IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Ross River Dena Council* v. *Canada (Attorney General)*, 2007 YKSC 65

Date: 20071214
S.C. No. 05-A0043
06-A0092
Registry: Whitehorse

Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

THE ATTORNEY GENERAL OF CANADA

Defendant

AND

Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

THE ATTORNEY GENERAL OF CANADA
On behalf of and as the representative for
Her Majesty the Queen in right of Canada

Defendant

Before: Mr. Justice L.F Gower

Appearances:

Suzanne M. Duncan	Counsel for the Applicant/Defendant
Stephen L. Walsh	Counsel for the Respondent/Plaintiff

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Attorney General of Canada ("Canada") for an order pursuant to s. 21(2) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (in conjunction with Rule 14(6)(b) of the *Rules of Court*), that two actions of the Ross River Dena Council ("RRDC") be dismissed on the ground that this Court does not have jurisdiction to hear them.

[2] In the alternative, Canada seeks an order pursuant to Rule 19 (24) of the *Rules of Court,* and this Court's inherent jurisdiction, that the plaintiff's amended statements of claim be struck out and that the actions be dismissed on the grounds that they are either an abuse of process or that they are unnecessary and vexatious.

[3] In the further alternative, Canada asks that I decline to exercise jurisdiction over the plaintiff's two actions and enter a stay of those proceedings, pursuant to Rule 14(6.1) of the *Rules of Court*, on the ground that the Federal Court is the more appropriate forum for the litigation of those claims.

[4] RRDC is the plaintiff in an existing action against Canada in the Federal Court (Docket #T-108-07). That action was commenced in 1999 and was most recently amended on January 17, 2006. All references to RRDC's claim in the Federal Court will be with respect to this 2006 amended statement of claim, which I will simply call the "statement of claim".

[5] In 2005, RRDC commenced an action against Canada in this Court under docket number 05-A0043. The writ of summons and the statement of claim in this action were amended on January 22, 2007. All references to RRDC's claim in S.C. No. 05-A0043 will be with respect to this amended statement of claim, which was filed January 24, 2007. I will call this the "'05 action".

[6] In 2006, RRDC commenced a second action against Canada in this Court under docket number 06-A0092. The writ of summons and statement of claim in this action were amended and filed on May 30, 2007. All references to RRDC's claim in S.C. No. 06-A0092 will be with respect to the 2007 amended statement of claim. I will refer to this as the "'06 action".

[7] Canada filed identical notices of motion in each of the '05 and '06 actions (together referred to as the "Yukon actions"), seeking the relief described above. The applications were heard together by consent and, for the sake of simplicity, I refer to them jointly as a single application.

[8] Canada's counsel conceded in her closing submissions that she was abandoning any attempt to strike the entirety of the statements of claim in the Yukon actions, but as I understood her, she was continuing to ask that portions of each action be either struck or stayed, pursuant to s. 21(2) of the *Crown Liability and Proceedings Act* or Rule 19(24) of the *Rules of Court*.

ISSUES

[9] There are essentially three issues in this application:

(1) Under s. 21(2) of the *Crown Liability and Proceedings Act*, are portions of the '05 or '06 actions in respect of "the same cause of action" as the proceedings in the Federal Court?

(2) Under Rule 19(24), are portions of the '05 and '06 actions either unnecessary and vexatious or an abuse of this Court's process?

(3) Under Rule 14(6.1), is the Federal Court the more appropriate forum to litigate the plaintiff's two claims currently in this Court?

ANALYSIS

1. Same cause of action?

1(a) Meaning of "cause of action"

[10] Section 21 of the *Crown Liability and Proceedings Act* states as follows:

> (1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.
>
> (2) No court in a province has jurisdiction to entertain any proceedings taken by a person if proceedings taken by that person in the Federal Court in respect of the same cause of action, whether taken before or after the proceedings are taken in the court, are pending. (my emphasis)

[11] In *Dumoulin* v. *Ontario*, [2004] O.J. No. 2814, Cullity J. of the Ontario Superior Court of Justice reviewed the law on how the phrase "cause of action" has been defined. At paras. 23 – 25, he noted that judicial explanations of the concept are numerous and include the following:

- “a plaintiff’s reason for suing”
- “the particular act of the defendant which gives the plaintiff his cause of complaint”
- “the legal basis for a claim as, for example, when it is said that a plaintiff's cause of action is for breach of contract, or in tort, or for a particular tort such as negligence, assault or deceit”
- “the material facts that must be proven if the plaintiff is to establish a particular claim”
- "the fact, or combination of facts, which give rise to a right to sue”
- "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”

[12] In *Surerus Construction & Development Ltd.* v. *Rudiger Enterprises Ltd.*, 2001 BCSC 355, A.F. Wilson J., of the British Columbia Supreme Court, referred to the definitions of cause of action adopted by earlier decisions of that court in *Reynard* v. *Carr* in 1983 and in *Service Packing Co. Ltd.* in 1995, at paras. 10 and 11. The latter case adopted the definition provided by Lord Esher M.R. in *Cooke* v. *Gill* (1873), L.R. 8 C.P. 107 at 116:

> ""Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, - every fact which the defendant would have a right to traverse.”

[13] In *Pioneer Envelopes Ltd*. v. *British Columbia (Minister of Finance)*, [1980] B.C.J. No. 1363 (B.C.S.C.), Bouck J. noted, at paras. 36 and 37, that the common law has never specifically said that the phrase “cause of action” has a particular meaning:

> “… More often it has been discussed with respect to limitation provisions in a statute. Then the Court has to decide at what time a cause of action came into being. The broad rule under this head is that the time a cause of action arises is when any

> fact that is material to be proved entitling the plaintiff to succeed is in existence so that a defendant will have the right to traverse any such allegations of fact.
>
> But "cause of action" in its popular sense can mean a number of things. In particular it can mean a plaintiff's "reason fur suing". A "cause" is a reason or motive and "action" is a suit or proceeding. …"

[14] In *Markevich* v. *Canada*, 2003 SCC 9, Major J., speaking for the majority of the Supreme Court of Canada, at para. 27, simply stated "A cause of action is only a set of facts that provides the basis for an action in court …"

[15] In *Chevron Canada Resources* v. *Canada (Executive Director of Indian Oil and Gas Canada)*, 1998 ABQB 910, Moore C.J.Q.B. was adjudicating an application made by Canada to strike out or stay a counterclaim and third party notice filed by the Samson Indian Band. Chevron had brought the original Alberta court action against Canada to recover the overpayment of gas royalties made to Canada and four First Nations, including Samson. Canada was holding the overpaid money in trust for the First Nations, and Samson filed a counterclaim against both Canada and Chevron asserting that the leases under which Chevron drilled for oil on its land were invalid, as well as claiming damages for trespass and unlawful removal of oil and gas. Samson also claimed that Canada had breached its fiduciary duty to the First Nation. In response, Canada argued that the counterclaim and third party notice were improper as they duplicated an action of Samson's against Canada that had already been underway for years in the Federal Court.

[16] Canada's application to strike out or stay the counterclaim and third party notice in the Alberta action was dismissed. Moore C.J. held that the proceedings involving Samson and Canada in the Federal Court and those before him in the Alberta Court of

Queen’s Bench were not identical and that the remedies sought in the two proceedings were different. In addressing whether the relevant pleadings pertained to the “same cause of action” Moore, C.J. said at paras. 23 - 26:

> “[23] The pleadings in question do have a great deal in common. They both outline a similar background of Samson and Treaty No. 6, covering the lands in question. Several areas of land are at issue in the Federal Court action, including the Pigeon Lake Reserve Lands, which are also at issue in the Chevron action. Both pleadings claim that Samson is the beneficial owner of the Reserve Lands, or has a sui generis interest in them, including the natural resources. Both pleadings claim that the Crown owes Samson various obligations - fiduciary, trust and equitable - and breached them. The statement of claim in the Federal Court action is broader in that it covers more land and has even more allegations against the Crown.
>
> [24] The difficulty for the Crown is that the counterclaim in the Chevron action pleads that the Surrender in 1946, and the leases made by the Crown on behalf of Samson after the Surrender, are invalid. This is an entirely different factual situation and cause of action than in the Federal Court action. In the Federal Court action, Samson accepts the validity of the Surrender and the leases.
>
> [25] The Crown tries to characterize these differences as a "contrary position" based on the same facts. I cannot accept that the same facts are involved, as the counterclaim alleges that the Surrender and leases are invalid because of the factual situation around the Surrender. The Crown also claims that the relief is identical in the Federal Court action and the Chevron action. I cannot accept this contention either. In fact, at one point in its argument, the Crown stated that Samson's abuse of the court's process is aggravated because Samson is claiming different relief based on the same facts. Some of the remedies sought in the Chevron action, including a declaration of lease invalidity, a declaration of underpayment, an accounting, and damages, are different than those sought in the Federal Court action. These facts do not parallel those in Edmonton Northlands v. Edmonton Oilers Hockey Corp. (1993), 15 Alta. L.R. (3d) 179 (Q.B.), where the relief sought in two actions was indeed the same (at 186).

> [26] In the result, the two actions are not the "same cause of action."

Thus, although the pleadings had a great deal in common, and some of the facts alleged were the same, Moore C.J. seemed to regard the fact that different remedies were sought in each of the proceedings as a reason to differentiate them as being different causes of action. An appeal of this decision was dismissed without reasons by the Alberta Court of Appeal (see note in *Chevron* v. *Canada* (*Executive Director of Indian Oil and Gas Canada)*, 2005 ABQB 2, at para. 10).

[17] The case continued for several years, and in *Chevron* v. *Canada* (2005), just cited above, Canada applied for a second time to strike or stay all or part of the counterclaim and third party notices filed by Samson. Once again the application was dismissed. At para. 35, Romaine J. reconsidered Canada's argument under s. 21(2) of the *Crown Liability and Proceedings Act*. She came to the same conclusion as Moore C.J. in the 1998 application, and again ruled that the causes of action were not the same. In particular she said:

> "…the heart of the problem is not that the same allegations have been made in the two actions, but that Samson is taking a contrary position on an issue that is integral to both actions, the validity of the Surrender. Section 21(2) does not preclude the same allegations being made in two different courts; it precludes the same cause of action. Different causes of action may have material facts in common: Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. at para. 54. …" (my emphasis)

1 (b) Points of Commonality

[18] As between the two Yukon actions, RRDC's counsel indicated in submissions that the '06 action was intentionally pleaded as "parallel" to the '05 action. He explained that as a number of pre-trial procedural steps had already been taken on the '05 action, it would have complicated matters to have attempted to amend the '05 action to include the new particulars found in the '06 action. Therefore, rather than proceed by way of an amendment, he opted to file the '06 action with the intention that he would eventually seek to have the '05 and '06 actions tried together. Thus, the similarities between these two actions are intentional.

[19] As between the Federal Court action and the Yukon actions, there is no question that there are some points of commonality. However, the real issue is whether those similarities are sufficient to justify a stay of portions of either Yukon action.

[20] It is difficult to describe the particulars of each of the three actions without repetitively setting out the actual words used in the pleadings, which would be rather unwieldy and tiresome. Rather, I will make my best effort to paraphrase the contents as much as possible.

[21] Following the prayer for relief in the Federal Court action, RRDC asserts claims to certain lands in southeastern Yukon which were, prior to 1870, part of the North–western Territory, referred to in s. 146 of the *Constitution Act*, *1867*. There is then reference to the *Rupert's Land and North–Western Territory Order* of 1870 (the "*1870 Order*"), which admitted the North–western Territory into Canada upon terms and conditions set out in a

joint address from the Senate and the House of Commons to the Queen in 1867 ("the*1867 Address*").

[22] The *1870 Order* is not reproduced in RRDC's pleadings, however it provided, among other things, that the North-western Territory was to be admitted into Canada "upon the terms and conditions" in the *1867 Address*. That address states:

> "… 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…"

[23] The plaintiff pleads in the Federal Court action that, as a result of the *1870 Order*, the *1867 Address,* and the historic relationship between the Crown and the aboriginal peoples of Canada, when the North-western Territory was admitted into Canada, Canada acquired certain fiduciary and constitutional duties. These include:

1. The duty to protect the property of aboriginal people;
2. The duty to "consider and settle" the plaintiff's claims "to compensation for lands required for the purposes of settlement, in conformity the equitable principles which historically governed the dealings of the British Crown with the aboriginal peoples of British North America", including the principles reflected in the *Royal Proclamation* of 1763; and
3. The duty to "negotiate with due diligence and in good faith" towards a settlement of the plaintiff's claims to its unextinguished and unsurrendered title to their territory.

[24] The *1867 Address*, the *1870 Order,* and the historic relationship between the Crown and the aboriginal peoples of Canada are similarly pled in the '05 action at paras. 14 – 21, and in the '06 action at paras. 16 – 24 and also at para. 48. RRDC points to these instruments and to the constitutional and fiduciary duties acquired by the Crown as basing its claims in all three of its actions.

[25] In para. 1 (c) of the Federal Court action, RRDC seeks a declaration that, because of this history, Canada "has a fiduciary and constitutional duty to negotiate with due diligence and in good faith toward a settlement of the plaintiff's claims to unextinguished and unsurrendered aboriginal rights, title and interests in and to its territory". However, as will be discussed below, this claim has been partially discontinued.

[26] In the '05 action, RRDC seeks, among other things, a declaration that the commitment made by Canada in the *1867 Address* and in the *1870 Order* "to settle the claims of the Indian tribes of the North–western Territory" is still in force today. RRDC further seeks a declaration that Canada is in breach of its constitutional and fiduciary duties to the plaintiff in respect of the lands in dispute, which are defined in this statement of claim as the "Ross River group trapline" and a smaller trapline around the community of Ross River, collectively referred to as "the Territory", comprising some 35,380 sq. kilometres or slightly more than 7% of the area of the Yukon. Further, at para. 24, RRDC asserts that Canada "has not settled the claims of the plaintiff … to the Territory in conformity with the terms of the 1870 Order."

[27] In the '06 action, RRDC again seeks a declaration that Canada "has a fiduciary and constitutional duty to negotiate with due diligence and in good faith towards a

settlement of the plaintiff's claims" in this case with respect to "compensation for lands within the Kaska traditional territory which have been or may be required for purposes of settlement …". The RRDC is identified as part of the Kaska Nation and the "traditional territory" is here alleged to constitute an area amounting to approximately 23% of the Yukon Territory.

[28] These are the similarities which Canada points to in arguing that the three claims all plead the same "cause of action". Canada says that the further details of each of the claims are either simply "evidence" of the fundamental alleged breach of the fiduciary and constitutional duty to settle RRDC's land claims, or, alternatively, are simply the "remedies" sought for the specific harm which RRDC has suffered as a result of that fundamental breach of duty.

1 (c) The Federal Court action

[29] In addition to those portions of the statement of claim already referenced, the Federal Court action also alleges that on January 26, 1965, Canada caused certain lands to be set aside for the use and benefit of the RRDC (the 'Lands Set Aside'). RRDC claims that these are "Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867* and, by virtue of having set them aside, Canada has acquired a fiduciary and constitutional duty to protect RRDC's interests in them. RRDC also pleads in this action that by agreeing in 1973 to negotiate RRDC's land claims, Canada assumed a duty to negotiate with due diligence and in good faith towards a settlement of those claims.

[30] Having asserted these general grounds, RRDC then goes on to particularize their claim as it relates to a moratorium on the taxation of income earned by Yukon Indians

while employed by recognized Indian organizations, or while employed on lands recognized as Indian lands, including the Lands Set Aside. Under the moratorium, the plaintiff and its members were entitled to an exemption from the collection of income tax and were treated as if the Lands Set Aside were “reserves” under the *Indian Act*. Canada, in the manner described below, ended the moratorium around 1999.

[31] In background to its moratorium argument, RRDC refers to their “Framework Agreement” with Canada, dated September 21, 1989, which specified that the negotiations to settle the plaintiff’s claims would, except where otherwise agreed, be based upon an “Agreement-in-Principle” that was entered into in 1989 between the Council for Yukon Indians, the Government of Yukon and the Government of Canada.

[32] The Agreement-in-Principle preceded the ”Umbrella Final Agreement” (or “UFA”, which was to serve as the template for further negotiations between Canada, the Government of Yukon and each of the Yukon First Nations towards their own respective Final Agreements and Self-Government Agreements. The plaintiff alleges that the UFA was not ratified in accordance with its ratification clause and, accordingly, that it has been precluded from completing a Final Agreement or Self-Government Agreement with Canada and Yukon.

[33] The plaintiff pleads that Canada purported to terminate the moratorium on the collection of income tax from Yukon Indians either by way of the *Income Tax Remission Order (Yukon Territory Lands)*, S.I./95-18 (“*Remission Order*”), or by way of the UFA itself. However, the plaintiff says that the *Remission Order* neither superseded the moratorium nor had the effect of terminating it, and further, the UFA could not have terminated the moratorium since the UFA was never properly ratified. Therefore, says

the plaintiff, the moratorium continues in full force and effect, but notwithstanding this, since about 1999 Canada has reassessed the employment income of the RRDC's members and has demanded income tax.

[34] These pleadings in the Federal Court action give rise to the remedies sought in the prayer for relief within:

> Para. 1(a) - a declaration that the lands set aside are "Lands reserved for the Indians" under s. 91(24) of the *Constitution Act*, *1867*;
>
> Para. 1(b) - a declaration that the moratorium continues in effect and that the plaintiff continues to be entitled to an exemption from the collection of income taxes as if the Lands Set Aside were "reserved" under the *Indian Act*;
>
> Para. 1(c) - a declaration that Canada has a fiduciary and constitutional duty to negotiate with due diligence and in good faith towards a settlement of the plaintiff's claims.
>
> Para. 1(d) - a declaration that the refusal of Canada to honour the moratorium constitutes a breach of its fiduciary and constitutional duties to the plaintiff;
>
> Para. 1(e) - has been discontinued by the plaintiff. It originally sought a declaration that Canada's abandonment of the negotiations with the plaintiff, as pled in para. 30A of the statement of claim, constituted a breach of Canada's fiduciary and constitutional duty to negotiate with the plaintiff with due diligence and in good faith;
>
> Para. 1(f) - seeks damages or compensation, including punitive damages, for breach of fiduciary duty. The plaintiff has confirmed by way of a response to a demand of particulars that it has discontinued this relief as it relates to paragraph

1(e) and now only seeks damages or compensation in relation to the termination of the moratorium.

[35] It is most significant to note here that the plaintiff has discontinued the relief sought in para. 1(c) as it relates to para. 1(e). Thus, RRDC says that the alleged breach of a duty to negotiate with diligence and in good faith now only pertains to the cessation of the moratorium, and not to the land claims that are the subject of the ’05 and ’06 actions.

[36] It is immediately obvious that paras. 1(a), 1(b) and 1(d) are not remedies sought or pled in either of the Yukon actions. Further, to the extent that para. 1(c), seeking a declaration of breach of the duty to negotiate with due diligence and in good faith, and para. 1(f), seeking damages, can also be found in the ‘06 action, the relief sought in that regard in the Federal Court action is now only in relation to the termination of the moratorium in 1999. Indeed, the plaintiff has confirmed with Canada that it is not advancing any claim with respect to any historical (i.e. pre-1989) breach of fiduciary duty by the Crown in the Federal Court action.

[37] The bulk of the remaining statement of claim in the Federal Court action contains pleadings which are neither seen in nor similar to those in either of the Yukon actions. In particular, I refer to paras. 3G, 3J, 5B through 30 and 31.

1. (d) The ‘05 action

[38] As mentioned, the ‘05 action focuses on the lands referred to as the “Ross River group trapline” and a smaller trapline around the community of Ross River (collectively the “Territory”). Here the plaintiff says that, by virtue of the fiduciary and constitutional duties arising from the *1867 Address*, the *1870 Order,* and the historic relationship

between Canada and the aboriginal peoples of Canada, Canada has a duty to refrain from making dispositions of land within the Territory, as well as a duty to refrain from issuing any licences or permits for the use or development of such lands, until such time as the plaintiff's claims for compensation for land have been settled in conformity with the *1870 Order*. The statement of claim in this action sets out the historical background giving rise to the alleged fiduciary and constitutional duties, which apart from those already mentioned, also includes the formulation of Canada's comprehensive land claims policy in 1973.

[39] In the prayer for relief in the '05 action, the plaintiff seeks the following remedies:

> Para. a. - a declaration that Canada's obligation under the *1870 Order* to settle the claims of the Indian tribes of the North-western Territory, including the claims of the plaintiff, is still in force today;
>
> Para. b. - a declaration that the above commitment is part of the Constitution of Canada;
>
> Para. c. - a declaration that the plaintiff's claims for compensation for lands within the Territory which have been alienated by Canada must be settled before any further dispositions are made to third parties;
>
> Para. d. - a declaration that any further dispositions of land within the Territory by Canada are invalid, unless preceded by a settlement of the plaintiff's claim;
>
> Para. e. - a declaration that the lands within the Territory are "Lands reserved for the Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867*;
>
> Para. f. - a declaration that, until the plaintiff's claims to the Territory have been settled, those lands are not available to Canada as a source of revenue;

> Para. g. - a declaration that Canada is in breach of its constitutional and fiduciary duties to the plaintiff with respect to the Territory;
>
> Para. h. - an accounting of, or alternatively a constructive order of remedial trust over, and payment and restitution of all revenues received by Canada in respect of the lands within the Territory;
>
> Para. i. - an injunction restraining Canada from dealing with the making of any further alienations of land within the Territory, until settlement of the plaintiff's claims; and
>
> Para. j. - damages for breach of Canada's constitutional and fiduciary duties to the plaintiff.

[40] Thus, the only potential overlap between the relief sought in the '05 action and the relief sought in the Federal court action is the declaration with respect to "Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*. However, in the Federal Court action, that declaration is only with respect to the Lands Set Aside, which the plaintiff says are identified in the RRDC "Land Inventory" and constitute no more than a few sq. hectares in total area. In contrast, the declaration sought in the '05 action refers to all the lands within the claimed Territory, comprising more than 35,000 sq. kilometres. Beyond that, and the points of commonality I referred to earlier, there are no similarities in the relief sought in the '05 action and the relief sought in the Federal Court action. Consequently, the vast majority of the pleadings in the statement of claim in the '05 Action are not pleaded in, nor are they similar to, any part of the Federal Court action. Here I refer to paras. 1A through 12, 17, 20, 22(c) & (d), 23, 25 through 33, 36 through 40, and 42 through 45 of the '05 statement of claim.

[41] As counsel for RRDC expressed it in his submissions, the facts pled in the ‘05 action would not entitle the plaintiff to the relief it seeks the Federal Court action; nor would the facts pled in the Federal Court action entitle the plaintiff to the relief it seeks in the ‘05 action.

1. (e) The ‘06 action

[42] The ‘06 action once again begins with the *1867 Address* and the *1870 Order* and sets out the history of the plaintiff’s land claim negotiations with Canada. The statement of claim cites Canada’s comprehensive land claims policy of 1973 and alleges certain actions by Canada with respect to that policy. In particular, RRDC says that it borrowed several millions of dollars from Canada to enable it to prepare for and participate in negotiations with Canada towards a settlement of its comprehensive land claims. The plaintiff then alleges that Canada abandoned the land claims negotiation process with it in June 2002.

[43] In the prayer for relief, RRDC seeks the following:

> Para. a. - a declaration that Canada has a fiduciary and constitutional duty to negotiate with due diligence and in good faith towards a settlement of the plaintiff’s claims to compensation for lands within the Kaska traditional territory which have been or may be required for the purposes of settlement;
>
> Para. b. - a declaration that Canada has breached its duty to negotiate with due diligence and in good faith towards a settlement of the plaintiff’s claims;
>
> Para. c. - a declaration that the land claims loans from Canada are void and unenforceable;

Para. d. – damages for breach of Canada's constitutional and fiduciary duty to negotiate with due diligence and in good faith.

[44] There is an overlap between the relief sought in the Federal Court action and that sought in the '06 action insofar as the former action similarly seeks a declaration that Canada has a fiduciary and constitutional duty to negotiate with due diligence and in good faith towards the settlement of the plaintiff's claims in relation to its territory. However, I repeat that in the Federal Court action the plaintiff's claim in that regard is only with respect to the termination of the moratorium in 1999 and the plaintiff does not advance any claim with respect to any historical breach of fiduciary duty by the Crown. In comparison, in the '06 action RRDC is alleging a breach with respect to the entire history of the plaintiff's land claim negotiations with Canada. Further, a good number of paragraphs within the statement of claim in the '06 action are not pled in, nor are they similar to, any part of the Federal Court action. Here I refer to paras. 2, 4 through 7(b) & (c), paras. 8 through 14, 18, 21, 23A, 25 through 43C, 44A, 44B, 46, 49(b), 49A, and 50 through 52 of the '06 statement of claim.

1. (f) Analysis of the cause of action issue

[45] Canada argues the "cause of action" in each of the three proceedings is the alleged failure of Canada to negotiate a settlement of RRDC's comprehensive land claim with due diligence and in good faith. Beyond that, Canada says that the only difference in the adjudication of each of the three proceedings would arise from the "nature of the harm alleged from the failure to conclude a negotiated settlement." As I noted earlier, Canada submits that the details of each claim are either just "evidence" of this fundamental breach, or are simply the "remedies" sought in consequence of that breach.

[46] However, while the failure to conclude a negotiated settlement is indeed pled in the prayer for relief in the ‘06 action, to the extent that this type of wording is found in the prayer for relief in the Federal Court action, as a result of RRDC’s amendment it is now only relevant with respect to the termination of the moratorium, which is a relatively narrow and discrete topic area in comparison with broad relief sought in the ‘06 action.

[47] Further, in my view, there is a necessary linkage between the alleged breach of the duty to negotiate with due diligence and in good faith and the harm allegedly suffered as a result of that breach. The interpretations of the phrase “cause of action” repeatedly refer to the fact, or combination of facts, which give rise to a “right to sue” and to entitle the plaintiff to “a remedy”. It seems to me that a plaintiff does not acquire a right to sue until they have suffered some particular harm; similarly, a plaintiff should not become entitled to a remedy until they have suffered that harm. The specific harm suffered will in turn depend on the factual context of the action. In each of the three proceedings at bar, the plaintiff is not focusing simply on the alleged breach of duty to negotiate and settle, but rather is linking the breach of that duty to the specific factual context at issue in each case. In the Federal Court action, the factual context is the termination of the moratorium on income tax. In the ‘05 action, the factual context is the alleged unlawful alienation and use of lands within the plaintiff’s group trapline and community trapline. In the ‘06 action, the primary factual context is the extinguishment of liability for land claims loans from Canada to the plaintiff.

[48] I acknowledge here that part of the relief sought in the ‘06 action, specifically the declaration that Canada has breached its duty to negotiate with due diligence and in good faith, could result in a determination that, for that reason alone, that the plaintiff is

entitled to damages. However, the plaintiff does not seek that relief in either the ‘05 action or the Federal Court action.

[49] I agree with the analogy used by RRDC’s counsel that Canada’s argument here is like saying that two actions, both based on s. 35 of the *Constitution Act, 1982* are the same cause of action even when one seeks a determination relating to hunting rights and the other seeks a determination relating to aboriginal title. In other words, notwithstanding that both cases have the constitutionally protected aboriginal rights under s. 35 as their source, RRDC says they should not be viewed as the same cause of action.

[50] Accordingly, I am not persuaded that any part of either of the Yukon actions can be said to be pleading “the same cause of action” as in the Federal Court action and therefore, s. 21(2) of the *Crown Liability and Proceedings Act* does not apply.

2. Are any of the Yukon pleadings vexatious, unnecessary or an abuse of process?

[51] The Crown also relies upon subrules 19(24)(b) and (d) in this application. Specifically, the Crown asks that I strike out portions of each of the Yukon actions, or order that those proceedings be stayed pending the outcome of the Federal Court action, on the grounds that the Yukon actions, or portions of each, are either unnecessary and vexatious or an abuse of the process of this Court.

[52] Here, Canada says that it does not want to deny the plaintiff its day in court, but rather seeks to avoid a multiplicity of proceedings and inconsistent verdicts. Canada submits that the Federal Court action and the Yukon actions are “integrated components

of one continuum” and that they involve the “same questions of law on almost identical facts”.

[53] Rule 19(24) states:

> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[54] Counsel for RRDC points to *Hunt* v. *Carey Canada Inc.*, [1990] 2 S.C.R. 959 (S.C.C.), as the leading case on the test governing Rule 19(24). This case states that the rule should only be engaged where it is “plain and obvious” that the plaintiff’s statement of claim violates one of the grounds in paras. (a) through (d). At para. 28, Wilson J., delivering the judgment of the Supreme Court of Canada, quoted with approval Tysoe J.A. of the British Columbia Court of Appeal in *Minnes* v. *Minnes* (1962), 39 W.W.R. 112, and, who said, at para. 122 of the W.W.R., in relation to subrule 19(24)(a):

> "… the power given by the Rule should be exercised only where the case is absolutely beyond doubt. … (my emphasis)

[55] Further, at para. 33, Wilson J. said:

> "Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a)." (my emphasis)

[56] *Chapman* v. *Canada*; *Westwick* v. *Canada*, 2003 BCCA 665, confirmed that the test for the application of all of the provisions of Rule 19(24) is whether it is plain and obvious that the impugned pleading has the fault alleged. At para. 12, Saunders J.A. stated:

> "The criteria for application of all provisions of Rule 19(24) are established in authorities considered by the chambers judge: Hunt v. Carey Can. Inc., [1990] 2 S.C.R. 959; Berscheid v. Ensign, [1999] B.C.J. No. 1172 (B.C.S.C.); Babavic v. Babowech, [1993] B.C.J. No. 1802, World Wide Treasure Adventures Inc. v. Trivia Games Inc. (1996), 17 B.C.L.R. (3d) 187 (B.C.C.A.), and Kripps v. Touche Ross & Co. (1990), 48 B.C.L.R. (2d) 171 (B.C.C.A.). The test is whether it is plain and obvious that the impugned pleading has the fault alleged. Otherwise the party whose pleading is challenged is entitled to a trial of the issue." (my emphasis)

[57] In *Carr* v. *Cheng*, 2007 BCSC 997, Smith J. referred to subrules 19(24)(a) through (d), and, at para. 20, citing *Keddie* v. *Dumas Hotel Ltd.* (1985), 62 B.C.L.R. 145 (B.C.C.A.) and *McGauley* v. *British Columbia* (1996), 44 B.C.L.R. (2d) 217 (B.C.S.C.), stated that the court must read the impugned pleading “as generously as possible” and that any flaw in the pleadings must be “apparent at first glance”.

[58] Chamberlist J., in *Parmar* v. *Blenz the Canadian Coffee Co.*, 2007 BCSC 1190, said, at para. 33, that in an application under Rule 19(24), not only must it be plain and obvious that the impugned pleadings offend one of the subrules, but also that the court “must give the benefit of any doubt to the plaintiff”.

[59] Romilly J.’s statement at para. 47 of *Citizens for Foreign Aid Reform Inc.* v. *Canada Jewish Congress* [1999], B.C.J. No. 2160 (B.C.S.C) has been widely quoted with respect to subrule 19(24)(b). Here, he said that a pleading is unnecessary or vexatious “if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law.”

[60] In *McNutt* v. *Canada (Attorney General)*, 2004 BCSC 1113, Allan J. stated, at para. 42, that a pleading is “an abuse of process” if the litigation is used for an improper purpose; for example, where the proceedings constitute a sham, where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose.

[61] Counsel for RRDC also relies on *Harris* v. *Canada*, 2001 FCT 758, where Heneghan J., speaking of Federal Court Rule 221, which is similar to Rule 19(24), said at para. 25:

> "… A pleading should not be struck when the other party has "pleaded over" or when there is a lengthy delay between delivery of the pleading and the motion to strike …"

[62] In the '05 action, Canada pled in its statement of defence, filed September 29, 2005, that it reserved the right to make an application to strike portions of the statement of claim pursuant to Rule 19(24). However, the within application to strike was not actually filed until June 15, 2007, and the hearing was not held until October 11 and 12, 2007. In the interim, a significant number of procedural steps have been taken by the parties, as detailed in the chronology filed by RRDC. These include demands and supplemental demands for further and better particulars and the responses thereto, a notice to admit, and supplemental notice to admit and the replies thereto. Further, over two years have passed since the pleadings closed and this application was heard. In my view, that is a significant delay and, notwithstanding the reservation by Canada of its right to bring this application, it was incumbent upon Canada to do so in a more timely and diligent fashion. Finally, Canada has clearly "pleaded over" in its defence to the '05 action and the numerous subsequent procedural steps have significantly advanced that action and put both parties to time and expense.

[63] Although I would be inclined to dismiss Canada's application under Rule 19(24) with respect to the '05 action for these reasons alone, I also conclude that Canada has not met its burden of establishing that it is "plain and obvious" or "apparent at first glance" that the '05 action is either unnecessary, vexatious or an abuse of process. On the contrary, I agree with counsel for RRDC that this action could be one of the most significant constitutional cases in Yukon history. It involves just over 7% of the area of the Yukon Territory and, among other things, seeks an accounting from Canada for the

disposition and exploitation of the lands within the Ross River group trapline and the Ross River community trapline, which includes, for instance, the former Faro mine, once the largest lead/zinc mine in the world.

[64] Canada's statement of defence in the '06 action similarly sought to reserve its right to bring an application under Rule 19(24). In that case, the original statement of defence was filed on November 7, 2006 and the amended statement of defence was filed June 28, 2007. In addition, Canada's counsel wrote to counsel for RRDC in January 2007, giving notice of Canada's intention to make the within application. Fewer procedural steps have been taken in the '06 action than in the '05 action. As a result, I would be less inclined to rely upon the circumstances of delay and Canada's pleading over to RRDC's claims as grounds for dismissing Canada's application under Rule 19(24). Nevertheless, applying the "plain and obvious" test, I once again conclude that Canada has not met its burden in satisfying me that RRDC's claim here does not go to establishing its cause of action or does not advance any claims known in law: *Citizens for Foreign Aid Reform*, cited above. Further, I am unable to find that the plaintiff's pleadings are being used for an improper purpose, that they constitute a sham, that the process of the court is not being fairly or honestly used, or that they are being employed for some ulterior or improper purpose: *McNutt*, cited above. Accordingly, I also dismiss Canada's application under Rule 19(24) as it applies to the '06 action.

[65] In *Toronto (City)* v. *Canadian Union of Public Employees (CUPE), Local 79,* 2003 SCC 63, Arbour J., speaking for the majority of the Supreme Court of Canada, discussed the common law test for abuse of process, as opposed to abuse of process

specifically within the context of Rule 19(24)(d), and the related doctrine of issue estoppel.

[66] At para. 37, Arbour J. quoted with approval Goudge J.A., in *Canam Enterprises Inc.* v. *Coles* (2000), 51 O.R. (3d) 481 (C.A.) (approved 2002 S.C.C.), who spoke about common law abuse of process (Arbour J.'s emphasis):

> "The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined."

[67] At para. 23, Arbour J. noted that issue estoppel is a branch of *res judicata*, with the other branch being cause of action estoppel, which precludes the relitigation of issues previously decided by a court in another proceeding. For issue estoppel to be successfully invoked, she said three pre-conditions must be met:

1. the issue must be the same as that decided in the prior decisions;
2. the prior judicial decision must have been final; and
3. the parties to both proceedings must be the same, or their privies, otherwise referred to as "mutuality" of parties.

[68] Further, at paras. 52 and 53, Arbour J. referred to the Supreme Court of Canada's previous decision in *Danyluk* v. *Ainsworth Technologies Inc.*, 2001 SCC 44,

which recognized that relitigation carries serious detrimental effects and should be avoided “unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole.” She also noted that there may be instances “when fairness dictates that the original result should not be binding in the new context.”

[69] *Westec Aerospace Inc.* v. *Raytheon Aircraft Co.* 1999 BCCA 243, was a case more focused on the issue of *forum conveniens* (which I will return to later) than abuse of process or issue estoppel. However, at para. 28, Rowles J.A., speaking for the British Columbia Court of Appeal, discussed the related topic of “parallel proceedings”:

> “Taking a narrow, particular, and formalistic approach to determining whether proceedings are parallel is also not consonant with the policy rationale for avoiding parallel proceedings. There are two policy concerns with parallel proceedings. Litigating the same dispute twice, in two sets of proceedings in different jurisdictions creates obvious inefficiencies and waste. More importantly, parallel proceedings raise the possibility of inconsistent or conflicting judgments being given. ....” (my emphasis)

[70] Clearly then, in cases where there are two or more actions in different courts relating to similar facts or causes of action, one must be alive to the risk of the inconsistent findings, excessive costs and duplication of effort. Here, I recognize that, when the Federal Court ultimately tries the RRDC action, in order to dispose of the moratorium issue, the court will be required to reach certain conclusions about the import and effect of the *1867 Address*, *1870 Order,* and the historical relationship between Canada and its aboriginal peoples (I refer to this as the “source of duties” issue). As I understood him, counsel for RRDC suggested that his argument on this point would not take more than half an hour. On the other hand, Canada’s counsel

estimated that this point alone might take at least a week to litigate. Despite the parties' widely divergent expectations of how this issue will be litigated, it seems to be common ground that the Federal Court action will almost certainly be tried before the Yukon actions.[1] Thus, regardless of how the Federal Court disposes of the source of duties issue, it may have to be litigated again in the Yukon Supreme Court if the Crown's application at bar fails. Accordingly, there is a risk of inconsistent outcomes. Is that a sufficient reason for granting the Crown's application and striking the duplicitous portions of the Yukon actions dealing with this issue? I answer that question in the negative, for the following reasons.

[71] First, in my view, the Yukon actions are not "the same dispute" as the Federal Court action, nor are they "parallel" to that action. I reach that conclusion largely for the reasons that led to my finding that the Yukon actions are not in respect of the same "cause of action" as the Federal Court proceedings. While a portion of the Federal Court action will necessarily involve a determination on the source of duties issue, the differences between the Federal Court action and the Yukon actions are so great that it would be unfair if RRDC were "driven from the judgment seat" in the Yukon solely because of the risk of a relatively minor degree of overlap between the two sets of proceedings.

[72] Second, the common law doctrines of abuse of process and/or issue estoppel are of no assistance on the current application, as there has not yet been a final determination of the claim in the Federal Court.

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[1] If RRDC is successful in its application to have the two Yukon actions heard together, there will be no risk of inconsistent findings as between those two actions.

[73] Third, even after such a determination, if Canada raises an issue estoppel argument in this Court, it may be unable to establish that both the issues and the parties are “the same” in both courts (See para. 76 below re. the parties in the Federal Court action).

[74] Finally, regardless of how the Federal Court decides the source of duties issue, it is premature at this stage to presume that such a determination would or should be binding in the context of the existing Yukon litigation: See *Danyluk*, cited above.

[75] I acknowledge here that Canada has indicated that it would consent to an amendment of the Federal Court pleadings to allow RRDC to incorporate all of the particulars in both the ‘05 and ‘06 actions and the relief sought therein. However, counsel for RRDC responded that his client has no interest whatsoever in proceeding in that fashion. From his point of view, the Federal Court action is significantly advanced and is approaching readiness for trial. If those pleadings were amended to include the claims from the Yukon actions, then it would likely be years before such an expanded action would come to trial. The ‘05 action alone will require extensive document and other discovery, potentially covering a period of about 135 years since the *1870 Order*.

[76] Further, the Federal Court action was initially a single action involving both the RRDC and the Liard First Nation (“LFN”) as co-plaintiffs represented by one counsel. However, as a result of RRDC later retaining different counsel (Mr. Walsh), a ruling was made by a Federal Court prothonotary that the action be split, such that RRDC continues as the plaintiff in one action (the one at issue) and LFN is the plaintiff is an almost identical parallel action. Nevertheless, the prothonotary also ruled that the two actions will be tried together and counsel for LFN has indicated that it would <u>not</u> consent

to any amendment of the existing Federal Court action, for the same reasons argued by RRDC's counsel in this application. Therefore, counsel for RRDC submitted that if the Yukon actions are stayed, rather than seeking to amend the existing Federal Court action, he would commence a new action in that Court seeking the relief from the Yukon actions.

3. Is the Federal Court the more appropriate forum?

[77] Canada's final argument on this application is that the Federal Court is the more appropriate forum for adjudicating all of the allegations in each of the three actions.

[78] Canada relied on a series of cases beginning with *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.), which set out the test when deciding which of two competing courts would be the most appropriate forum. The court deemed to be the least appropriate is referred to as the *forum non conveniens*. In this case, the Supreme Court of Canada said that the test is that there must be some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice. The loss of a personal or juridical advantage is not necessarily the only potential cause of injustice, but it will likely be the most frequent. At para. 32, Sopinka J., speaking for the Court, said:

> "… The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. …" (my emphasis)

[79] At para. 33, Sopinka J. then stated his agreement with the English authorities that “the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff.” (my emphasis)

[80] In *Westec Aerospace Inc.* v. *Raytheon Aircraft Co.*, cited above, Rowles J. at para. 15 cites the chambers judge who noted, with reference to *Amchem,* that a defendant who contends that the action in one jurisdiction should be stayed “bears the onus of demonstrating that the courts of another jurisdiction are sufficiently more appropriate for the resolution of the dispute to displace the forum the plaintiff has selected.”

[81] In *Underwriters, Lloyd’s* v. *Cominco Ltd*, 2006 BCSC 1276, B.M. Davis J., at para. 106, listed the competing factors that come into play in a *forum non conveniens* analysis in British Columbia, as being:

> “(1) Where each party resides.
> (2) Where each party carries on business.
> (3) Where the cause of action arose.
> (4) Where the loss or damage occurred.
> (5) Any juridical advantage to the plaintiff in this jurisdiction.
> (6) Any juridical disadvantage to the defendant in this jurisdiction.
> (7) Convenience or inconvenience to potential witness.
> (8) Cost of conducting the litigation in this jurisdiction.
> (9) Applicable substantive law.
> (10) Difficulty and cost of proving foreign law, if necessary.
> (11) Whether there are parallel proceedings in any other jurisdiction. ("Forum shopping" is to be discouraged.)”

[82] Canada's counsel initially argued that the Federal Court was the more appropriate forum to litigate the Yukon actions for four reasons:

1. The Federal Court action was further advanced than the Yukon actions, but not so much that it could not be amended to incorporate the relief sought in the Yukon actions.

2. The Federal Court is perhaps more familiar with the types of allegations in these actions (including the constitutional and fiduciary duties in play) as well as in other actions against the Crown in that Court.

3. The Federal Court is already familiar with the nature of the plaintiff's claims since there are three other previous actions commenced by the Kaska Dene Council and other individuals which are on-going, but in abeyance.

4. The Federal Court action contains all of the allegations with respect to the duties owed, and the alleged breaches, that are in the '05 and '06 Yukon actions.

[83] With respect, none of Canada's arguments on this point hold much sway. First, although I agree that the Federal Court action is the most advanced of the three actions, the prospect of an amendment to that action is nothing more than a theoretical possibility, as RRDC's counsel has already indicated that he would not seek to amend the existing Federal Court action in the event that the Yukon actions are stayed. Second, it is slightly presumptuous to expect that the Federal Court is more familiar with these types of allegations than is the Yukon Supreme Court, insofar as Canada's argument on this point might suggest that the Federal Court is in a better position to decide such issues. Third, while there may well be other related actions by related parties previously filed in the Federal Court, it is speculative to expect that the judge who will be assigned to the trial of the Federal Court action would be familiar with the nature of those other claims or even aware of their existence. Fourth, for the reasons given in detail above, it

is incorrect to state that the Federal Court action contains all of the “alleged breaches” that are in the ‘05 and ‘06 Yukon actions.

[84] Counsel for RRDC argues that this Court and not the Federal Court, is the most convenient forum to try the Yukon actions for the following reasons:

1. It would clearly be less costly and more convenient, as counsel for both parties reside in Whitehorse and would not have travel to Ottawa and other venues in Canada for hearings and other pre-trial proceedings.
2. Counsel would not have to contend with the considerable cost and inconvenience of filing documents in the Ottawa registry of the Federal Court.
3. Case management officials, such as judges, prothonotaries and registry officers of the Federal Court would not have to incur the cost and inconvenience of traveling across Canada for the purposes of pre-trial proceedings and the trial itself, which is expected to last several weeks.
4. The public, including the plaintiff’s members and other interested Yukoners, would be able to attend court in the Yukon to observe the proceedings.
5. The plaintiff would have a juridical advantage by using this Court’s *Rules of Court*, which allow for the possibility of a summary trial, which is not available under the *Federal Court Rules*.

[85] I agree with all of those arguments and, with the *Underwriters, Lloyds* case in mind, I would add three more. First, to the extent that the Yukon actions will involve Yukon witnesses, it would clearly be more convenient for these witnesses if the trial takes place here. Second, the cause (or causes) of action in the Yukon proceedings arguably arose within the Yukon and this is arguably the jurisdiction where the loss or

damage occurred. Lastly, as I have already concluded, I would not characterize the Federal Court action as a “parallel proceeding” to those in the Yukon. In short, the plaintiff’s “case” in the ’05 and ’06 actions would seem to have a “real and substantial connection” with this jurisdiction: *Amchem*, cited above.

[86] It is interesting to note that in her reply to the submissions of RRDC’s counsel on this point, Canada’s counsel fairly and reasonably conceded that it would be more convenient to litigate the Yukon actions in the Yukon, but added that it was RRDC’s choice to commence the Federal Court action in that court in the first place. RRDC’s counsel responded by stating that he was not the plaintiff’s counsel of record at that time.

[87] For these reasons, I dismiss Canada’s alternative application pursuant to Rule 14(6.1), asking that this Court decline jurisdiction in each of the Yukon actions and enter a stay of proceedings in those actions.

CONCLUSION

[88] I would dispose of this application as follows:

1. I find that neither the ’05 nor the ’06 action, nor any portion of either, are in respect of the same cause of action as that in the Federal Court. Accordingly, I dismiss Canada’s application under section 21(2) of the *Crown Liability and Proceedings Act*.

2. I am not persuaded that either the ’05 or ’06 action, or any portions thereof, are unnecessary, vexatious, or an abuse of this Court’s process, in the context of Rule 19(24) and I dismiss Canada’s application under that subrule as well.

3. I am not persuaded that the Federal Court is the more appropriate forum to litigate the plaintiff's claims the '05 and the '06 actions. Thus, Canada's application under Rule 14(6.1) is also dismissed.

Costs

[89] Counsel for RRDC briefly indicated in his submissions that he was seeking costs "in any event of the cause" if successful on this motion. Ordinarily, under Rule 57(12)(b), the party opposing a motion that is refused is entitled to costs "as costs in the cause". Since I did not hear any submissions from Canada on this point, I will leave the parties with the option of returning before me to argue the issue of costs in a more fulsome manner, if they are unable to agree otherwise.

GOWER J.