COURT OF APPEAL

Citation: *The Attorney General of Canada et al.* v. *Ross River Dena Council*, 2009 YKCA 02

Date: 20090327
Court of Appeal File No. 08-YU627
Registry: Whitehorse

Between:

ROSS RIVER DENA COUNCIL

Respondent
(Plaintiff)

And

THE ATTORNEY GENERAL OF CANADA

Appellant
(Defendant)

AND

Between:

ROSS RIVER DENA COUNCIL

Respondent
(Plaintiff)

And:

THE ATTORNEY GENERAL OF CANADA
on behalf of and as a representative for
Her Majesty the Queen in Right of Canada

Appellant
(Defendant)

Before: Mr. Justice L.F. Gower

Appearances:

Suzanne M. Duncan — Counsel for the Appellant
Stephen L. Walsh — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for a stay of execution of an order pending appeal.

[2] On January 23, 2009, sitting as judge of the Supreme Court of Yukon, I ordered the appellant ("Canada") to produce a Report, dated June 17, 1982 ("the Report"), to the respondent ("RRDC") pursuant to Rule 25(14) of the Yukon *Rules of Court*. The Report is an historical and anthropological review of the submission of the Kaska Dena Council ("KDC") for recognition of their comprehensive land claim in northern British Columbia. It was prepared by a researcher on contract to the Department of Indian Affairs and Northern Development ("DIAND"). Canada objected to producing the Report on grounds that: it is irrelevant; its production is premature, since discovery has not yet taken place; and that it is subject to either solicitor-client or settlement privilege. I rejected all of those arguments and ordered that the Report be produced by 4 p.m. on January 28, 2009, as RRDC had a further application scheduled for February 4, 2009, and I understood that it intended to rely on the Report in that application.

[3] Canada has appealed my Order, filing its Notice of Appeal on January 29, 2009, together with its Notice of Motion for a stay of my Order, pursuant to Rule 9 of the *Court of Appeal Rules, 2005*. As I understand it, Canada's counsel originally intended to make this stay application to me under s.13 of the *Court of Appeal Act*, R.S.Y. 2002, c. 47, as "the judge of the Supreme Court" who made the Order appealed from. However, in that case, the application should have been filed in the Supreme Court of Yukon. As the Notice of Motion was filed in this Court, the parties agreed at the hearing that I may hear the application sitting as a judge of the Court of Appeal, notwithstanding that I was also

the judge who made the Order. Counsel have also agreed that the deadline for producing the Report would be extended, pending the issuance of these reasons.

ISSUES and PRINCIPLES

[4] The test for a stay of execution of an order pending appeal is the three part test set out by the Supreme Court of Canada in *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311, which was adopted by the Yukon Court of Appeal in *Gonder* v. *Velder Estate*, 2001 YKCA 4. Specifically, the onus is on the appellant to show:

1. That there is some merit to the appeal, in the sense that there is a serious question to be determined;
2. That irreparable harm would be suffered by the applicant if the stay is refused; and
3. On balance, the inconvenience to the applicant if the stay is refused would be greater than the inconvenience to the respondent if the stay is granted.

[5] Other general principles applicable to an application for a stay pending appeal include the following:

1. An order for a stay is discretionary: *Miller* v. *Loughead Ventures Ltd*. (1990), 70 D.L.R. 4th 160 (B.C.C.A.).
2. A successful plaintiff is entitled the fruits of its judgment and should not be deprived of them unless the interests of justice require that they be withheld: *Coburn* v. *Nagra*, 2001 BCCA 607, para.12.

3. A stay order should only be granted where it is necessary to preserve the subject matter of the litigation, or to prevent irremediable damage, or where there are other special circumstances: *Peter Kiewit Sons Co.* v. *Perry*, 2006 BCCA 259, para. 12.
4. The judgment below is assumed to be correct and protection of the successful plaintiff is a precondition to granting a stay: *Gill* v. *Darbar*, 2003 BCCA 3.
5. The onus lies on the applicant to establish the right to a stay: *Re: Taylor* (1986), 4 B.C.L.R. (2d) 15 (C.A.), at para. 2.

ANALYSIS

Serious Question?

[6] In *RJR-MacDonald*, the Supreme Court stated that the determination of whether there is a serious question to be tried should be "on the basis of common sense and an extremely limited review of the case on the merits" (para. 78). Further, unless the case on the merits is frivolous or vexatious, the court should, as a general rule, go on to consider the second and third parts of the test (para. 78). Finally, the Supreme Court held that the threshold is a low one, and that a prolonged examination of the merits is generally neither necessary nor desirable (para. 50).

[7] Ultimately, this first part of the three part test is satisfied if the appellant has an "arguable case": see *Whitehorse (City)* v. *Darragh*, 2008 YKCA 19, at para. 20.

[8] RRDC's counsel made rather extensive submissions on the numerous grounds of appeal listed by Canada in its Notice of Appeal. While he raised some interesting points, like Frankel J.A. in the *Darragh* case, cited above, I do not think it is appropriate for me to

comment on the substance of those submissions. Having said that, I tend to agree with Canada's counsel that some of the points raised seem to turn on particular semantic interpretations of the words or phraseology employed by Canada's counsel in drafting the grounds of appeal. As I stated in my decision below, Canada's position with respect to both privilege and waiver was fairly arguable: *Ross River Dena Council* v. *Canada (Attorney General)* 2009 YKSC 4, at para. 54. Taking a common sense view of the grounds as a whole, I am satisfied that Canada has met the first part of the test for a stay.

Irreparable Harm?

[9] "Irreparable" here refers to the nature of the harm suffered rather than its magnitude. It has been described as harm which cannot be quantified in monetary terms. The question is whether a refusal to grant a stay could so adversely affect the applicant's own interests that the harm could not be remedied if the appeal is successful: *RJR-MacDonald Inc*., at para. 58.

[10] In *White* v. *E.B.F. Manufacturing Ltd.*, 2005 NSCA 17, Cromwell J.A., as he then was, dealt with circumstances where a third party corporation, which was not before the court, was ordered to disclose financial information, which the appellant argued would, if disclosed, rob it of any practical success on appeal. Cromwell J.A. referred to this argument, at para. 24, and commented as follows:

> "I accept that, in general, the disclosure of confidential information required by a court order which is subsequently set aside on appeal constitutes irreparable harm: Business Depot Ltd. (c.o.b. Staples) v. 2502731 Nova Scotia Ltd. (carrying on business as Mailboxes Etc.), [2004] N.S.J. No. 185 (Q.L.) (N.S.C.A. Chambers) and O'Connor v. Nova Scotia (2001), 193 N.S.R. (2d) 8 (N.S.C.A. Chambers) at paras. 14-17. Such harm may result either because the content of the information, once released, may cause harm that cannot be cured by a damage award or simply because the disclosure, once made, cannot be undone. The appellant says it will suffer both types of harm." (my emphasis)

[11] Earlier, in *O'Connor* v. *Nova Scotia,* 2001 NSCA 47, Cromwell J.A., dealt with the issue of irreparable harm in the context of an access to information case, in which an order granting access had been made and was being appealed. He noted, at para. 14, that if the stay was not granted pending the appeal and the information was released, if the appeal succeeded, that release would be found unlawful. In his view, such a wrongful release would constitute irreparable harm in at least three ways, which he detailed as follows:

> "[15] First, the release of the information may injure the persons affected by its release in ways which cannot be compensated by money.
>
> [16] Second, once access to information is granted, it cannot be undone if the order for access is subsequently reversed on appeal. The harm is irreparable in the sense that a legal wrong has been committed which cannot be compensated or reversed. In some cases, the injury resulting from disclosure will be minimal, but that does not detract, in my view, from the proper characterization of the wrongful disclosure as constituting irreparable harm. As Cory and Sopinka JJ. said in *RJR - MacDonald*, supra, irreparable refers to the nature of the harm rather than its magnitude. The essence of the concept is a wrong which cannot be undone or cured. The unlawful disclosure of information, even where it does not injure anyone, is a wrong which cannot be undone or cured and is, therefore, capable of being "irreparable" for the purposes of a stay pending appeal.
>
> [17] Third, the disclosure of the contested information will generally render the effects of a successful appeal nugatory. There is ample authority for the proposition that where that is the result of the refusal of a stay pending appeal or judicial review, irreparable harm has been shown: see, for example, *National Financial Services Corp.* v. *Wolverton Securities* (1998), 160 D.L.R. (4th) 688 (B.C.C.A. Chambers) at (paragraph) 29 and 32; *Suresh* v. *Canada (Minister of Citizenship and Immigration)* (1999), 176 D.L.R. (4th) 296 (Fed. C.A. Chambers) at pp. 305 - 307; *Gaudet* v. *Ontario (Securities Commission)* (1990), 38 O.A.C. 216 (Div. Ct.); *Re Hayles* and *Sproule* (1980), 29 O.R. (2d) 500 (Ont. Div. Ct.)."

[12] The Nova Scotia Court of Appeal in *Stewart McKelvey Stirling Scales* v. *Nova Scotia Barristers' Society*, 2005 NSCA 149, applied both *White* and *O'Connor* in the context of the production of material which was arguably subject to solicitor-client privilege. There, the law firm of Stewart McKelvey opposed a subpoena by the Barristers' Society to produce certain documents and information, on the basis of solicitor-client privilege. The law firm applied to the court for directions and was ordered to produce the material requested by the Barristers' Society. That order was appealed to the Court of Appeal and an application was made to stay the order pending the disposition of the appeal. Dealing with the issue of irreparable harm, Oland J.A., in Chambers, stated, at para. 31:

> "If, in accordance with Justice Scanlan's order, privileged communications are delivered to the Society, and if his decision should be reversed on appeal, legal wrongs will have been committed that cannot be undone. The Complaints Investigation Committee will have received and will have had access to material for which it had no legal authority to compel production. Moreover, [Stewart McKelvey] will have surrendered privileged material which concerns its clients to that Committee, without any legal basis for having done so. Finally, Mr. Potter's appeal which argues that the Complaints Investigation Committee has no such authority will have been futile and made nugatory. In my view such consequences constitute irreparable harm."

[13] As noted, Canada argues that the Report at issue is subject to solicitor-client privilege. I have already determined that it has an arguable case in that regard, notwithstanding my conclusions to the contrary in my reasons below.

[14] RRDC's counsel argued that my earlier determination that the Report does not contain any legal advice, assessment or analysis eliminates the risk that any such information would be disclosed by the production of the Report. He also points to Canada's implicit concession below that some of the facts contained in the Report may

be discoverable by other means: *Ross River Dena Council*, cited above, at paras. 2, 13 and 28.

[15] While I find both points attractive, I remain unpersuaded that Canada would not suffer irreparable harm if the Report is disclosed prior to the merits of the appeal being heard. I have had the advantage of reading the Report and have expressed certain opinions about it in my decision below. Although it remains unclear to me why Canada is adamant that it not be released, that is not a question to be resolved at this stage. Canada obviously has its reasons for wanting to protect the Report and I have to assume that there may be certain facts contained therein which, although not in the nature of normal lawyer-client communications, are either sensitive, or important for other reasons to remain confidential. Thus, I prefer to follow the general principle in *O'Connor*, *White* and *Stewart McKelvey* that the disclosure of such confidential information at this time, in the event of a successful appeal, would constitute irreparable harm.

[16] Further, notwithstanding the creative conditions suggested by RRDC's counsel to minimize the risk of such irreparable harm, again, I remain unpersuaded that they would eliminate that risk altogether. Wittmann J.A., in *Ericsson Inc*. v. *Novatel Inc.*, 2001 ABCA 170, addressed similar proposed safeguards, undertakings and promises by counsel, but dismissed them out of hand, at para. 19:

> "I indicated during the hearing that I do not accept that those kinds of safeguards are appropriate. They are simply not good enough. There are sound policy reasons for keeping documents which have attracted a privilege from opposing counsel as well as the opposite party. I need not comment further on that issue."

Balance of Inconvenience?

[17] The third part of the test to be applied in an application for a stay pending appeal is a determination of which of the two parties will suffer the greater harm from the granting or refusal of the stay, pending a decision on the merits. The factors which must be considered in assessing the balance of inconvenience are numerous and will vary in each individual case: *RJR-MacDonald*, at paras. 62 and 63. In addition to the damage each party alleges it will suffer, the interest of the public must also be taken into account: *RJR-MacDonald*, at para. 80.

[18] I noted in my decision below, at para. 14, that RRDC had given notice that they want to rely on the contents of the Report in two upcoming pre-trial motions. The first of those was an application by RRDC to strike portions of Canada's Statements of Defence, where Canada had pled that it has "no knowledge" of matters relating to the existence of the Kaska or their traditional territory. The subsequent application will be by Canada to challenge RRDC's ability to prosecute these claims as "representative" actions. One of the grounds I anticipate Canada will argue on the latter application is that the Kaska Nation and its members cannot be identified for the purposes of the representative action. I concluded below that it was possible the contents of the Report "may" be of assistance to RRDC in litigating both applications. This suggests that it would be inconvenient to RRDC if the stay is granted.

[19] However, as it turned out, RRDC's application to strike was resolved by an agreed upon amendment to Canada's pleadings. Further, with respect to Canada's upcoming motion on the representative action, Canada's counsel informs me that she has made a proposal to RRDC's counsel in an attempt to resolve that issue as well. Alternatively, she

suggested Canada would be willing to adjourn the motion until after the within appeal is heard. In any event, Canada's counsel also notes that RRDC was originally prepared to argue that motion last December, prior to bringing the application for production of the Report. Finally, Canada's counsel points to the absence of any specific reasons given by RRDC's counsel as to why he needs the Report to respond to the application. These points suggest that the potential inconvenience to RRDC is not as great as one initially might think, and that it is capable of being mitigated.

[20] RRDC's counsel submits that he also requires the Report in order to fully and fairly respond to the appeal. He noted that one of the grounds of appeal is that I erred below in finding that the Report was "relevant" to the issues in those actions, and that he cannot properly respond to that ground without knowing the contents of the Report. On the other hand, Canada's counsel submits that the question of relevance will be a relatively straightforward one for the Court of Appeal to determine, and will likely be based primarily on its own examination of the Report and not so much the submissions of counsel. Once again, I tend to agree.

[21] With respect to the public interest consideration, Canada's counsel argues that the issues of solicitor-client and settlement privilege are fundamental to our justice system and therefore of significant concern to the public at large: see *Stewart McKelvey*, cited above, para. 14. RRDC's counsel counters that by suggesting the honour of the Crown in its dealings with Canadian aboriginal peoples is also a public interest issue. In particular, he says that it is inconsistent with the honour of the Crown for Canada to attempt to suppress material facts "which are clearly not privileged." However, the question of whether the Report is privileged is one of the very issues to be decided on the

appeal. Therefore, I view the public interest factor as tending to tip the balance in Canada's favour.

[22] Finally on this part of the three part test, I understand the appeal will be heard at the sittings of the Court of Appeal in Whitehorse commencing May 22, 2009, and that dates have been set for the timely filing of materials. That will allow for a relatively expeditious hearing of the appeal on its merits, leading me to conclude that the inconvenience to RRDC resulting from a stay of my Order for production will be minimized.

[23] Accordingly, I find that the balance of inconvenience favours Canada.

CONCLUSION

[24] The application for a stay of my Order of January 23, 2009 is granted. Costs will be in the appeal.

Gower J.