Federal Court

Cour fédérale

Date: 20150727

Docket: T-2210-76

Citation: 2015 FC 918

Ottawa, Ontario, July 27, 2015

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

GRAND CHIEF MICHAEL MITCHELL, acting personally and on behalf of and as representative of the Mohawks of Akwesasne and the members of the Mohawk Council of Akwesasne

and

THE MOHAWK COUNCIL AND MOHAWKS OF AKWESASNE

and

FORMER CHIEF WILLIAM SUNDAY, former band chief of St. Regis Reserve, Quebec, **BENJAMIN ROUNDPOINT**, construction worker of Cornwall Island Reserve, Ontario, **JAMES CALDWELL**, mailman, of Cornwall Island Reserve, Ontario, **LAWRENCE FRANCIS**, executive, of Cornwall Island Reserve, Ontario, **CATHERINE DAY**, housewife, of Cornwall Island Reserve, Ontario, **CECILIA BUCKSHOT**, self-employed, of St. Regis Reserve, Quebec, **FRANCIS SAM**, administrator, of St. Regis Reserve, Quebec, **GERALD SHARROW**, construction worker of St. Regis Reserve, Quebec, **MICHAEL FRANCIS**, construction worker of St. Regis Reserve, Quebec, **REGINALD MITCHELL**, maintenance worker of St. Regis Reserve, Quebec, **JAMES LAZORE**, electrician, of St. Regis Reserve, Quebec, and **MICHAEL DAVID**, construction worker, of St. Regis Reserve,

Quebec, being all at one time councillors of the Iroquois of St. Regis Indian Band

and

THE MOHAWKS OF AKWESASNE, formerly known as **THE IROQUOIS OF ST. REGIS**, a recognized legal entity under the Indian Act, herein acting through the band council and its councillors

Plaintiffs

and

THE ST. LAWRENCE SEAWAY AUTHORITY, a corporation established by Act of the Parliament of Canada having its head office in the City of Ottawa and having branches in Quebec situated at the St. Lambert Locks, St. Lambert, Quebec, and in Ontario situated in Cornwall, Ontario at 202 Pitt Street

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

and

THE FEDERAL BRIDGE CORPORATION LIMITED, a corporation incorporated under the laws of Canada, having its head office in Ottawa, Ontario at 55 Metcalfe Street, Suite 1210,

and

THE SEAWAY INTERNATIONAL BRIDGE CORPORATION, LTD., a corporation incorporated under the laws of Canada, having its head office in Cornwall, Ontario, with an office on Kawehnoke (Cornwall Island) and with its mailing address as P.O. Box 836,

Defendants

ORDER AND REASONS

I. Introduction

[1] This is a motion for summary judgment in favour of the Defendants on that portion of a much more comprehensive Amended Statement of Claim [Claim] as that Claim relates to an area of land on Cornwall Island in the St. Lawrence River known to the parties as “Area M”.

[2] The Order sought is one:

a) Granting the within motion for partial summary judgment dismissing that part of the Statement of Claim which seeks to advance a claim in respect of the dumping of fill upon land located in Area M on Cornwall Island;

b) Declaring that all interests, including that of the Mohawks of Akwesasne [Band], arising from the addition of fill to lots in Area M on Cornwall Island were intended to and were fully and finally settled by agreement with each of the Locatees whose lands had been effected; and,

c) In the alternative, granting a declaration to the effect set out in paragraph b) above but subject to legal impact, if any, that might later be determined to arise should a treaty be found to apply to this transaction as part of Phase 1 of these proceedings.

[3] For the reasons outlined, this motion will be dismissed. In summary, I have concluded:

a) that material facts are in issue in respect to Area M and also in respect to the whole of the Claim;

b) that the law on aboriginal land title and possession both generally, and in particular related to these facts, is not settled;

c) that the issues in respect to Area M overlap with issues in the balance of the Claim; the determination of which ought not to be done at this stage;

d) that alternatives to Summary Judgment such as Summary Trial would not be sufficiently practical or beneficial now; and,

e) that this litigation requires active case management including a review of the Phasing Order in the light of legal developments since its issuance and the developing position of the Plaintiffs.

II. Background

A. *Legislation*

[4] A central issue in this part of the Claim is the rights of a Band as contrasted with those of an individual Band member holding a Certificate of Possession; specifically, the issue of whether the Band holds a collective interest separate from the interest of individual Band members.

Therefore, I have set out below the most applicable provisions of the *Indian Act*, RSC 1985 c I-5 [*Indian Act*]:

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.	**18.** (1) Sous réserve des autres dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; sous réserve des autres dispositions de la présente loi et des stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.
…	…
20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.	**20.** (1) Un Indien n'est légalement en possession d'une terre dans une réserve que si, avec l'approbation du ministre, possession de la terre lui a été accordée par le conseil de la bande.
(2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.	(2) Le ministre peut délivrer à un Indien légalement en possession d'une terre dans une réserve un certificat, appelé certificat de possession, attestant son droit de posséder la terre y décrite.
(3) For the purposes of this Act, any person who, on September 4, 1951, held a valid and subsisting Location Ticket issued under *The Indian Act, 1880*, or any statute relating to the same subject-	(3) Pour l'application de la présente loi, toute personne qui, le 4 septembre 1951, détenait un billet de location valide délivré sous le régime de l'*Acte relatif aux Sauvages, 1880*, ou de toute loi sur le

matter, shall be deemed to be lawfully in possession of the land to which the location ticket relates and to hold a Certificate of Possession with respect thereto.

même sujet, est réputée légalement en possession de la terre visée par le billet de location et est censée détenir un certificat de possession à cet égard.

(4) Where possession of land in a reserve has been allotted to an Indian by the council of the band, the Minister may, in his discretion, withhold his approval and may authorize the Indian to occupy the land temporarily and may prescribe the conditions as to use and settlement that are to be fulfilled by the Indian before the Minister approves of the allotment.

(4) Lorsque le conseil de la bande a attribué à un Indien la possession d'une terre dans une réserve, le ministre peut, à sa discrétion, différer son approbation et autoriser l'Indien à occuper la terre temporairement, de même que prescrire les conditions, concernant l'usage et l'établissement, que doit remplir l'Indien avant que le ministre approuve l'attribution.

(5) Where the Minister withholds approval pursuant to subsection (4), he shall issue a Certificate of Occupation to the Indian, and the Certificate entitles the Indian, or those claiming possession by devise or descent, to occupy the land in respect of which it is issued for a period of two years from the date thereof.

(5) Lorsque le ministre diffère son approbation conformément au paragraphe (4), il délivre un certificat d'occupation à l'Indien, et le certificat autorise l'Indien, ou ceux qui réclament possession par legs ou par transmission sous forme d'héritage, à occuper la terre concernant laquelle il est délivré, pendant une période de deux ans, à compter de sa date.

(6) The Minister may extend the term of a Certificate of Occupation for a further period not exceeding two years, and may, at the expiration of any period during which a Certificate of Occupation is in force

(6) Le ministre peut proroger la durée d'un certificat d'occupation pour une nouvelle période n'excédant pas deux ans et peut, à l'expiration de toute période durant laquelle un certificat d'occupation est en vigueur :

(*a*) approve the allotment by the council of the band and issue a Certificate of Possession if in his opinion the

a) soit approuver l'attribution faite par le conseil de la bande et délivrer un certificat de possession si, d'après lui, on a

conditions as to use and settlement have been fulfilled; or

satisfait aux conditions concernant l'usage et l'établissement;

(*b*) refuse approval of the allotment by the council of the band and declare the land in respect of which the Certificate of Occupation was issued to be available for re-allotment by the council of the band.

b) soit refuser d'approuver l'attribution faite par le conseil de la bande et déclarer que la terre, à l'égard de laquelle le certificat d'occupation a été délivré, peut être attribuée de nouveau par le conseil de la bande.

21. There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

21. Il doit être tenu au ministère un registre, connu sous le nom de Registre des terres de réserve, où sont inscrits les détails concernant les certificats de possession et certificats d'occupation et les autres opérations relatives aux terres situées dans une réserve.

22. Where an Indian who is in possession of lands at the time they are included in a reserve made permanent improvements thereon before that time, he shall be deemed to be in lawful possession of those lands at the time they are included.

22. Un Indien qui a fait des améliorations à des terres en sa possession avant leur inclusion dans une réserve, est considéré comme étant en possession légale de ces terres au moment de leur inclusion.

23. An Indian who is lawfully removed from lands in a reserve on which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by the Minister, either from the person who goes into possession or from the funds of the band, at the discretion of the Minister.

23. Un Indien qui est légalement retiré de terres situées dans une réserve et sur lesquelles il a fait des améliorations permanentes peut, si le ministre l'ordonne, recevoir à cet égard une indemnité d'un montant que le ministre détermine, soit de la personne qui entre en possession, soit sur les fonds de la bande, à la discrétion du ministre.

24. An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.

24. Un Indien qui est légalement en possession d'une terre dans une réserve peut transférer à la bande, ou à un autre membre de celle-ci, le droit à la possession de la terre, mais aucun transfert ou accord en vue du transfert du droit à la possession de terres dans une réserve n'est valable tant qu'il n'est pas approuvé par le ministre.

25. (1) An Indian who ceases to be entitled to reside on a reserve may, within six months or such further period as the Minister may direct, transfer to the band or another member of the band the right to possession of any lands in the reserve of which he was lawfully in possession.

25. (1) Un Indien qui cesse d'avoir droit de résider sur une réserve peut, dans un délai de six mois ou dans tel délai prorogé que prescrit le ministre, transférer à la bande, ou à un autre membre de celle-ci, le droit à la possession de toute terre dans la réserve, dont il était légalement en possession.

(2) Where an Indian does not dispose of his right of possession in accordance with subsection (1), the right to possession of the land reverts to the band, subject to the payment to the Indian who was lawfully in possession of the land, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

(2) Lorsqu'un Indien ne dispose pas de son droit de possession conformément au paragraphe (1), le droit à la possession de la terre retourne à la bande, sous réserve du paiement, à l'Indien qui était légalement en possession de la terre, sur les fonds de la bande, de telle indemnité pour améliorations permanentes que fixe le ministre.

26. Whenever a Certificate of Possession or Occupation or a Location Ticket issued under *The Indian Act, 1880*, or any statute relating to the same subject-matter was, in the opinion of the Minister, issued to or in the name of the wrong person, through mistake, or

26. Lorsqu'un certificat de possession ou d'occupation ou un billet de location délivré sous le régime de l'*Acte relatif aux Sauvages, 1880* ou de toute loi traitant du même sujet, a été, de l'avis du ministre, délivré par erreur à une personne à qui il n'était

contains any clerical error or misnomer or wrong description of any material fact therein, the Minister may cancel the Certificate or Location Ticket and issue a corrected Certificate in lieu thereof.	pas destiné ou au nom d'une telle personne, ou contient une erreur d'écriture ou une fausse appellation, ou une description erronée de quelque fait important, le ministre peut annuler le certificat ou billet de location et délivrer un certificat corrigé pour le remplacer.
27. The Minister may, with the consent of the holder thereof, cancel any Certificate of Possession or Occupation or Location Ticket referred to in section 26, and may cancel any Certificate of Possession or Occupation or Location Ticket that in his opinion was issued through fraud or in error.	**27.** Le ministre peut, avec le consentement de celui qui en est titulaire, annuler tout certificat de possession ou occupation ou billet de location mentionné à l'article 26, et peut annuler tout certificat de possession ou d'occupation ou billet de location qui, selon lui, a été délivré par fraude ou erreur.

B. *Facts*

[5] Cornwall Island [Island] is one of several islands in the St. Lawrence River between Prescott, Ontario and Montreal, Quebec, and forms part of the Plaintiff Band's reserve which straddles the Ontario/Quebec border. The Ontario Reserve, formally Cornwall Island Reserve No. 59, is now referred to as Akwesasne Reserve No. 59; the Quebec Reserve, formerly St. Regis Indian Reserve No. 15, is now Akwesasne Reserve No. 15. These reserves are divided into districts: Tsi-Snailhe (Chenail, Quebec), Kanatakon (St. Regis Village, Quebec) and Kawehnoke (Cornwall Island, Ontario).

[6] Members of the Band have lived and cultivated the Island continuously since 1760. Members built homes on higher ground and cultivated fruits, vegetables, hay and livestock, as well as engaged in hunting and trapping activities.

[7] The Plaintiffs alleged that the Akwesasne Reserve has a long, unique and complex history and as a result, has to be understood on its own terms. It is apparent that the nature of the relationship with the Defendant Crown is a critical aspect of the Claim as a whole.

[8] The Plaintiffs specifically allege, and there is some dispute on these assertions or at least their relevance, that:

- the Band occupied Kawehnoke at the time of the British conquest of New France;
- on August 30, 1780, at Oswegatchy, the Seven Nations entered into a treaty of neutrality with the British where the British Crown promised that the lands of the Seven Nations would be protected; and,
- a fiduciary relationship between the Band and the Crown was established by the Treaty of Swegatchy of 1760, by the Crown's acquisition of the territory of New France as indicated by the Articles of Capitulation and by the Royal Proclamation of 1763.

[9] The St. Lawrence Seaway Authority [SLSA], created under federal statute, was part of the joint Canada-USA construction of the new canal and other works in the St. Lawrence River. It planned and supervised the construction of navigation works and bridges from 1956 to 1963. As part of its operation, it excavated large parts of the north and south of the Island. To do so, it expropriated land and dumped fill in different locations in and around the Island.

[10] Area M was used to dispose of excavation fill from the area. The parties disagree as to the reason Area M was used – the Plaintiffs contend that the SLSA initiated the operation; the

Defendants say that the Band asked SLSA to fill in the low areas to make swampy land more useful.

[11] A Band Council Resolution [BCR] of 1957 consented to the SLSA's infill project which would add fill to the land held by individual Band members under a Certificate of Possession. The Certificate is referred to as a COP and the Band members as Locatees.

[12] There is a significant dispute as to how this Area M infill project came about; the role of SLSA, its engineers, and Department of Justice counsel. There is a further issue of what the Band knew and understood of the Area M project as it had neither engineering advice nor legal counsel.

However, the Plaintiffs acknowledge that the Band Council was favourable to the Area M project because of the opportunity to improve the land.

[13] Area M was comprised of a number of lots; each one held by a Locatee.

[14] Another BCR in 1957 confirmed that Band Council agreed to SLSA's wishes "to pay for any compensation claimed by individual owners for the loss of the use of the land and crops in the fill area".

[15] From 1957 various Locatees complained about the suitability of the filled in land. It is contended that SLSA recognized this problem and agreed to pay for crop loss in 1959.

[16] In 1960, without Band Council's consent, SLSA released the contractors doing the work in Area M despite the land being unfit for occupation.

[17] Thereafter, until 1967, Band Council continued to complain to SLSA and various studies and efforts at remediation were undertaken. Efforts appeared to dissipate over time. SLSA paid for crop losses until and including 1964 when SLSA refused until Band Council agreed to a settlement.

[18] There was continuous interplay between Band Council, SLSA and Indian Affairs. By mid-1967 the general basis of a settlement was being worked out. The Defendants assert that only Locatees had a right to advance a claim for damages. However, the May 29, 1967 BCR approving a settlement process with the Locatees also included a 10% equity to the Band Council on payments made to the Locatees. The specific words were:

> 1) The Seaway Authority shall negotiate directly with each Claimant and shall obtain good sufficient receipts for all claims paid.
>
> 2) <u>The Seaway Authority shall deal with the Band Council for all claims involving the Band as a whole including a 10% equity on payments made to individual claimants who have occupation rights through Location Ticket or Certificate of Possession.</u> [emphasis added]
>
> 3) The Seaway Authority to report periodically to Council on payments made to and the reason therefor.
>
> 4) Compensation for payment made on behalf of the Band shall be paid to the Receiver General of Canada for the credit of the St. Regis Band.

5) That the Seaway Authority shall perform to the satisfaction of the Claimant such work as may be required and agreed upon in writing involving restitution for loss of crop; fencing; seeding; drainage; road repairs and the like or shall pay to the Claimant in lieu thereof such amounts as may be agreed upon in writing.

6) That the Claims covering Area M shall be disposed of first.

[19] There is a significant factual and legal issue in this litigation as to whether only Locatees had the right to damages or whether the Band also had a compensable interest, as well as what may be the meaning and significance of the 10% equity.

[20] A letter the following day from Chief Angus Mitchell stated:

> Notification has gone out to individual claimants on Cornwall Island that the Authority will negotiate directly with them covering claims to which they have a legal right to be compensated….The Authority shall pay to the Receiver General of Canada for the credit of the St. Regis Band, the full amount of all claims payable on behalf of the Band as a whole, plus a 10% Band equity on the amount of each and every claim paid to an individual Band Member.

[21] Between 1967 and 1969 each of the 11 Locatees settled their claims with the SLSA and executed releases. There is no issue that these individuals have not been compensated and no claim is asserted on their behalf.

[22] While the Defendants object to the evidence of Brian David, a member of the Band attesting to events of which he does not have direct knowledge, they also rely on his evidence that the President of SLSA could reasonably perceive that all matters were settled.

[23] The Plaintiffs point out that the BCRs and related correspondence refer to two separate groups of claimants – the Locatees on the one hand and the Band on the other, under which the Band was to receive compensation plus a 10% equity in payments to Locatees.

[24] In 1972 the litigation process began with a general demand letter followed by a formal claim to SLSA.

C. *Procedural History – Relevant Portions*

[25] The original Statement of Claim was filed on June 8, 1976, amended on June 22, 1988, and a Statement of Defence was filed on November 15, 1990.

[26] On January 28, 2000, the Amended Statement of Claim No. 2 was filed naming the St. Lawrence Seaway Authority, Her Majesty the Queen in Right of Canada, the Seaway International Bridge Corporation Ltd. and the Federal Bridge Corporation Limited as Defendants.

[27] The Claim includes the following:

1. The Defendants were involved in the construction and maintenance of the deep waterway, the St. Lawrence Seaway and all related works structures facilities and changes to water levels and flow, defined as the Seaway Project.
2. The entire Seaway Project was unconstitutional and illegal, or constitutionally inoperative to the Plaintiffs and a breach of their aboriginal title, aboriginal rights, treaty rights and other rights.

3. The construction and demolishment of identified bridges and expropriation including trespass of the land was illegal (this is described in great detail).

4. The Plaintiffs have received no compensation or benefits respecting the revenues from the Power Project comprising of the electric power development in the St. Lawrence River at the International Rapids section near Kawehnoke or its counterpart in the United States. The Defendant, Canada, took no measures or inadequate measures to protect the rights and interests of the Plaintiffs respecting the facilities of the Power Project and the purported restructuring of Ontario Hydro in further breach of trust, fiduciary and equitable obligations to the Plaintiffs.

5. The Plaintiffs and their predecessors have continuously occupied and used the St. Lawrence River between approximately Prescott and Valleyfield, adjacent lands and waters and other lands and waters, the islands in the St. Lawrence River and certain parts of Quebec, Ontario and the United States and all natural resources and cultural properties on such lands [the traditional lands].

6. The Plaintiffs claim that they have aboriginal title and treaty rights over the traditional lands and that these rights have been breached.

7. Damages from the Projects include, *inter alia*, negatively altering the natural environment and ecosystem, changing the course of the river, pollution, stagnation, loss of habitat and traditional knowledge, damage to health, livelihood, subsistence and way of life. The losses described amount to $105 million.

8. The Plaintiffs seek $110 million for damages in regard to the illegal expropriations, taking, occupation and trespass and illegal revenues. The Plaintiffs further seek recovery totalling $70,257,250 for compensation, injurious affection and other losses as a direct and immediate result of the purported expropriations on Cornwall Island. Total compensation sought is $315,257,250.

9. Additional relief sought includes numerous declarations in relation to land, certain acts and title.

[28] The Amended Statement of Defence and Reply have been filed. In the Defence, the Defendants, in addition to a series of details of the allegations, raise the compensation paid to individuals on Cornwall Island.

[29] A critical piece of this case management process is what is known as the Phasing Order granted by Justice Tremblay-Lamer on February 13, 2007. The Phasing Order identified those issues arising from the Claim that are suitable for earlier determination because they "are relatively straightforward when compared to the complexity of the other proceedings taken as a whole".

The Court was satisfied that the creation of Phase 1 issues for determination would "contribute to the just, expeditious and less expensive determination of the proceedings on the merits and therefore is in the interests of justice". This Order was put in place over eight years ago.

[30] The issue of aboriginal title was not to be determined in Phase 1. The issues to be determined included:

- the purported expropriation for the construction of the hydroelectric project [Power Project] on the St. Lawrence River which included the north shore of Cornwall Island expropriated for the tailrace of the Power Project;
- the purported expropriation related to the construction of the Navigation Channel, which covered a number of islands including Cornwall Island that was expropriated for the Seaway Project;
- the purported expropriations related to the construction of the International Bridge, which principally affected Cornwall Island;
- depending on the basis of liability, determination of the applicable principles of compensation;
- whether the Band as a collectivity and in respect of all of their collective rights and interests in the relevant land, received fair compensation for the purported expropriation in respect of "Reclamation and use of lands"; and,
- whether the SLSA had due authorization to deposit excavated materials including dredge spoils on lands on Cornwall Island including Area M and if so, whether such authorization constituted a breach of trust or breach of fiduciary duty by the Crown.

[31] In respect of Area M, the Phasing Order identified various issues including: obligations owed under the BCR by SLSA and/or the Crown; potential breach thereof by rendering land unfit for agricultural use; whether there was a loss of use of the lands by the Mohawks of

Akwesasne; a diminution in the value of those lands or costs of restoration; and, remediation of Area M to a useable state, the quantum of compensation.

[32] It is apparent that Cornwall Island and what happened there in its many aspects is integral to the Claim, of which Area M is an important part.

[33] The Defendants' motion for summary judgment would attempt to carve out certain Area M issues from the Phasing Order.

III. Analysis

[34] The principal issue is whether Summary Judgment is an appropriate procedure for the Area M issues raised by the Defendants. Ancillary to this is whether reliance on the expert report of Jean-Pierre Sawaya on the Treaty of Swegatchy (or Oswegatchie) and the affidavit of Brian David is appropriate.

[35] This Court and the Court of Appeal have commented upon the principles of the Supreme Court's decision in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, in the context of the *Federal Courts Rules*, SOR/98-106 [*Rules*], and how there is little change to the substantive content of the *Rules*. The Supreme Court of Canada's decision reaffirmed the principles in our *Rules*, particularly Rule 3.

This litigation has been case managed in accordance with these *Rules* and the proposed remedy of active case management continues the application of those principles.

[36] Justice Stratas in *Manitoba v Canada*, 2015 FCA 57, 250 ACWS (3d) 240 [*Manitoba*], summarized the principles of Federal Court summary judgment proceedings:

> [11] In my view, *Hryniak* does bear upon the summary judgment issues before us, but only in the sense of reminding us of certain principles resident in our Rules. It does not materially change the procedures or standards to be applied in summary judgment motions brought in the Federal Court under Rule 215(1).
>
> [12] *Hryniak* considered the summary judgment rules in Ontario's *Rules of Civil Procedure*. The summary judgment rules in the *Federal Courts Rules* are worded differently from those in Ontario.
>
> [13] The *Federal Courts Rules* are a federal regulation and have the status of laws that the Federal Courts cannot change. Care must be taken not to import the pronouncements in *Hryniak* uncritically, thereby improperly amending the *Federal Courts Rules*.
>
> [14] The summary judgment rules in the *Federal Courts Rules* were amended just six years ago to take into account the sorts of considerations discussed in *Hryniak* and the challenges posed by modern litigation: see SOR/2009-331, section 3. Foremost among these amendments was the introduction of an elaborate and aggressive summary trial procedure in Rule 216, available in accordance with the specific wording of the *Federal Courts Rules*. I turn now to the specific wording of Rules 215 and 216.
>
> [15] Under Rule 215(1) of the *Federal Courts Rules*, where there is "no genuine issue for trial" the Court "shall" grant summary judgment. The cases concerning "no genuine issue for trial" in the Federal Courts system, informed as they are by the objectives of fairness, expeditiousness and cost-effectiveness in Rule 3, are consistent with the values and principles expressed in *Hryniak*. In the words of *Burns Bog Conservation Society v. Canada*, 2014 FCA 170, there is "no genuine issue" if there is "no legal basis" to the claim based on the law or the evidence brought forward (at paragraphs 35-36). In the words of *Hryniak*, there is "no genuine issue" if there is no legal basis to the claim or if the judge has "the evidence required to fairly and justly adjudicate the dispute" (at paragraph 66). *Hryniak* also speaks of using "new powers" to assist in that determination (at paragraph 44). But under the text of the *Federal Courts Rules* those powers come to bear only later in the analysis, in Rule 216.

> [16] Where, as the Federal Court found here, there is a genuine issue of fact or law for trial, then the Court "may" (i.e., as a matter of discretion), among other things, conduct a summary trial under Rule 216: Rule 215(3). As is evident from Rule 216, summary trials supply the sort of intensive procedures for pre-trial determinations that the Court in *Hryniak* (at paragraph 44) called "new powers" for the Ontario courts to exercise.
>
> [17] For all of the foregoing reasons, like the Alberta Court of Appeal in *Can v. Calgary (Police Service)*, 2014 ABCA 322, 560 A.R. 202, I conclude that *Hryniak* does not change the substantive content of our procedures. However it does remind us of the imperatives and principles that reside in our summary judgment and summary trial rules – imperatives and principles that, by virtue of Rule 3, must guide the interpretation and application of our Rules.

A. *Sawaya Report/Affidavit of Brian David*

[37] The Defendants' objection to the inclusion of the Sawaya Report is that it runs counter to the Phasing Order which provided that issues of aboriginal title were not to be decided in Phase 1. They argue that it is evidence, which is neither necessary nor determinative of the central question on the motion – did the Band Council intend to conclude a settlement on all disputes arising out of Area M by resolving to have the SLSA resolve the issues with each Locatee?

[38] The Defendants also object to the argument and supposition of fact upon which the documents presented by David's affidavit were made – the documents themselves are not objected to. David purports to offer insights into intentions, historical action and general argument on the documents despite having no contemporary knowledge of those facts.

[39] While there was some argument on the motion, it was not extensive; however, for completeness, the objection will be addressed.

[40] Regarding the Sawaya Report, firstly, this motion can be disposed of without reference to treaty rights. Secondly, the existence of the Treaty is a live issue in this case. The legal principles that govern Indian interests in reserve lands are the same as govern aboriginal title (*Guerin v The Queen*, [1984] 2 SCR 335 at 379). Issues of fiduciary duty may be created or coloured by treaty considerations and the Treaty is relevant to the intentions of the parties, particularly the Band Council's.

[41] The David affidavit's infirmities of hearsay and the notion of expert/lay opinion can be dealt with by the Court in weighing the credibility of the statements. The Court's conclusion on this motion does not turn on David's narrative. The documents attached to the affidavit are relevant even for the Defendants, who relied upon them.

[42] Therefore, both the Report and the Affidavit will not be struck.

B. *Summary Judgment*

[43] As confirmed in *Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2010 FC 966, 373 FTR 306, and held in *Society of Composers, Authors and Music Publishers of Canada v Maple Leaf Sports & Entertainments*, 2010 FC 731, 191 ACWS (3d) 92, a motion for summary judgment is to determine whether there is a "genuine issue for trial", and not to litigate the merits of the trial.

[44] The Defendants' principal grounds for the motion are that the SLSA in 1969 settled the claims arising from the infill project at Area M with each of the Locatees, and obtained releases confirming the final resolution of these claims. The Defendants further argue that there is no independent Band claim flowing from the infill project.

At the core of the Defendants' position is that the Locatees had all the rights, by virtue of their COP, to any compensation and the Band had none.

[45] With respect, I do not see the situation as being so crystal clear that the Band does not have at the very least a "genuine issue for trial" in this regard. This matter breaks down into the general legal proposition of the rights of COP holders contrasted with those of the Band as well as the specifics of this case and its provision for compensation.

[46] The Defendants' position is that COP holders replace any interest a band may have in the land subject only to the right of reversion in favour of the Band. They rely in particular on the Ontario Court of Appeal's decision in *Tyendinaga Mohawk Council v Brant*, 2014 ONCA 565, 121 OR (3d) 561 [*Tyendinaga*].

[47] The *Tyendinaga* case involved the question of whether a band member's COP could be seized by the band for payment of debts. That court refers to an argument made about the rights of a COP holder vis-à-vis the band:

> [49] Miracle then relies on commentary of the application judge in the case of *Seguin v. Pelletier* (2001), 25 C.B.R. (4th) 90, and suggests that while individual possession of reserve land is not equivalent to ownership in fee simple to land off reserve, it is the closest possible comparison. In *Seguin*, at para. 22, the application judge uses a quote from Jack Woodward's *Native Law* text, which

is still in the present version of his looseleaf: *Native Law*, looseleaf (Toronto: Carswell, 2014), at p. 278:

> Individual possession of reserve land is a unique form of land tenure not equivalent to any other type of land ownership under Canadian law. *It is not precisely the same as fee simple ownership off reserve and it is entirely different from the Band's interest in the unallocated land of a reserve* ... An individual Indian has no right of possession over the unallocated lands of the reserve, but when an individual Indian is in possession of reserve lands under Section 20 of the Indian Act, the rest of the band members lose their collective right to occupy that portion of the reserve. *The individual may then occupy and develop lands in their possession without interference by the Band Council or the other Band members*. [Emphasis added.]

[48] The Defendants also refer to *Joe v Findlay*, [1981] BCJ No 366, 122 DLR (3d) 377, (BCCA), regarding the possessory right of a COP holder:

> [8] This right of the entire band in common may be exercised for the use and benefit of an individual member of the band by the band council, with the approval of the minister, allotting to such individual member the right to possession of a given parcel of reserve lands: see the Indian Act, s. 20.
>
> [9] The subsequent provisions of the statute relating to improvements on reserve lands and transfer of possession of reserve lands are consistent only with this right of use and benefit being exercised by the individual band member through an allotment to that individual band member of reserve land on the part of the band council with the approval of the minister. I emphasize that we are considering merely the right to possession or occupation of a particular part of the reserve lands, which right is given by statute to the entire band in common, but which can, with the consent of the Crown, be allotted in part as aforesaid to individual members, thus vesting in the individual member all the incidents of ownership in the allotted part with the exception of legal title to the land itself, which remains with the Crown: *Brick Cartage Ltd. v. R.*, [1965] 1 Ex. C.R. 102. In the absence of such allotment by the band council, there is no statutory provision enabling the individual band member alone to exercise through

> possession the right of use and benefit which is held in common for all band members.

[49] In *Tyendinaga*, the Ontario Court of Appeal made no finding as to individual rights and band rights. It recognized that native title is communal and *sui generis*/different from normal property interests.

[50] In *Joe v Findlay*, above, the issue was the right of an individual to sue for trespass. Similar to common law property cases, where a tenant in possession may sue for trespass, so too can a band member. However, the court accepted that a band had sufficient legal interests to claim for trespass in allotted land (see paragraph 38).

[51] Neither of these cases state specifically that a band has no legal interest which is compensable when that land is held by an individual under a COP.

The Plaintiffs' principal position is that the Band had a compensable interest in addition to the compensable interest of the individual COP holders. The Plaintiffs are asserting collective rights which have not been compensated.

[52] The Defendants' other authorities all relate to private disputes on land with a COP holder. These cases do not consider the interaction between provisions of the *Indian Act* and other legal sources of collective interests in reserve lands, including such sources as treaties.

[53] While the other cases relied on dealing with interference with possession by individuals, this case deals with collective rights of a band and the relationship with the Crown.

[54] Aside from the distinctions already drawn between the Defendants' authorities and the nature of this Claim, there is no final pronouncement by the Supreme Court or the Federal Court of Appeal on the validity of the position that the Band has compensable collective rights in addition to the rights of the COP holders.

[55] The decision in *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 33-35, [2013] 2 SCR 227, shows that this matter of aboriginal collective and individual rights is a live issue.

> [33] The Crown argues that claims in relation to treaty rights must be brought by, or on behalf of, the Aboriginal community. This general proposition is too narrow. It is true that Aboriginal and treaty rights are collective in nature: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1112; *Delgamuukw*, at para. 115; *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 36; *R. v. Marshall*, [1999] 3 S.C.R. 533, at paras. 17 and 37; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 31; *Beckman*, at para. 35. However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed.
>
> [34] Some interesting suggestions have been made in respect of the classification of Aboriginal and treaty rights. For example, the interveners Grand Council of the Crees and Cree Regional Authority propose in their factum, at para. 14, that a distinction be made between three types of Aboriginal and treaty rights: (a) rights that are exclusively collective; (b) rights that are mixed; and (c) rights that are predominantly individual. These interveners also attempt to classify a variety of rights on the basis of these three categories.
>
> [35] These suggestions bear witness to the diversity of Aboriginal and treaty rights. But I would not, on the occasion of this appeal and at this stage of the development of the law, try to develop broad categories for these rights and to slot each right in the appropriate one. It will suffice to acknowledge that, despite the critical importance of the collective aspect of Aboriginal and treaty

> rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature. Nothing more need be said at this time.
>
> [Emphasis added]

[56] Before any determination of the collective versus individual rights can be resolved, a court must determine what happened and what was intended when the Locatees' claims were settled. This requires a consideration of all the facts and their context.

[57] Whether there was a final settlement with the Band is a significant issue for trial. It is arguable that the BCR of May 29, 1967, and Chief Mitchell's letter of the next day recognized the two groups of payees – the individual Band members, and the Band.

[58] A determination of whether there are collective rights and individual rights in reserve lands also impacts other Band members beyond the Area M claimants and it may impact various aspects of the multi-faceted claims. A decision on Area M collective/individual rights has the potential for dealing with critical issues in the Claim and relates to other Band members on a piecemeal basis.

[59] In *Carew v Goose*, 2005 BCSC 949 at para 84, 141 ACWS (3d) 399, the Court expressed concern for the potential embarrassment if decisions made would change when all the evidence is in. A court can be placed in a difficult position where it decides or comments upon matters in

the context of one part of a claim, which may not be as pertinent or correct when the issues are seen on a wider canvass of facts.

[60] There are strong facts on each side. There is a live issue of fact and law between the parties. In my view, the Plaintiffs have shown that there are genuine issues for trial including the scope of any collective rights, the intention of the agreements and BCRs, and the settlement of the underlying breach between Band Council, the SLSA and the Crown related to Area M.

[61] As Justice Stratas pointed out in *Manitoba*, where the Court has found that there is a genuine issue for trial, the Court has a discretion to conduct a summary trial.

[62] In my view, at this stage of the litigation, a summary trial should not proceed. Pursuant to Rule 216(3), on the record, I cannot find the facts necessary to decide the case. Even if I could, the Court must be concerned with the impact of a piecemeal or issue by issue determination of a much broader dispute.

[63] The better approach in this case is to have the parties engage in active case management in which deadlines are set, and met, and the litigation proceed expeditiously. Litigation, unlike wine, does not improve with age and this dispute is becoming overly aged.

The matter of bifurcating certain events and issues can be assessed at a later date.

IV. Conclusion

[64] For all these reasons, the motion for summary judgment will be dismissed. This is, however, not a case where one wonders if the time spent on motions would have been better spent on moving the litigation along. This motion has had the effect of clarifying or beginning to clarify the key issues in this multi-faceted claim. Therefore, the costs of this motion will be in the cause.

ORDER

THIS COURT ORDERS that the motion for summary judgment is dismissed. The costs of this matter are to be in the cause.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2210-76
STYLE OF CAUSE:	GRAND CHIEF MICHAEL MITCHELL, acting personally and on behalf of and as representative of the Mohawks of Akwesasne and the members of the Mohawk Council of Akwesasne, and THE MOHAWK COUNCIL AND MOHAWKS OF AKWESASNE, and FORMER CHIEF WILLIAM SUNDAY, former band chief of St. Regis Reserve, Quebec, BENJAMIN ROUNDPOINT, construction worker of Cornwall Island Reserve, Ontario, JAMES CALDWELL, mailman, of Cornwall Island Reserve, Ontario, LAWRENCE FRANCIS, executive, of Cornwall Island Reserve, Ontario, CATHERINE DAY, housewife, of Cornwall Island Reserve, Ontario, CECILIA BUCKSHOT, self-employed, of St. Regis Reserve, Quebec, FRANCIS SAM, administrator, of St. Regis Reserve, Quebec, GERALD SHARROW, construction worker of St. Regis Reserve, Quebec, MICHAEL FRANCIS, construction worker of St. Regis Reserve, Quebec, REGINALD MITCHELL, maintenance worker of St. Regis Reserve, Quebec, JAMES LAZORE, electrician, of St. Regis Reserve, Quebec, and MICHAEL DAVID, construction worker, of St. Regis Reserve, Quebec, being all at one time councillors of the Iroquois of St. Regis Indian Band, and THE MOHAWKS OF AKWESASNE, formerly known as THE IROQUOIS OF ST. REGIS, a recognized legal entity under the Indian Act, herein acting through the band council and its councillors v THE ST. LAWRENCE SEAWAY AUTHORITY, a corporation established by Act of the Parliament of Canada having its head office in the City of Ottawa and having branches in Quebec situated at the St. Lambert Locks, St. Lambert, Quebec, and in Ontario situated in Cornwall, Ontario at 202 Pitt Street, and HER MAJESTY THE QUEEN IN RIGHT OF CANADA, and THE FEDERAL BRIDGE CORPORATION LIMITED, a corporation incorporated under the laws of Canada, having its head office in Ottawa, Ontario at 55 Metcalfe Street, Suite 1210, and THE SEAWAY INTERNATIONAL BRIDGE CORPORATION, LTD., a corporation incorporated under the laws of Canada, having its head office in Cornwall,

Ontario, with an office on Kawehnoke (Cornwall Island) and with its mailing address as P.O. Box 836,

PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 22 AND 23, 2015
ORDER AND REASONS:	PHELAN J.
DATED:	JULY 27, 2015

APPEARANCES:

Nathan Richards Gary Carot	FOR THE PLAINTIFFS
Jeff Anderson Jennifer Francis	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Dionne Schulze Barristers and Solicitors Montréal, Quebec	FOR THE PLAINTIFFS
O'Reilly & Associés Barristers & Solicitors Montréal, Quebec	
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANTS