T-1154-89

Between:

JACK SEBASTIAN CHIEF COUNCILLOR, GORDON SEBASTIAN, MARVIN GEORGE and DOUGLAS TAIT, BAND COUNCILLORS ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE HAGWILGET BAND COUNCIL

Plaintiffs,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by the **MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT and THE CATHOLIC PUBLIC SCHOOLS OF THE DIOCESE OF PRINCE GEORGE,**

Defendants.

REASONS FOR ORDER

JOHN A. HARGRAVE
PROTHONOTARY

These reasons arise out of two motions, one brought by Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development (the "Crown") and the other by the Defendants, The Roman Catholic Episcopal Corporation of Prince Rupert and The Catholic Public Schools of the Diocese of Prince George (the "Church") for dismissal of the action for want of prosecution as provided by *Federal Court Rule* 440.

BACKGROUND

The present action has its roots in the acquisition of land at Hazelton by the Church in 1958 for the construction of what became St. Mary's School, a facility for both Indian and non-Indian children. The government of Canada contributed 45% of the initial $77,648.00 cost of land acquisition and construction of St. Mary's School, in return for which the Church agreed, by a contract of July 11, 1958, to accept thirty Roman Catholic children of Indian status, the government to pay their tuition.

In December of 1964 the Church and the Government of Canada, in view of additions to St. Mary's School, entered into another agreement whereby the government contributed 50% of the cost of the additions, including a gymnasium or hall. Total government contribution, by the 1958 and 1964 agreements was thus some $98,000.00. In return for the 1964 contribution the Church agreed to accept 80 children of Indian status into St. Mary's School each year.

In 1979 the Plaintiffs sought unrestricted access to various buildings on the St. Mary's School property and particularly the hall, which they believed had been built with Indian monies (as defined in the *Indian Act)* earmarked for the Plaintiff Hagwilget Band, but instead contributed by the government to the Church's school project. Negotiations for access broke down in 1983, resulting in litigation.

The Plaintiffs' initial action, commenced in the B.C. Supreme Court in 1983, came to an unsatisfactory conclusion when the B.C. Court of Appeal, in May of 1989, held the B.C. Supreme Court to be without jurisdiction as against Her Majesty the Queen in Right of Canada. In the result the Plaintiffs began the present action May 31, 1989.

Some examinations for discovery were done in the B.C. Supreme Court proceedings and it appears are, by agreement, to be used in the present action. The balance of the examinations for discovery, as between the Crown and the Plaintiff, took place during the summer of 1991, although there are still outstanding answers due. There appear to have been no proceedings in the action, as against the Church, since some time in 1989. At various times in 1991 and 1992 counsel for the Crown wrote to counsel for the Plaintiffs requesting answers to questions asked on examinations for discovery. Counsel for . the Plaintiffs wrote to counsel for the Crown in 1991 requesting similar answers. Those answers remain outstanding.

In 1993 the Plaintiffs made what seems to have been a one-sided attempt to negotiate a resolution, directly with the Church, with no result.

Father William Walker sets out in his affidavit filed May 22, 1996, that St. Mary's School, which consists of six classrooms and the gymnasium or hall, is no longer required and indeed is in need of repairs. The parish of Hazelton would like to demolish the classrooms. They are also considering using the hall to replace their present small Church, however, the hall needs a new roof, which would cost $20,000.00. Further, heating of the hall, on an ongoing basis, costs the parish $20,000.00 per year. The parish of Hazelton, an autonomous entity, says it is prejudiced by the ongoing heating costs and that it is unwilling to take on restoration given both the present litigation and *a lis pendens* filed against the property by the Plaintiffs.

I have set out the background at some length, not so much to illustrate time gone by with little progress by the Plaintiffs, but rather to show that while some of the evidence will be documentary, a substantial portion must be the recollections of those who were involved with the St. Mary's School

project from its inception some 38 years ago. Here, say the Defendants, lies their problem.

The principal witness for the Crown was to have been W. Allen Friesen, an employee of the Department of Indian and Northern Affairs between **1954** and **1985,** a relevant timespan, and who **subsequently worked** for the Department on a contract basis to assist with this litigation. In April of this year, Mr. Friesen advised he was no longer able either to assist or to be a deponent or a witness by reason of a medical problem.

The Plaintiffs suggest the Crown could rely upon a Mr. Ronald Penner who was, along with Mr. Friesen, a nominee of the Crown for examination for discovery. However, neither the Crown nor the Plaintiffs have provided me with any information as to Mr. Penner's knowledge or background in the St. Mary's School project.

For the Church, Father Walker sets out in his affidavit:

> **...** The principal witness for the Catholic Defendants would be the former Bishop of the Diocese of Prince George, **Bishop** Fergus **O'Grady O.M.I., who** is **now retired,** is of 87 years of age and with whom I have **spoken and** who has a failing recollection of the circumstances and events giving rise to this litigation; ... **(paragraph** 27}

On April 3, 1996, counsel for the Church wrote to counsel for the Plaintiffs to give notice of an application to dismiss for want of prosecution in the event the Plaintiffs did not take the necessary steps to bring the action on for trial. The Plaintiffs have taken no steps to further the action in the interim.

Ms. Dora Wilson, Chief Councillor of the Hagwilget Band, refers in her affidavit filed June 17, 1996, to a meeting of the Band on June 14, 1996, to discuss the matter and also to put together a settlement proposal. The affidavit goes on to set out that the Band Council has determined it will

proceed with the action if there can be no negotiated resolution and that it has instructed counsel to set the matter down for trial. Given the unsuccessful negotiations going back to at least 1983 and perhaps to 1979 this is a pragmatic approach, although at a rather late date.

ANALYSIS

The test to be applied in determining a motion to dismiss for want of prosecution has its roots *in Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] All E.R. 543, a decision of the Court of Appeal, in which Lord Denning referred to it as a stern measure, but one required to enforce expedition in the face of delay (p. 547). The test in *Sir Alfred McAlpine* was elaborated on by the House of Lords in *Birkett v. James,* [1978] A.C. 297 in which Lord Diplock, who had been of the Court of Appeal in the *Sir Alfred McAlpine* case said, of the power to dismiss an action for want of prosecution:

> The power **should** be exercised **only** where the court is satisfied either (1) **that the default has been intentional and contumelious, e.g., disobedience to** a peremptory order **of** the court or **conduct amounting to an** abuse ***of*** the process of the court; or (2) (a) that there **has been inordinate and** inexcusable **delay on** the **part of the** plaintiff **or** his lawyers, **and** (b) **that such delay** will give rise to **a substantial** risk **that** it is not possible **to** have **a** fair trial of the issues in the action or is such as is likely to we or to have caused serious prejudices to the defendants either as between themselves **and** the plaintiff or between each other or between them **and** a third party. O. 318)

Our Court approved this test in *Nichols v. Canada* (1990), *36* F.T.R. 77, W. Justice Dube summarizing it at p. 78:

> The classic test to be applied in these matters is three-fold: first, whether there has been inordinate delay; **secondly,** is **the delay inexcusable; and thirdly,** whether the **defendants** are likely to be seriously **prejudiced** by the **delay.**

This summary was quoted with approval by the Court of Appeal in *The Queen v. Aqua-Gem Investments Ltd,* [1993] *2 F.C. 425 at* 459 and 469.

There is another phrasing of the prejudice part of the test and that is the effect of the delay in preventing a fair trial, for as aptly put by Lord **Griffiths in *Department*** *of Transport v. Chris Smaller (Transport) Ltd,* [1989] A.C. 1197, a decision of the House of Lords, at pp. 1207-1208:

> The principles in *Allen v. McAlpine* **and** *Birkeu* v. ***James*** **are now well understood and I have not been persuaded that a case has been made out to abandon the need to show that the post writ delay will either make a fair trial impossible or prejudice the defendant.**

The reference in the above passage from the *Chris Smaller* case, to "post writ delay" leads to another point made by counsel for the Church. He submits that I should consider a cumulative view of delay for the dispute has been ongoing for some thirteen years if one considers the ill-fated B.C. Supreme **Court** action, or some **seventeen years, going** back to when **the** dispute over the use of the hall came into being. Counsel refers to the reference in *Nichols v. Canada [supra] at* p. 79 and to *McFetters et as v. Drau Realty et as* (1986), 55 O.R. (2d) 722.

In the *McFetters* case the action was commenced just inside of a six-year limitation. Following examinations for .discovery there was an unexplained delay of four years. The judge looked at the time gone by, from a cumulative point of view, in the context of the recollections of witnesses:

> In **any** event, 13 years after the event, it ought in my view to be presumed that witnesses' recollections of the events, even where that recollection can be refreshed by an earlier statement, will in many instances **be vague, confusing and inconclusive, if indeed any recollection independent** of the statement **remains at** A. (p. 726)

The more conventional view is that inordinate delay is measured not from when the last step occurred, but rather it is the total time from when the action was commenced: see *Chris Smaller [supra]* and *Midland Lumber Co. v. Smoky Lake (Town),* (1992), *5* C.P.C. (3d) *220* at 222.

There is no Wile to the effect that a given number of years of delay is or is not inordinate and that is as it should be, for whether delay is inordinate depends upon all of the surrounding circumstances. In this instance, the Plaintiffs, by their action together with their *u s pendens* lodged against title, are not only preventing the Church from dealing with and maintaining the hall, but are also forcing the Church to spend money on heating the hall,

which in the northern climate of Hazelton amounts to $20,000.00 a year. In the circumstances of this case it is in the interest of all concerned to have the matter dealt with expeditiously. But this is not to say that there is an onus on the Defendants to try and push along reluctant Plaintiffs. The Crown is in a somewhat different position, although they too have the ongoing costs of the litigation. The loss, for practical purposes, of the Crown's principal witness, will also result, should this action proceed, in further costs, at the expense of the taxpayer. All of this is in the context of litigation which should have been completed a number of years ago. From the perspectives of the Church and the Crown the delay is undue. Seven years, the time span since this Federal Court action was commenced, under the circumstances, is inordinate.

The time that has gone by is also a factor in considering prejudice to the Church and the Crown. As Madame Justice Reed pointed out in The *'Neekis', an* unreported decision of July 20, 1994, in action T-557-86, delay per se may equal prejudice. She went on to say that despite examinations for discovery having taken place ". . . I cannot conclude that the role of oral evidence will be so insignificant that the passage of time and faded memories are not likely to seriously prejudice the defendants." (p. 2).

In the present instance examinations for discovery have been done and thus two of the principal witnesses, if they were healthy and available for trial, might refresh their memories. However, I accept that those two witnesses, who would apparently have been available several years ago, when the matter ought to have been concluded, will not now be available. Notwithstanding the part that the documents will play in this action, oral first-hand evidence, such as that which Bishop Fergus O'Grady might have had to offer, will in all likelihood be significant. In that the interests of the Crown and of the Church are not dissimilar, the fact that neither Bishop O'Grady nor Mr. Friesen will be available to give evidence prejudices both parties.

That the Church's hall has been tied up in this litigation for many years may be unfortunate, however, I do not take that as prejudicial in the sense of preventing a fair trial. However, I have also kept in mind Madame Justice Reed's comment in The *"Nee" [supra],* to the effect that one of the defendants had been prejudiced, or possibly prejudiced, as his financial position had deteriorated during the delay. There is a parallel here in the ongoing costs of delay and of heating of the hall which the church has had and will have if this action proceeds. Leaving this aside, both of the defendants have been prejudiced in that the inordinate delay has prevented *them* from being able to put forward their best defences.

The point on which I have had more difficulty is whether there is reasonable excuse for the delay. The Plaintiffs began this action in May of 1989, a very short time after the B.C. Court of Appeal decided the action ought to have been brought in this Court. Discoveries between the Crown and the Plaintiffs went forward over the next twenty-six months. During the nine months following, counsel for the Crown wrote on four occasions to counsel for the Plaintiffs to try to obtain answers to outstanding discovery questions, but to no avail.

Ms. Nikki Frumau, of the office of counsel for the Plaintiffs, in an affidavit filed June 17, 1996, says the Plaintiffs obtained appraisals and a survey of the hall in 1992 and 1993 and in June of 1993 delivered a proposal to the Church. There was no response to the proposal, the Plaintiffs say, because the Church had leased out the hall in the summer of 1993. The appraisals are said to have been with the knowledge of the Church. However, there is nothing to indicate whether the appraisals or the proposal were encouraged by the Church. Indeed, the absence of any response to the proposal would indicate just the opposite. Is the one-sided set of appraisals

and an unsolicited and unanswered offer an excuse for delay? I do not think so.

I have considered the matters set out in the affidavit of Ms. Dora Wilson, Chief Councillor of the Hagwilget Band. Deponents of affidavits should try to avoid swearing to irrelevant material, particularly where it is spurious, for it can only detract from the weight of the affidavit. Ms. Wilson refers to a meeting in March of 1993 with the Bishop. In June of 1993, there are said' to have further negotiations. However, it is apparent that nothing came of all of this.

There is no explanation for the delay between the summer of 1993 and the bringing of the present motion, other than Ms. Wilson's assertion that "Because the C.P.S. (the Catholic Public Schools of the Diocese of Prince George) was leasing the property it was **understood by Hagwilget that** the C.P.S. was not interested in pursuing negotiations until the lease had expired." (paragraph 27). This is a very doubtful excuse and particularly so given that past negotiation by the Hagwilget Band had lead nowhere.

The Hagwilget Band determined, in due course, that the lease had come to an end in March of 1996. At some point afterwards the Hagwilget Band wrote to Bishop Wiesner and apparently received a response on May 29, 1996. Subsequently the Band met with their Council on June 14, 1996. The Band feels that a full answer to the present application is that the Church has taken no steps to ensure that the action would proceed. It is not for a defendant to press a plaintiff to get on with legal proceedings. Moreover, there is no evidence as to the Church or the Crown in any way misleading the Plaintiffs over the past seven years.

Affidavit material indicates counsel for the plaintiffs had a heavy workload in 1992 as a result of his role in preparing for and arguing an appeal *in Delgamuukow v. The Queen* in May and June of 1992. Even if pressure of work were an acceptable excuse, it goes only to a small portion of the seven year delay.

The Plaintiffs also complain of the short notice of the present proceedings to dismiss for want of prosecution. Counsel for the Church gave ample notice of the impending motion to dismiss for want of prosecution, as is required by Rule 440(2), by letter of 3 April, 1996. Counsel for the Crown wrote a similar letter 17 May, 1996. Counsel for the Church set down his client's motion to dismiss for want of prosecution for June 10. The motion was subsequently adjourned until June 17, to be heard together with the Crown's motion for similar relief. The purpose of the notice under Rule 440(2) is to give the plaintiff an opportunity, by taking some steps in an action, to demonstrate to a defendant and to the court a desire to get on with the litigation. Here the Plaintiffs failed to take advantage of that opportunity.

During the period between the April 3, 1996, letter from counsel for the Church to counsel for the Band and the hearing of this motion, all that has taken place, according to the affidavit material, has been a Band meeting on June 14, 1996, which produced a resolution setting out that the Band is prepared to continue to try to resolve the lawsuit through negotiation, but that the Band Council "... reaffirms it's decision to proceed vigorously with this case through the Courts.". This resolution is late in the day.

A decision to dismiss for want of prosecution ought not to be taken lightly. It is a very stern measure indeed to deprive a party of their day in Court. However, in any litigation a plaintiff has duties and a defendant has rights. A duty on the part of a plaintiff is to move the action forward at a

proper pace; a defendant has a right to expect a trial of an action without undue delay, so that the defendant may not be prejudiced by being unable to put forward its best case and then, win or lose, certainty and an opportunity to get on with business within a reasonable time.

In the present instance there has been undue delay, to the prejudice of the defendants. The plaintiffs have failed to give an acceptable reason for the delay. Indeed, the action appears to have been so low in priority that the Hagwilget Band Council did nothing to further the litigation during the two months at their disposal following receipt of advice from the Church of an intention to reply for dismissal for want of prosecution.

The action is dismissed for want of prosecution, with costs to the Defendants.

(Signed) John A. Hargrave
Prothonotary

VANCOUVER, British Columbia
June 24, 1996

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE: **JACK SEBASTIAN (CHIEF COUNCILLOR) ET AL v. THE QUEEN ET AL**

COURT NO.: T-1154-89

PLACE OF HEARING: **Vancouver, BC**

DATE OF HEARING: June 17, 1996

REASONS FOR ORDER OF JOHN A HARGRAVE, PROTHONOTARY dated June 2A, 1996

APPEARANCES:

Peter R. Grant Hutchins Soroka, Grant & Paterson	for Plaintiff
J. R. Pollard Richards Buell Sutton	for Defendant (HMQ)
P. M. Pakenham Hope, Heinrich	for Defendants, The Roman Catholic Episcopal Corporation of Prince Rupert and the Catholic Public Schools of the Diocese of Prince George

SOLICTPORS OF RECORD:

Peter R. Grant Hazelton, B.C.	for Plaintiff
J. R. Pollard Richards, Buell, Sutton Vancouver, B.C.	for Defendant (HMQ)
P. M. Pakenham Hope, Heinrich Prince George, B.C.	for Defendants, The Roman Catholic Episcopal Corporation of Prince Rupert and the Catholic Public Schools of the Diocese of Prince George