Federal Court  Cour fédérale

Date: 20160719

Docket: T-340-99

Citation: 2016 FC 817

Ottawa, Ontario, July 19, 2016

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

KAINAIWA NATION (BLOOD TRIBE) AND CHIEF CHRIS SHADE, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE KAINAIWA/BLOOD TRIBE

PEIGAN NATION AND CHIEF PETER STRIKES WITH A GUN, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE PEIGAN NATION

SIKSIKA NATION AND CHIEF DARLENE YELLOW OLD WOMAN MUNROE, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE SIKSIKA NATION

TSUU T'INA NATION AND CHIEF ROY WHITNEY SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE TSUU T'INA NATION

BEARSPAW BAND AND CHIEF DARCY DIXON, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE BEARSPAW BAND

CHINIKI BAND AND CHIEF PAUL CHINIQUAY, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CHINIKI BAND

WESLEY BAND AND CHIEF JOHN SNOW SR., SUING ON HIS BEHALF AND ON BEHALF OF THE MEMBERS OF THE WESLEY BAND

Plaintiffs (Respondents)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant (Respondent)

and

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Proposed Third Party (Applicant)

ORDER AND REASONS
(Re: Third Party Order)

I. Introduction

[1] These are the reasons in respect of an appeal from a Prothonotary's decision of June 9, 2015, in respect of adding Her Majesty the Queen in Right of Alberta [Alberta] as a third party in this action.

This appeal was heard in this Court at the same time as an appeal of the same Prothonotary's decision of June 11, 2015, dismissing a motion to add Alberta as a Defendant in this same action.

As the matters are the subject of two distinct orders, the appeals have their own reasons and orders but can be read together to give context to those orders.

[2] The order under appeal [Third Party Order] granted Her Majesty the Queen in Right of Canada's [Canada] motion to add Alberta as a Third Party.

II. Procedural History

[3] The action was commenced on February 26, 1999, against both Canada and Alberta. The Plaintiffs alleged that both Canada and Alberta have breached various trust and fiduciary obligations originating in the *Royal Proclamation of 1793*, the *Rupert's Land and North-Western Territory Order*, the *Constitution Act* of 1867 and 1982, the *Indian Act* and *Treaty 7*.

The Plaintiffs claim that they did not relinquish title to Treaty 7 territory and they challenge the transfer of land and rights in resources from Canada to Alberta under the *Natural Resources Transfer Agreement*, 1930.

[4] On October 29, 2001, Prothonotary Hargrave granted Alberta's motion to strike the claim against it and be removed as a Defendant on the grounds that the Federal Court lacked jurisdiction to hear the Plaintiffs' claim against it. Canada took no position on the motion. The decision was not appealed.

[5] Following this decision, on consent of the parties, progress in the litigation was held in abeyance.

[6] On May 7, 2009, counsel for Stoney Band demanded a Statement of Defence from Canada, indicating that it would note Canada in default should a statement not be filed.

[7] In the meantime, three of the Plaintiffs initiated a separate action in the Court of Queen's Bench of Alberta against both Canada and Alberta. Canada notified the Federal Court on October 22, 2009, that an action was commenced by the Stoney Band in the Court of Queen's Bench of Alberta that raised nearly identical issues.

[8] Canada notified the Federal Court that it intended to apply for a stay of the action on the grounds that there were overlapping claims being litigated and the Federal Court lacked the jurisdiction to hear the matter.

[9] On November 10, 2009, Prothonotary Milczynski directed that Canada was to file its Notice of Motion in this regard by March 31, 2010. The Notice of Motion was filed on March 31, 2010.

[10] On April 9, 2010, Canada filed a Statement of Claim in the Alberta Court of Queen's Bench seeking contribution and indemnity against Alberta should Canada be found liable for damages in the action.

[11] Canada's stay application was originally scheduled for May 18-19, 2010, but was adjourned when the Court was advised that some of the Plaintiffs were in the process of

finalizing instructions to resolve the application. The motion was rescheduled for February 23 and 24, 2012.

[12] Canada's motion for a stay was denied on July 24, 2012, without determination of the jurisdiction issue. An appeal of this decision was filed on August 2, 2012. The decision was upheld by Justice Harrington on June 25, 2013.

[13] On December 13, 2013, Canada filed its Statement of Defence in this action, and sent a copy of the Third Party Claim to the proposed third party, Alberta. Alberta advised Canada to seek leave to serve and file the Third Party Claim.

[14] On February 18, 2014, Canada filed a motion for an Order granting leave to commence a third party claim against Alberta.

[15] On June 11, 2014, Kainaiwa filed a motion for an Order adding Alberta as a Party Defendant.

[16] On June 9, 2015, Prothonotary Milczynski granted Canada's motion for leave to commence a Third Party Claim against Alberta. On June 19, 2015, Alberta filed a Notice of Motion to appeal this decision. This is the matter to which these Reasons are directed.

[17] On June 11, 2015, Prothonotary Milczynski denied Kainaiwa's motion for leave to add Alberta as a Party Defendant. On June 19, 2015, Kainaiwa filed a Notice of Motion to appeal this decision. This is the matter of *Kainaiwa Nation v Canada*, 2016 FC 818.

III. Background

A. *Relevant Legislation*

[18] The pertinent provisions are:

Federal Courts Act, RSC 1985, c F-7

19 If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies.	**19** Lorsqu'une loi d'une province reconnaît sa compétence en l'espèce, — qu'elle y soit désignée sous le nom de Cour fédérale, Cour fédérale du Canada ou Cour de l'Échiquier du Canada — la Cour fédérale est compétente pour juger les cas de litige entre le Canada et cette province ou entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable.

Federal Courts Rules, SOR/98-106

8 (1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.	**8 (1)** La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par ordonnance.
(2) A motion for an extension of time may be brought before or after the end of the period sought to be extended.	**(2)** La requête visant la prorogation d'un délai peut être présentée avant ou après l'expiration du délai.

…

193 A defendant may commence a third party claim against a co-defendant, or against a person who is not a party to the action, who the defendant claims is or may be liable to the defendant for all or part of the plaintiff's claim.

194 With leave of the Court, a defendant may commence a third party claim against a co-defendant, or against another person who is not a defendant to the action, who the defendant claims

(a) is or may be liable to the defendant for relief, other than that referred to in rule 193, relating to the subject-matter of the action; or

(b) should be bound by the determination of an issue between the plaintiff and the defendant.

195 A third party claim against a co-defendant shall be served and filed within 10 days after the filing of the statement of defence.

196 (1) A third party claim against a person who is not already a party to the action shall be

(a) issued within the time set out in rule 204 for the service and filing of a

...

193 Un défendeur peut mettre en cause un codéfendeur ou toute personne qui n'est pas partie à l'action et dont il prétend qu'ils ont ou peuvent avoir une obligation envers lui à l'égard de tout ou partie de la réclamation du demandeur.

194 Un défendeur peut, avec l'autorisation de la Cour, mettre en cause une personne — qu'elle soit ou non un codéfendeur dans l'action — dont il prétend :

a) soit qu'elle lui est ou peut lui être redevable d'une réparation, autre que celle visée à la règle 193, liée à l'objet de l'action;

b) soit qu'elle devrait être liée par la décision sur toute question en litige entre lui et le demandeur.

195 Lorsqu'un défendeur entend mettre en cause un codéfendeur dans l'action, la mise en cause est signifiée et déposée dans les 10 jours suivant le dépôt de la défense.

196 (1) Lorsqu'un défendeur entend mettre en cause une personne qui n'est pas un codéfendeur dans l'action, la mise en cause :

a) est délivrée dans le délai prévu à la règle 204 pour la signification et le dépôt

statement of defence; and

(b) served within 30 days after it is issued.

d'une défense;

b) est signifiée dans les 30 jours suivant sa délivrance.

(2) A third party claim served on a person who is not already a party to the action shall be accompanied by a copy of all pleadings filed in the action.

(2) La mise en cause visée au paragraphe (1) est signifiée à la tierce partie avec une copie de tous les actes de procédure déjà déposés.

Natural Resource Transfer Agreement, SC 1930, c 3

1 In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *British North America Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province and the interest of the Crown in the waters and water-powers within the Province under the *North-west Irrigation Act, 1898*, and the *Dominion Water Power Act*, and all sums due or payable for such lands, mines, minerals or royalties, or for interests or rights in or to the use of such waters or water-powers, shall, from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes

1 Afin que la province puisse être traitée à l'égal des provinces constituant originairement la Confédération, sous le régime de l'article cent neuf de l'*Acte de l'Amérique britannique du Nord, 1867*, l'intérêt de la Couronne dans toutes les terres, toutes les mines, tous les minéraux (précieux et vils) et toutes les redevances en découlant à l'intérieur de la province ainsi que l'intérêt de la Couronne dans les eaux et les forces hydrauliques à l'intérieur de la province, visées par l'*Acte d'irrigation du Nord-Ouest, 1898*, et par la *Loi des forces hydrauliques du Canada*, qui appartiennent à la Couronne, et toutes les sommes dues ou payables pour ces mêmes terres, mines, minéraux ou redevances, ou pour les intérêts dans l'utilisation de ces eaux ou forces hydrauliques ou pour les droits y afférents, doivent, à compter de l'entrée en vigueur de la présente convention, et sous réserve des dispositions contraires de la présente

thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

convention appartenir à la province, subordonnément à toutes les fiducies existant à leur égard et à tout intérêt autre que celui de la Couronne dans ces ressources naturelles, et ces terres, mines, minéraux et redevances seront administrés par la province pour ces fins, sous réserve, jusqu'à ce que l'Assemblée législative de la province prescrive autrement, des dispositions de toute loi rendue par le Parlement du Canada concernant cette administration; tout payement reçu par le Canada à l'égard de ces terres, mines, minéraux ou redevances avant que la présente convention soit exécutoire continue d'appartenir au Canada, qu'il soit payé d'avance ou autrement, l'intention de la présente convention étant que, sauf dispositions contraires spécialement prévues aux présentes, le Canada ne soit pas obligé de rendre compte à la province d'un payement effectué à l'égard de ces terres, mines, minéraux ou redevances, avant la mise en vigueur de la présente convention, et que la province ne soit pas obligée de rendre compte au Canada d'un pareil payement effectué postérieurement à la présente convention.

…

…

10 All lands included in Indian reserves within the Province, including those selected and surveyed but not yet

10 Toutes les terres faisant partie des réserves indiennes situées dans la province, y compris celles qui ont été

confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

choisies et dont on a mesuré la superficie, mais qui n'ont pas encore fait l'objet d'une ratification, ainsi que celles qui en ont été l'objet, continuent d'appartenir à la Couronne et d'être administrées par le gouvernement du Canada pour les fins du Canada, et, à la demande du surintendant général des Affaires indiennes, la province réservera, au besoin, à même les terres de la Couronne inoccupées et par les présentes transférées à son administration, les autres étendues que ledit surintendant général peut, d'accord avec le ministre approprié de la province, choisir comme étant nécessaires pour permettre au Canada de remplir ses obligations en vertu des traités avec les Indiens de la province, et ces étendues seront dans la suite administrées par le Canada de la même manière à tous égards que si elles n'étaient jamais passées à la province en vertu des dispositions des présentes.

Judicature Act, RSA 2000, c J-2

27 The Supreme Court of Canada and the Federal Court of Canada, or the Supreme Court of Canada alone, according to the *Supreme Court Act* (Canada) and the *Federal Court Act* (Canada) have jurisdiction

(a) in controversies between Canada and Alberta;

…

[Emphasis added]

B. *Impugned Order*

[19] Prothonotary Milczynski outlined the grounds alleged by Canada for bringing its motion to add Alberta as a third party:

- Alberta is an essential party to the litigation, as the lands and resources that are claimed by the Plaintiffs in the action are all situated within Alberta;
- The Federal Court has jurisdiction to hear the Third Party Claim against Alberta;
- Canada has a legitimate Third Party Claim against Alberta under sections 1 and 10 of the *Natural Resource Transfer Agreement* (NRTA);
- Canada has a legitimate claim against Alberta for contribution and indemnity; and
- Canada's desire to add Alberta as a third party is genuine.

[20] Prothonotary Milczynski outlined the three-part test from *ITO-Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752 [*ITO*] for determining whether the Federal Court has jurisdiction: (1) there must be a statutory grant of jurisdiction by Parliament; (2) there must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and (3) the law upon which the case is based must be a "law of Canada" within the scope of section 101 of the *Constitution Act, 1867*.

[21] In the appeal decision in *Southwind v Canada*, 2011 FC 351, 386 FTR 265 [*Southwind*] on a similar motion, this Court determined that the standard applied was whether it was "plain and obvious" that the Court has no jurisdiction to hear the claim.

C. *There must be a statutory grant of jurisdiction by Parliament*

[22] Prothonotary Milczynski reproduced section 19 of the *Federal Courts Act* [Act], and noted that Alberta passed an act contemplated under this section (see section 27(a) of Alberta's *Judicature Act*, which grants jurisdiction to the Federal Court in "controversies between Canada and Alberta").

[23] Alberta submitted that there is no live controversy between Canada and itself that would engage section 19 of the Act, as the proposed Third Party Claim does not plead that a demand for transfer of land from Alberta was made or refused. Instead, the proposed claim indicates only potential liability, contingent upon Canada being found liable.

[24] Prothonotary Milczynski concluded that the proposed Third Party Claim does disclose a controversy for the purposes of section 19. The Federal Court of Appeal in *Canada v Prince Edward Island*, 1977 CarswellNat 122 (FCA) [*PEI*] defined "controversies" as "any kind of legal right, obligation or liability that may exist between governments".

[25] The Federal Court of Appeal further found that the term is "certainly broad enough to include a dispute as to whether one government is liable in damages to another" (at para 67).

[26] In the event that the Plaintiffs are successful and it is determined that Treaty 7 did not extinguish title and interest in the land, then the Third Party Claim between Canada and Alberta

would be necessary to determine what was transferred to Alberta under the NRTA and whether continuing obligations exist under sections 1 and 10 of the NRTA.

[27] Accordingly, Prothonotary Milczynski found that there is a controversy that may exist between Canada and Alberta, and it is thus not plain and obvious that the Federal Court has no jurisdiction.

[28] Prothonotary Milczynski noted that, where section 19 of the Act is satisfied, it is not necessary to consider the second and third branches of the *ITO* test (*Southwind* at para 34). However, she continued to note that the action involves aboriginal title, fiduciary duties to aboriginal people and the effect of the NRTA, all of which Canada argues are questions of federal law sufficient to satisfy the second and third parts of the *ITO* test. Prothonotary Milczynski does not explicitly decide on these branches of the test.

[29] Prothonotary Milczynski was thus satisfied that the Federal Court has jurisdiction and that leave should be granted to Canada to commence the Third Party Claim. She noted that limitations or other defences are more properly raised after the Third Party Claim has been filed, and not on this motion.

[30] The Prothonotary also granted an extension of time as required for the timeliness of the motion, noting that Canada explained the delay and established a continuing intention to pursue the Third Party Claim. Canada also confirmed its intention to discontinue the action for indemnity and contribution at the Court of Queen’s Bench of Alberta. As the matters at issue in

the claim at the Alberta Court of Queen's Bench are essentially the same as in the Third Party Claim, Alberta effectively had notice of the matters and there is no substantive prejudice.

IV. Analysis

[31] The issues in this appeal are:

a) Did the Learned Prothonotary err in determining that it was not plain and obvious that this Court does not have jurisdiction over the proposed Third Party Claim against Alberta?

b) Did the Learned Prothonotary err in granting an extension of time for Canada to issue and serve the Third Party Claim?

A. *Standard of Review*

[32] The parties agree, and I concur, that the standard of review to be applied to discretionary orders of prothonotaries was established in *Merck & Co Inc v Apotex Inc*, 2003 FCA 488 at para 19, [2004] 2 FCR 459, that such discretionary orders ought not to be disturbed on appeal to a judge unless:

> a) the questions raised in the motion are vital to the final issue of the case, or
>
> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[33] If either condition is met, the Court may intervene to issue the order which ought to have been granted.

B. *Issue 1 – Plain and Obvious/Jurisdiction*

[34] On the issue of jurisdiction, that question need not and ought not be decided at this stage. The Court does not have to make a final decision on jurisdiction; this should be left to trial or other proceeding on which jurisdictional facts may be put in evidence.

[35] The Court, at this stage, is required to determine only whether it is plain and obvious that this Court does not have final jurisdiction (*Hodgson v Ermineskin Indian Band No 942*, [2000] FCJ No 2042 (FCA) at para 5, 102 ACWS (3d) 2).

[36] Alberta's reliance on *Southwind* to suggest that issues of jurisdiction at this stage are vital, is misplaced. The case is reasonably similar and this Court reviewed the matter *de novo* in the alternative because of the positions taken by the parties. The Court emphasized that the legal test at this stage was "plain and obvious" that the Federal Court did not have jurisdiction.

> [24] In considering whether the Learned Prothonotary's conclusion on jurisdiction is vital, it is important to have regard to what threshold had to be met. The Learned Prothonotary did not have to determine with finality the issue of jurisdiction. In *Hodgson v Ermineskin Indian Band No. 942*, [2000] F.C.J. No. 2042 (F.C.A.), the Federal Court of Appeal applied the test of whether it was "plain and obvious" that the Federal Court did not have jurisdiction.
>
> [25] Given that threshold, the jurisdiction question still remains open at trial. Thus it is arguable that the issue is not vital, although both parties say it is. In any event, I have considered the jurisdiction issue de novo whereas the extension of time decision is discretionary.

[37] Given the position taken by Canada that the issue is not vital, I will apply the governing principle of "plain and obvious".

[38] It was a central plank of Alberta's argument that there was no "controversy" between Canada and Alberta such as to engage s 27 of the *Judicature Act* of Alberta.

[39] It follows logically that if there is a controversy (or more apt – if it is not plain and obvious that there is no controversy), Alberta's jurisdictional argument is seriously eroded.

[40] Alberta's position rests on comments made by Justice Harrington in his Reasons in respect of a stay application matter in which he noted "twelve years later, still no evidence of a controversy between Canada and Alberta has been put before the Court".

[41] However, those comments must be read in the context of paragraph 30 of Harrington J's reasons:

> … perhaps at some future date, a fresh motion may be considered. The Court is being asked to act in too much of a factual vacuum.

[42] As noted by the Learned Prothonotary, the Third Party Claim does disclose a controversy for purposes of section 19. As was evident before the Learned Prothonotary and also before this Court on the motion, the situation now is considerably different than that before Justice Harrington. At that time Canada took no position on Kainaiwa's motion to add Alberta.

[43] Consistent with modern interpretative principles, the term "controversy" is to be given such fair and liberal interpretation as will give effect to purpose and intent of the provision. In *PEI*, a case dealing with ferry service and the Terms of Union between Canada and Prince Edward Island, the Court concludes that controversies were "any kind of legal right, obligation or liability that may exist between governments".

[44] The Court further found at para 67 that the term is "certainly broad enough to include a dispute as to whether one government is liable in damages to another".

[45] It is evident that Alberta and Canada have very different views of their respective rights, responsibilities and obligations if the Plaintiffs were successful on the grounds that Treaty 7 did not extinguish title and interest in the land.

[46] It is not plain and obvious that there is no controversy. Further, I concur with the Learned Prothonotary's analysis of the jurisdictional issues in the context of "plain and obvious". Anything further that the Court may say is unnecessary verbiage.

[47] The following from *Southwind* summarizes the issue of jurisdiction:

> [33] The issue of whether a substratum of federal law exists (factors 2 and 3 in ITO) is in doubt, and it is certainly not a matter that is plain and obvious. The Federal Court of Appeal in *Fairford First Nation v Canada (Attorney General)*, [1996] FCJ No. 1242, held that s. 19 of the *Federal Court Act* and s. 1 of the *Federal Courts Jurisdiction Act* were sufficiently unique in character as to satisfy the issue of jurisdiction completely.
>
> > **1 HUGESSEN J.**:— We are in general agreement with the reasons of the learned motions judge. In particular, we agree that the effect of

> section 19 of the *Federal Court Act* and section 1 of the *Federal Courts Jurisdiction Act* of Manitoba was to give this Court jurisdiction over the appellant's proposed third party claim against the province of Manitoba. Assuming, which we doubt, that section 19 requires a substratum of federal law other than section 19 itself, we also agree with the judge that the respondents' action against the appellant will turn primarily on issues of aboriginal title, the Indian Act, and the Crown's fiduciary obligation to aboriginal peoples, all undisputably matters of federal law. Finally, we agree that the judge correctly distinguished the decision in *Union Oil Co. of Canada Ltd. v. The Queen in Right of Canada et al*.

> [34] As indicated by Justice Strayer in *Montana Band v Canada*, [1991] 2 FC 273, at para. 9, there is no requirement that each of the three ITO conditions be seen as watertight compartments. If two conditions can be met under the same provisions, there is no reason that all three conditions could not also be met or established in one provision such as s. 19. There is a significant difference between a provision in the *Federal Courts Act* which gives concurrent jurisdiction where a search for a federal law nourishing the grant is necessary to ensure that the matter is truly federal and a special provision (constitutionally pragmatic) to confer jurisdiction, on consent of the province, to deal with controversies between federal and provincial governments.

[48] Therefore, the Court will dismiss the appeal on this issue.

C. *Issue 2 – Extension of Time*

[49] This aspect of the appeal addresses the Learned Prothonotary’s decision to extend time to permit Canada to serve and file the Third Party Claim.

[50] By way of an aside, it is of significant concern that a case can languish in this Court for close to 15 years. The Court appreciates the complexity of aboriginal cases, the uncertainty of the law and its development as well as the shifting political/policy imperatives of all parties.

[51] However, unlike wine, cases tend not to improve with age. Languishing cases are more like a sore which fester.

[52] I ascribe no fault to any party but this case, consistent with more current norms, will be put into case management as designated by the Chief Justice.

[53] The Learned Prothonotary granted the extension of time, noting particularly that Canada explained the delay satisfactorily. Canada has indicated that it will discontinue its claim for contribution and indemnity at the Court of Queen's Bench of Alberta.

[54] The principles for review of a prothonotary's discretionary decision have been outlined earlier.

[55] While the Learned Prothonotary may not have focused specifically on Rule 8, she did apply the four-part test from *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 (FCA) at para 3, 89 ACWS (3d) 376:

1. a continuing intention;
2. some merit;

3. absence of prejudice; and

4. reasonable explanation.

[56] Despite Alberta's criticism, the Learned Prothonotary addressed all four elements. The fact that the parties chose to also litigate in the Alberta courts does not lessen Canada's intent to hold Alberta responsible in this Court if Canada should be held liable to the Plaintiffs. The Learned Prothonotary had an evidentiary basis for her conclusion on this matter as well as on the others.

[57] Alberta has been unable to meaningfully assert, much less establish, any prejudice resulting from delay.

[58] With respect to merit, Canada need only establish that it has an "arguable case" which the Learned Prothonotary considered. Canada claims specific performance and contribution and indemnity as well as specific provisions of the NRTA. The fact that some of these pleas are based in common law does not lessen the fact that Canada claims that if the lands are in trust, Alberta acquired them subject to the terms of the trust. The NRTA s 10 requires Alberta to set aside areas necessary for Canada to fulfil its treaty obligations. Therefore, it is arguable that Canada has a claim against Alberta in this regard.

[59] The Learned Prothonotary was clearly mindful of the "merits" issue.

[60] Therefore, I see no reason to interfere with the Learned Prothonotary's decision in respect of the extension of time.

V. Conclusion

[61] For these reasons, the appeal will be dismissed with costs.

ORDER

THIS COURT ORDERS that the appeal is dismissed with costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-340-99
STYLE OF CAUSE:	KAINAIWA NATION (BLOOD TRIBE) AND CHIEF CHRIS SHADE, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE KAINAIWA/BLOOD TRIBE, PEIGAN NATION AND CHIEF PETER STRIKES WITH A GUN, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE PEIGAN NATION, SIKSIKA NATION AND CHIEF DARLENE YELLOW OLD WOMAN MUNROE, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE SIKSIKA NATION, TSUU T'INA NATION AND CHIEF ROY WHITNEY SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE TSUU T'INA NATION, BEARSPAW BAND AND CHIEF DARCY DIXON, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE BEARSPAW BAND, CHINIKI BAND AND CHIEF PAUL CHINIQUAY, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CHINIKI BAND, WESLEY BAND AND CHIEF JOHN SNOW SR., SUING ON HIS BEHALF AND ON BEHALF OF THE MEMBERS OF THE WESLEY BAND v HER MAJESTY THE QUEEN IN RIGHT OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	DECEMBER 8, 2015
ORDER AND REASONS:	PHELAN J.
DATED:	JULY 19, 2016

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