the "'05 Action", is essentially, a land claim. See *Ross River Dena Council v. Canada (Attorney General)*, 2013 YKCA 6 at para. 4. The second action, referred to as the "'06 Action", seeks declarations and damages arising from the alleged failure of the Crown to negotiate with due diligence and in good faith to settle the claim over lands in the Yukon (para. 5). The two actions were ordered to be tried together.

[3] In November 2011, the trial judge considered two "threshold" questions relating to the actions and answered both questions in the negative. 2012 YKSC 4. There is no need to delve into that decision for the purposes of this application.

[4] This Court overturned that decision on the basis that the two issues should not have been carved out of the litigation as a whole. 2013 YKCA 6, noted above.

[5] The matter was set for trial. Ross River decided that it did not want the '06 Action heard with the '05 Action, and the trial proceeded on the basis that only the '05 Action would be tried, with the '06 action in abeyance. After hearing all of the evidence and submissions, Canada asked the trial judge to "suspend" the decision

until the '06 Action was tried. The trial judge, in what he referred to as a "procedural ruling", concluded that he should suspend the decision. He said, at para. 44:

> [44] In conclusion, I agree with Canada that, in these particular circumstances, it is appropriate to suspend my decision on the modern-day interpretation of the *1870 Order* until the issues in the '06 Action are tried. RRDC's asserted right to obtain a treaty before their lands were opened up for settlement is not absolute. Rather, it is subject to infringement by Canada, providing the infringement can be justified. For the sake of this argument, I will assume that the *1870 Order* gives rise to a binding constitutional obligation on Canada to consider and settle RRDC's claims before opening up their lands for settlement. I will further assume that there was an historic breach of that obligation by Canada by opening up the lands before commencing negotiations in 1973. However, if Canada can establish that it conducted itself in accordance with the honour of the Crown throughout the modern era negotiations, and was unable to obtain a treaty with RRDC notwithstanding, then that finding may have an ameliorating effect on any historic breach. Thus, the issue of whether the honour of the Crown was upheld during the negotiations is inextricably intertwined with whether Canada can be held liable for any historic breach. Accordingly, Canada should be given a full opportunity to establish that it interpreted the relevant provision in a purposive manner and diligently pursued fulfillment of the purposes of the obligation arising from it, to use the language from *Manitoba Metis*, cited above.

[6] The effect of this order was to adjourn the trial, join the '06 Action (which was the original trial plan), and hear the '06 Action in conjunction with the '05 Action before rendering a decision.

[7] Ross River filed a notice of appeal, appealing the decision to suspend the decision pending the trial of the '06 Action. The notice of appeal, however, asks for the following relief:

(a) an order that the appeal be allowed and the order of the Honourable Mr. Justice Gower pronounced July 14th, 2015, be set aside;

(b) an order declaring that the commitment made by Canada in 1867 and accepted by Her Majesty in the *Rupert's Land and North-western Territory Order* of June 23, 1870, ("the *1870 Order")* to consider and settle the claims of the Indian tribes of the North-western Territory, including the claims of the plaintiff and other Kaska, "in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines"

   i) is still in force today;

   ii) is a part of the Constitution of Canada; and

   iii) is binding on Canada; and,

(c) a further order declaring

i) that this commitment engages the honour of the Crown and that the honour of Crown has not been upheld by the defendant in respect of this commitment;

ii) that the claims of the plaintiff and other Kaska for compensation for lands comprising the Territory that have been alienated by the defendant by way of grants, leases, licences or permits must be settled before any further such dispositions may be made by the defendant to third parties;

iii) that any further dispositions, by way of grants, leases, licenses, or permits, made by the defendant in respect of land within the Territory, are invalid unless preceded by a settlement of the plaintiffs and other Kaska's claim for compensation in respect of such further dispositions;

iv) that, until such time as the plaintiffs and other Kaska's claims to the Territory have been considered and settled in conformity with the terms of the *1870 Order,* the lands which comprise the Territory are "Lands reserved for the Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867*',

v) that, until such time as the plaintiffs and other Kaska's claims to the Territory have been considered and settled in conformity with the terms of the *1870 Order,* the lands which comprise the Territory are not available to the defendant as a source of revenue;

vi) that s. 45 of the Yukon Act, S.C. 2002, c.7 is inconsistent with the rights of the plaintiff and other Kaska under the 1870 Order and is, therefore, of no force and effect in respect of the Territory;

vii) that s. 19(1) of the Yukon Act, S.C. 2002, c.7 is inconsistent with the rights of the plaintiff and other Kaska under the 1870 Order and is, therefore, of no force and effect in respect of the Territory; and,

viii) that the defendant is in breach of its constitutional and fiduciary duties to the plaintiff and other Kaska in respect of the Territory;

(d) an injunction restraining the defendant from making any further alienations, or Crown grants, or leases, licenses or permits relating to land and resources in the Territory until a settlement of the plaintiff's and other Kaska's claims for compensation has been made; and,

(e) an order granting the appellant (plaintiff) its cost throughout.

Position of the parties

[8] As can be seen, Ross River seeks not only to have the decision to suspend the decision on the '05 Action set aside, it also asks for substantive relief for all of the claims made in the cause of action, which Gower J. has heard all of the evidence, but not rendered a decision.

[9] Canada seeks to quash or dismiss this appeal, except on ground (a).

[10] Ross River relies, it appears, on ss. 8 and 9 of the British Columbia *Court of Appeal Act*, R.S.B.C. 1960, c. 82, as incorporated by s. 1 of the Yukon *Court of Appeal Act*, R.S.Y. 2002, c. 47.

[11] This provision's present day equivalent is s. 9(8) of the British Columbia *Court of Appeal Act*, R.S.B.C. 1996, c. 77 which counsel applies:

> **Powers of Court of Appeal**
>
> …
>
> 9(8) For all purposes of and incidental to the hearing and determination of any matter and the amendment, execution and enforcement of any order and for the purpose of every other authority expressly or impliedly given to the Court of Appeal,
>
> (a) the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court, …

[12] Ross River argues that it has brought its appeal on time, in the appropriate forum. It argues that this Court has the jurisdiction, based on the provisions noted above, to essentially decide the case. It is Ross River's position that, despite approximately 16 days of trial and submissions heard by Gower J., and the fact Gower J. did not rule on the case other than to suspend his ruling, this Court is in as good a position to decide all of the issues and should do so. It submits that the case went forward largely on an agreed statement of facts, with only two experts testifying, and therefore there are no significant questions of fact to be determined, but solely questions of law.

Discussion

[13] It is a fundamental principle of appellate jurisprudence that an appeal is taken from the order, and not the reasons expressed by the court granting the order. John Sopinka & Mark A. Gelowitz, *The Conduct of an Appeal*, 2d ed. (Vancouver: Butterworths, 2000) at 6; *R. v. Sheppard*, 2002 S.C.C. 26 at para. 4.

[14] The order in this case reflects only the suspension of the decision in the '05 Action pending the trial in the '06 Action:

> THIS COURT ORDERS THAT:
>
> 1. The Court's decision in this action with respect to the modern day interpretation of the *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App.II No. 9, is suspended until the issues in the '06 Action (S.C. No.: 06-A0092) are tried.

[15] This is not the first time an effort has been made to have an appellate court decide matters of original jurisdiction. A review of the cases and a definitive answer is found in *B.C. Ferry Corp. v. British Columbia Ferry & Marine Workers' Union* (1979), 100 D.L.R. (3d) 705 (B.C.C.A). I can do no better than to quote from that decision at 709-711:

> Mr. Nathanson submits that the inherent and exclusive power of the King's Bench Division as "custos morum of all the subjects of the realm" and "the very great trust reposed in [it] in respect of its control and superintendence of all inferior courts" have somehow devolved upon this court. I do not think that this is so.
>
> The *Court of Appeal Act*, R.S.B.C. 1960, c. 82, prescribes the jurisdiction of this Court, apart from divorce appeals, in sections 7, 8 and 9. I quote the last two and the relevant portion of s. 7:
>
> > 7. The Court of Appeal shall be a Superior Court of Record, and, to the full extent of the power of the Legislature of the Province to confer jurisdiction, there is transferred to and vested in such Court all jurisdiction and powers, civil and criminal, of the Supreme Court and the Judges thereof, sitting as a Full Court, that were held and exercised prior to the twenty-fifth day of April, 1907, and all other appellate jurisdiction and appellate powers, statutory and otherwise, and howsoever arising or conferred, that were on the said date held or exercised by the Supreme Court sitting as a Full Court. And without restricting the generality of the foregoing an appeal lies to the Court of Appeal …
> >
> > 8. The Court of Appeal further has and shall exercise such original jurisdiction as may be necessary or incidental to the hearing and determination of any appeal.
> >
> > 9. For the purposes of and incidental to the hearing and determination of any matter within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order, and for the purpose of every other authority expressly or impliedly given to the Court of Appeal by this Act, the Court of Appeal has the power, authority, and jurisdiction vested in the Supreme Court.
>
> The effect of this legislation is apparent from a number of cases. *McKelvey v. Le Roi Mining Co. Ltd.* (1901), 8 B.C.R. 268, is a judgment of the Full Court. The Chief Justice, as trial Judge, did not see fit to enter any judgment on the findings of a jury. So both parties moved the Full Court for judgment. It was decided by Walkem and Drake JJ., Martin J. dissenting, that the Court had no

jurisdiction to entertain the application and the matter was referred back to the trial Judge. Walkem J. said this, p. 270:

> Sitting as a Full Court, our jurisdiction is limited by section 72 of the Supreme Court Act "To the hearing of appeals" in cases that are specified; hence we have no authority to do what we are, virtually, asked to do, that is to say, to sit vicariously, as it were, for a Court of First Instance and deal with a matter that is exclusively within its jurisdiction.

In *R. v. Rahmat Ali* (1910), 15 B.C.R. 65, there was an application to the Court of Appeal, in the first instance, for a writ of *habeas corpus*. Earlier, the application had been refused by two Judges of the Supreme Court. The *per curiam* judgment of the Court of Appeal stated:

> We think the application should be dismissed. Counsel for the motion having admitted that this is not an appeal matter, and this Court having appellate jurisdiction only, the motion should be refused.

I refer next to *R. v. Kwong Yick Tai* (1915), 22 D.L.R. 323, 21 B.C.R. 127. That was an appeal, on behalf of a person convicted under the *Criminal Code*, from an order refusing a writ of *certiorari*. There was then no right of appeal under the *Criminal Code* or any other Dominion statute. All Judges agreed that there was no jurisdiction to entertain the appeal. Macdonald, C.J.A., with whom Irving and McPhillips, JJ.A. agreed, said this at p. 324 D.L.R., pp. 129-30 B.C.R.:

> This Court is merely an appellate Court and has no original jurisdiction except that set forth in the Act, which jurisdiction is confined to matters incidental to the hearing and determination of appeals.

The Chief Justice was referring to the *Court of Appeal Act*.

The last decision I cite is the judgment of Tysoe, J.A in Chambers, *R. v. Black, R. v. Schmidt*, [1969] 2 C.C.C. 68, 65 W.W.R. 400, 5 C.R.N.S. 7. The appellants had been committed for trial on charges of kidnapping and indecent assault on a male person. They had been refused bail successively by a Magistrate and a Supreme Court Judge. They applied for the same relief, and on the same grounds, to Mr. Justice Tysoe. He dismissed the applications after consideration of a number points. At pp. 81-2 C.C.C., pp. 413-4 W.W.R., after pointing out that the Court of Appeal and the Supreme Court are separate and distinct Courts with different areas of jurisdiction, and quoting s. 7 in part, and ss. 8 and 9 of the *Court of Appeal Act*, Tysoe J.A. went on:

> By *Code*, s. 463(l)(*b*), an accused is given the right, in the circumstances set out therein, to apply for bail to "a judge of, or a judge presiding in, a superior court of criminal jurisdiction for the province." *Code*, s. 413(1) provides that "Every superior court of criminal jurisdiction has jurisdiction to try any indictable offence, "and throughout the Code will be found instances of power given to a "superior court of criminal jurisdiction." By *Code*, s. 2(38) "superior court of criminal jurisdiction" means, in British Columbia, the Supreme Court or the Court of Appeal. The fact is, however, that the Court of Appeal has never, to my knowledge, attempted to assume a

> jurisdiction except to try an indictable offence or to exercise any of the other powers or any original jurisdiction, except as ancillary to its appellate jurisdiction and in proceedings that are before it by way of appeal. In *R. v. Rahmat Ali (No. 2)* (1910), 16 C.C.C. 195, 15 B.C.R. 65, this Court dismissed a motion for a writ of *habeas corpus* made to it in the first instance on the ground that it has appellate jurisdiction only. In *Re v. Kwong Yick Tai* (1915), 24 C.C.C. 28, 22 D.L.R. 323, 21 B.C.R. 127, Macdonald, C.J.A. said, in the course of his judgment at p. 29:
>
> "This Court is merely an appellate Court ..."
>
> These considerations have raised a serious doubt in my mind that I, a Judge of the Court of Appeal, have any jurisdiction to entertain these applications, notwithstanding the provisions of the *Code*. However, I would not care to decide this point without hearing full argument on it.
>
> Even if my doubt is ill-founded, I would nevertheless dismiss these applications as, in my view, they should have been made to a Judge of the Supreme Court and not to a Judge of the Court of Appeal.

[16] The jurisdiction conferred on this Court clearly confines any original jurisdiction to "what may be necessary or incidental to the hearing and determination of any appeal". *Court of Appeal Act*, R.S.B.C. 1960, c. 82, s. 8. The only appeal before the court is the ruling by Gower J. to postpone his decision on the '05 Action until he has heard the evidence on the '06 Action.

Conclusion

[17] Ross River invites this Court to read the record before Gower J., make findings of fact and legal determination without a decision from the trial court. This Court does not have jurisdiction to do so. An appellate court hears appeals based on orders. Except for the ruling noted in the order of Gower J. to suspend his decision on the '05 Action and a request for costs—grounds (a) and (e) of Ross River's notice of appeal—the remaining grounds raised do not constitute a proper basis for an appeal. Through the other grounds, Ross River seeks a decision on matters that are presently before and not decided by Gower J. They are not matters necessary or incidental to the only appeal properly brought to this Court.

[18] I would allow the application and quash the appeal relating to (b), (c) and (d).

[19] **GARSON J.A.**: I agree.

[20] **SAVAGE J.A.**: I agree.

[21] **BENNETT J.A.**: The application is allowed and the part of the appeal relating to grounds (b), (c) and (d) is quashed.

"The Honourable Madam Justice Bennett"