Federal Court of Appeal  Cour d'appel fédérale

Date: 20180427

Docket: A-271-16

Citation: 2018 FCA 83

CORAM: **GAUTHIER J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

and

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 OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE WESLEY BAND

Plaintiffs

Heard at Calgary, Alberta, on October 31, 2017.

Judgment delivered at Ottawa, Ontario, on April 27, 2018.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NEAR J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Her Majesty the Queen in Right of Alberta (Alberta) appeals a decision of the Federal Court (*per* Phelan J.) dismissing its appeal from an order of Prothonotary Milczynski (2016 FC 817). In her order, Prothonotary Milczynski granted leave to Her Majesty the Queen in Right of Canada (Canada) to file a Third Party Claim against Alberta after granting it an extension of time to do so.

[2] Alberta contests both aspects of the decision. For the following reasons, I would dismiss the appeal.

I. CONTEXT

[3] On February 26, 1999, the plaintiffs, seven First Nations who are parties to Treaty 7 of 1877, commenced an action against Alberta and Canada for breach of trust and fiduciary obligations (the Action). They allege, among other things, 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 [Schedule 2 of the *Constitution Act*, 1930, being Item 16 of the Schedule to the *Constitution Act*, 1982, being Schedule B to *Canada Act 1982* (U.K.), 1982, c. 11(the NRTA)]" (Federal Court judge reasons at para. 3). They seek among other reliefs a declaration of aboriginal title in the land which is described in Treaty 7 and is essentially in the southern part of Alberta (Statement of Claim, Appeal Book, tab 3).

[4] On October 10, 1999, the Action was put under case management with Prothonotary Hargrave. In 2005, Prothonotary Milczynski started assisting with the case management and became the sole Case Manager sometimes after the death of Prothonotary Hargrave. The minutes and details of the case management conferences which had to take place regularly according to the *Federal Court Rules*, S.O.R./98-106, are not in the Appeal Book nor have the parties included a copy of the recorded entries of the Federal Court. Thus, we have an incomplete picture of what went on since then. What we know is that there were orders and directions issued and regular case management conferences. That said, I will briefly mention some major events that can be gleaned from the material before us.

[5] On September 27, 2001, Prothonotary Hargrave granted Alberta's motion to be removed as a defendant on the basis that the Federal Court had no jurisdiction to hear the plaintiffs' claim against it (*Shade v. The Queen*, 2001 FCT 1067) (*Shade*). Prothonotary Hargrave's conclusion was based, among other things, on the fact that the Federal Court does not have jurisdiction over a dispute between a subject and the Crown in Right of a province, and that section 19 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the FC Act) was therefore not applicable, as it could only be relied upon by Canada or Alberta (*Shade* at para. 32). At the time, Canada took no position on that motion and, at paragraph 13 of its Memorandum of Fact and Law, Canada states that it expressly noted, in its letter to the Federal Court dated April 27, 2000, that this should not prejudice its right to commence third party proceedings against Alberta. This fact was not disputed at the hearing before us.

[6] It appears that the parties and the Case Manager agreed to hold the matter in abeyance for quite sometimes thereafter. This could only be done by way of a direction or order. On December 10, 2003, three of the plaintiffs in the Action, that is the Wesley Band, the Chiniki Band and the Bearspaw Band, also commenced an action against Alberta and Canada in the Court of Queen's Bench of Alberta (the Second Action).

[7] On May 7, 2009, the same three plaintiffs required Canada to file its Statement of Defence. Canada then informed the Federal Court (presumably the Case Manager) that it would apply for a stay and it did file such motion on March 31, 2010.

[8] After discussing about its intention to assert a Third Party Claim with Alberta (Affidavit of Lynda Sturney, Appeal Book, tab 11 at para. 11), Canada also filed, on April 9, 2010, a Statement of Claim in the Court of Queen's Bench of Alberta (the Third Action) essentially seeking contribution and indemnity from Alberta in respect of any judgment the plaintiffs in the Action may obtain against Canada.

[9] The hearing of Canada's motion for a stay was adjourned until February 23 and 24, 2012. In support of the said motion, Canada had declared its intentions to seek indemnity and contribution from Alberta before the Queen's Bench of Alberta because it questioned the jurisdiction of the Federal Court in that respect. In the context of its motion for leave, Canada added that it had also instituted the Third Action to protect its limitations defences.

[10] On July 24, 2012, Prothonotary Milczynski denied Canada's motion, noting that she did not have to decide the issue of the jurisdiction of the Federal Court, which had been raised before her. In her decision, Prothonotary Milczynski relied on the fact that four of the plaintiffs in the Action were not involved at all in the Second Action before the Queen's Bench of Alberta. Also, she noted that it was unclear if the lands that were at issue in the Second Action (traditional lands of these three First Nations) encompassed more than the territory covered by Treaty 7 in the Action. This decision was appealed to a Federal Court judge. Harrington J. dismissed the appeal on June 25, 2013.

[11] On December 11, 2013, Canada sent a copy of its Statement of Defence and Third Party Claim to Alberta. In a letter dated December 12, 2013, counsel for Alberta advised Canada that

she would be seeking instructions with respect to the procedural irregularities identified such as i) not all the pleadings had been sent with the Third Party Claim (presumably the Statement of Claim was missing) and ii) the claim was made outside of the delay set out in Rule 196 (Appeal Book, tab 6). In this letter, Alberta also referred to the jurisdictional issue. We do not know when counsel for Alberta received instructions and advised Canada of Alberta's position.

[12] On December 18, 2013, Canada filed its Statement of Defence in the Action. Obviously, Canada would have had to have a direction of the Case Manager in order for the said Statement of Defence to be accepted for filing. Two months later, on February 18, 2014, Canada filed its motion for an order granting leave to commence a Third Party Claim against Alberta pursuant to Rules 193 and 194. On June 9, 2015, Prothonotary Milczynski granted the said motion. It is this decision that was upheld on appeal by Phelan J. of the Federal Court. The latter decision is the one under appeal before us.

II. DECISIONS

[13] Considering that correctness is the applicable standard of review to the issue of jurisdiction (see para. 19 below), there is no need to say much about the Federal Court decisions in that respect. Both the Prothonotary and the Federal Court judge found that it was not plain and obvious that the Federal Court does not have jurisdiction over the Third Party Claim pursuant to section 19 of the FC Act either on the basis of this Court's reasoning in *Fairford First Nation v. Canada (Attorney General)* (1996), 205 N.R. 380 (F.C.A.) (*Fairford*), or the tripartite test set out in *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752 (*ITO*).

[14] With respect to the extension of time, the Prothonotary was satisfied that the delay had been explained by Canada and that, in the circumstances of this case, "there is no substantive prejudice arising to Alberta" (Prothonotary reasons at 8). She was also satisfied that Canada had demonstrated a continuing intention to pursue a Third Party Claim. She noted that Canada intended to discontinue the Third Action.

[15] The Federal Court judge concluded that Alberta had failed to establish a reviewable error. He noted that "Alberta [had] been unable to meaningfully assert, much less establish, any prejudice resulting from the delay" (Federal Court judge reasons at para. 57). The Federal Court judge was of the view that Canada clearly had an arguable case on the merits and that it had the intention to claim contribution and indemnity for Alberta throughout.

III. RELEVANT RULES

[16] The most relevant provisions of the *Federal Court Rules* read as follows:

Third Party Claims	**Réclamation contre une tierce partie**
Availability as of right	**Tierces parties**
93. 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.	**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.
Where leave of Court required	**Autorisation de la Cour**
194. With leave of the Court, a defendant may commence a third party claim against a co-defendant, or	**194.** Un défendeur peut, avec l'autorisation de la Cour, mettre en cause une personne — qu'elle soit ou

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.

Time for third party claim

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.

Third party claim against non-defendant

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 statement of defence; and

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

Copy of pleadings

(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.

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.

Mise en cause d'une partie

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.

Mise en cause – personne non partie

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 d'une défense;

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

Copie des actes de procédure

(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.

IV. ISSUES

[17] The issues raised by Alberta can be summarized as follows:

i. Is it plain and obvious that the Federal Court does not have jurisdiction over Alberta as a party, the Third Party Claim, or the within Action?

ii. Should Canada be allowed to file a Third Party Claim after the lengthy delays since Alberta was removed as a party from this Action?

[18] I do not intend to address the issue of the Federal Court's jurisdiction with respect to the Action, as this was not a matter to be determined on the motion that was before the Prothonotary and the Federal Court judge. The plaintiffs in the Action did not participate at all in this appeal.

V. ANALYSIS

[19] Our Court clarified the standard of review applicable to discretionary orders of prothonotaries and judges in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215. Both parties presented their case on the basis that the question of jurisdiction was to be reviewed on a correctness standard. The application of the test to be met to obtain an extension of time raised a question of mixed fact and law reviewable on the standard of the palpable and overriding error, unless there was an extricable legal error. I agree that these are the standard of review to be applied here (see *Pembina County Water Resource District v. Manitoba (Government)*, 2017 FCA 92 at para. 35, leave to appeal to S.C.C. refused, 37674 (December 21, 2017); *Bygrave v. Canada*, 2017 FCA 124 at paras. 1, 10).

A. *Jurisdiction*

[20] The question of jurisdiction was not raised by way of a motion for summary judgment (Rule 214) or summary trial on a particular issue of law (Rule 216), or a motion for a preliminary determination of a question of law (Rule 220). Thus, the Federal Court was not required to determine this issue definitively. Because leave was required pursuant to Rule 194, the Prothonotary had to insure that the Third Party Claim was triable in the same way that amendments to include a new cause of action must be assessed. If the Third Party Claim met the test that would apply on a motion to strike (whether it was plain and obvious that it could not succeed), leave ought to be refused. This test applies regardless of the arguments raised, including jurisdiction (*Hodgson v. Ermineskin Indian Band No. 942* (2000), 267 N.R. 143 (F.C.A.), leave to appeal to S.C.C. refused, 28413 (February 8, 2001); *Kremikovtzi Trade v. Phoenix Bulk Carriers Ltd*., 2007 FCA 381 at para. 33).

[21] If leave was granted, the question of jurisdiction could then be finally determined either at trial or upon the filing of any of the above mentioned motions, once the pleadings are complete and proper evidence with respect to all the jurisdictional facts is available. This would also give an opportunity to the parties to fully address the interpretation discussed hereinafter.

[22] Despite the temptation to give a definite answer to the question of jurisdiction so that Canada could immediately discontinue the Third Action, I can only conclude that it is not plain and obvious that the Federal Court does not have jurisdiction over the controversy (or “litige” in French) between Canada and Alberta on the basis of section 19 of the FC Act.

[23] Section 19 of the FC Act reads as follows:

Intergovernmental disputes	**Différends entre gouvernements**
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.

[24] This unique provision obviously cannot apply to controversies between individuals and Alberta. There is unanimous jurisprudence in that respect (*Union Oil Co. of Canada Ltd. v. The Queen in Right of Canada et al*., [1976] 1 F.C.R. 74 (F.C.A.), aff'd 72 D.L.R. (3d) 82 (S.C.C.); *Canada v. Toney*, 2013 FCA 217 at paras. 19-25). As mentioned, it is on that basis that Prothonotary Hargrave struck Alberta as a defendant in the Action and that Prothonotary Milczynski refused to re-include Alberta (Order of Prothonotary Milczynski dated June 11, 2015, aff'd 2016 FC 818).

[25] Like the other provinces in Canada, Alberta has passed legislation to give effect to section 19 of the FC Act. Currently, it is paragraph 27(*a*) of the Alberta *Judicature Act*, R.S.A. 2000, c. J-2, that grants the Federal Court jurisdiction over controversies between Canada and Alberta, and over controversies between Alberta and any other province or territory in which an Act similar to the Alberta *Judicature Act* is in force. There is thus no doubt that no issue of Crown immunity arises in respect of Alberta when sections 19 and 27 of the aforementioned statutes apply.

[26] With respect to the subject matters covered by these provisions and more particularly by section 19 of the FC Act, it appears that there is no limit as to the type of controversy to which they would apply. At this stage and without the benefit of full arguments, the legislative evolution of section 19, as well as the manner in which both provisions have been applied, appears to support the broad scope suggested by the ordinary meaning of the words any "controversy" or "litige" in French.

[27] As mentioned, the legislative evolution of section 19 of the FC Act is, in my view, helpful in that respect. A similar provision has been included since 1875 in the various versions of the statutes defining the jurisdiction of the Exchequer Court, the predecessor of the Federal Court (see section 54 of the *Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, 38 Vict., c. 11). In 1886, section 74 of the *Supreme and Exchequer Courts Act*, S.C. 1886, c. 135, specified that this special jurisdiction, set out in the first and second paragraphs of section 72 of the latter Act, only applied to controversies of a civil nature. This precision like many other provisions of the 1886 version disappeared following the revision of statutes in 1906 (see *Exchequer Court Act*, R.S.C. 1906, c. 140). In any event, I note that, in the *Black's Law Dictionary*, controversy is a term that does not ordinarily apply to criminal matters and is limited to civil ones (10th ed., *s.v.* "case-or-controversy requirement").

[28] It is certainly arguable that the Superior Courts of the provinces did not have jurisdiction historically over Canada or any of the Provincial Crowns, given that the Crown immunity was then almost absolute (Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, 5th ed. (Toronto: Thomson Reuters, 2016) at 7.3(d)-(e)). These entities were not person judiciable before those

courts. Thus, jurisdiction over such intergovernmental disputes would not be part of their core jurisdiction (see also for example *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at paras. 58-61, where the Supreme Court held that section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, which gives exclusive jurisdiction to the Federal Court to deal with a claim of Crown's privilege, did not invade the core jurisdiction of Superior Courts).

[29] Even after the adoption of provincial statutes waiving Crown immunities, such waivers were limited — suits could be instituted against the Provincial Crown but only before the courts of that province (Peter W. Hogg, Patrick Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011) at 485-486). Thus, without section 19 of the FC Act (and its previous versions), if a controversy arose between Alberta and Saskatchewan for example, it appears that either Provincial Crown could sue the other but before the defending's provincial Crown's courts.

[30] Section 19 certainly provided a pragmatic and practical approach to deal with intergovernmental disputes. It is an example of cooperative federalism. Whether or not this jurisdiction was at any time and in respect of any province exclusive or not, it is clear that today, it would only provide a concurrent jurisdiction to the Federal Court.

[31] It is worth noting that, in addition to the precursors of section 19 of the FC Act, other types of mechanisms have been used to deal with intergovernmental disputes. In fact, Canada, and the Provincial Crowns of Ontario and of Québec had chosen arbitration before three individual judges, selected by each party with an appeal to the Supreme Court of Canada and

then to the Privy Council as the proper forum to deal with the settlement of accounts between Canada, Québec and Ontario, and between those two provinces (see *Attorney General for the Dominion of Canada v. Attorney General for Ontario; Attorney General for Quebec v. Attorney General for Ontario*, [1897] A.C. 199 (P.C.)). Each of the said parties had enacted statutes to that effect (*An Act respecting the Settlement of Accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, and between the said Provinces*, S.C. 1891, c. 6; *An Act respecting the settlement, by arbitration, of accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, and between the said two provinces*, S.O. 1891, c. 2; *An Act respecting the settlement, by arbitration, of accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, and between the said two provinces*, S.Q. 1890, c. 31).

[32] This would explain, in my view, why this Court stated in *Fairford*:

> […]
>
> 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 Federal Court that the respondents' action against the appellant will turn primarily on issues of aboriginal title, the Indian Act, the Crown's fiduciary obligation to aboriginal peoples, all undisputedly matters of Federal Law
>
> […]
>
> (References omitted) (My emphasis)

[33] This statement was later followed by the Federal Court in *Southwind v. Canada*, 2011 FC 351 (*Southwind*):

> [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.
>
> […]
>
> [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.
>
> (My emphasis)

[34] Read in the context described above, it is easier to understand the doubts expressed by this Court in *Fairford* as to the need for a substratum of federal law to nourish the Federal Court's grant of jurisdiction under section 19. Unlike other provisions of the FC Act, such as section 22 at issue in *ITO* or section 23 involved in *Windsor (City) v. Canadian Transit* Co., 2016 SCC 54 at paragraphs 16 and 55 (*Windsor*), section 19 does not appear to be grounded solely on the power of Canada under section 101 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (*Constitution*). It is also nourished by the power of provincial legislatures, which the Alberta legislature did exercise, to confer to a statutory court jurisdiction over controversies or "litiges" in French in respect of subject matters that could fall within section 92 of the *Constitution*.

[35] Therefore, the "constitutional boundaries" of the Federal Court (*Windsor* at para. 33) would not be relevant as they are only meant to ensure that the federal Parliament does not use

its power provided in section 101 to expand unilaterally the Federal Court's jurisdiction unilaterally. In this case, neither the said provincial power nor, as mentioned, the core jurisdiction of Superior Courts appear to raise an issue, for such jurisdiction does not deprive the Superior Courts of their jurisdiction as it is only a concurrent jurisdiction. It is merely a useful tool available when the alternative is not the favoured option.

[36] On this interpretation of section 19, there is no need to comment on the debate between the parties as to whether or not the essential character of the Third Party Claim involves federal law including federal common law on aboriginal rights and titles (*Roberts v. Canada*, 1989 1 S.C.R. 322) or not. It is sufficient to recall that Canada's position that the Third Party Claim meets the *ITO* test, in any event, was accepted as raising an arguable case by both decision makers in the Federal Court. I also note without the need to decide it, that Canada argues that for the purpose of section 101 of the Constitution, the special nature of the NRTA as an agreement and a federal statute was not lost in 1982, and raises an arguable case, especially with respect to trust of third party rights that may have existed in December 1929, when the said agreement was signed.

[37] I will now turn to the last point raised by Alberta in respect of section 19 of the FC Act.

[38] To avoid the application of section 19, Alberta also argues that there is no controversy or "litige" in French at this stage, given that the Third Party Claim is contingent on this Court finding in favour of the plaintiffs in the within Action. As this has yet to occur, Alberta cannot be said to have refused to recognize such right. Thus, there is no controversy or "litige".

[39] As far back as 1977, the term "controversy" has been construed widely by this Court in *Canada v. Prince Edward Island* (1977), 83 D.L.R. (3d) 492 (*Prince Edward*). Le Dain J.A. (as he was then) found that controversies were "any kind of legal right, obligation or liability that may exist between Governments" and that "it is certainly broad enough to include a dispute as to whether one Government is liable in damages to another" (*Prince* Edward at 532-533).

[40] Alberta did not object to the filing of the Third Party Claim on the basis that it is plain and obvious that Canada has no legal right to contribution or indemnity under the NRTA.

[41] And like the Federal Court, I believe that it is not plain and obvious that Canada has no such legal right. Fleshing out the extent of that claimed right in respect of Treaty 7 territory is what needs to be determined (see for example *Southwind* where the Federal Court found that it is not plain and obvious that there was no controversy between Canada and the Manitoba Crown with respect to the latter's alleged liability under the *Manitoba Natural Resources Transfer Agreement*, Schedule 1 of the *Constitution Act*, 1930).

[42] The simple fact that Canada felt compelled to institute the Third Action to protect its rights against Alberta and sought leave to file a Third Party Claim when the stay was refused indicates that Canada has received no assurance that Alberta would not contest the Federal Court's findings in respect of the plaintiffs' (other than those involved in the Second Action) aboriginal rights before and after Treaty 7. In fact, if Alberta intends to simply accept those findings, it is difficult to understand why it would have given instructions to contest so forcefully

a motion simply meant to ensure it can participate in any way it deems appropriate so that it be bound by the determination of the issues between the plaintiffs and Canada (Rule 194(*b*)), .

[43] In any event, to say that a controversy or a "litige" does not exist until a formal request for payment is made by Canada and is refused by Alberta makes little sense, especially when limitations may be in play as was argued by Canada to explain why it filed the Third Action. In my view, it would require this Court to change the broad definition adopted in *Prince Edward*, which the Prothonotary and the Federal Court judge applied. This in and of itself indicates that the answer to this last question is not plain and obvious, and the test applicable to refuse leave is not met.

B. *Extension of time to seek leave or to file the Third Party Claim*

[44] In *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 (F.C.A.) (*Hennelly*), this Court listed four questions relevant to the exercise of discretion to allow extension of time under Rule 8:

(1) Did the moving party have a continuing intention to pursue the proceeding?

(2) Is there some merit to the proceeding?

(3) Has the defendant been prejudiced from the delay?

(4) Does the moving party have a reasonable explanation for the delay?

[45] These questions are helpful to determine whether the granting of an extension is in the interest of justice, because the overriding consideration or the real test is ultimately that justice

be done between the parties (*Grewal v. Minister of Employment and Immigration*, [1985] 2 F.C.R. 263 at 277-279 (F.C.A.)). Thus, *Hennelly* does not provide an extensive list of questions or factors that may be relevant in any given case, nor is the failure to give a positive response to one of the four questions referred to above necessarily determinative (*Canada (Attorney General) v. Larkman*, 2012 FCA 204, at para. 62).

[46] Alberta submits that there is a presumption that it suffers a prejudice not compensable by the granting of costs because of the long delay between 2001 (when it ceased to be a party to the Action) and the motion for leave to file a Third Party Claim. It argues that failing to apply such a presumption constitutes an error on an extricable question of law by the Federal Court.

[47] Alberta also argues that the Prothonotary erred in her consideration of the continuing intention of Canada to file a Third Party Claim and that the Federal Court judge erred by considering instead that Canada always intended to seek contribution or indemnity from Alberta, whether before the Federal Court or the Queen's Bench of Alberta.

[48] Alberta adds that there is no merit to the Third Party Claim because of the lack of jurisdiction of the Federal Court, and the fact that, in any event, such a claim constitutes an abuse of process because Canada also instituted the Third Action in 2010.

[49] Finally, Alberta says that the evidence was too thin for the Prothonotary to conclude that the delay had been explained by the Crown.

[50] Before I deal with the aforementioned arguments, I ought to mention that Alberta presented its argument on the basis that Rule 196 applied to the motion before the Prothonotary because, at the time of the filing of Canada's motion, Alberta was not a co-defendant. As mentioned, Alberta specifically referred to this Rule in its December 12, 2013 letter to Canada and even raised the fact that it had not been provided with a copy of the Statement of Claim, the only pleading that had not been included in the documentation received from Canada on December 11, 2013.

[51] Rule 196 (see para. 16 above) applies to Third Party Claims filed against a party that is not a co-defendant. It provides that the Third Party Claim must be issued within the time set out in Rule 204 for the filing and service of a Statement of Defence and served within 30 days of its issuance.

[52] Obviously, during the time set out in Rule 204 (30 days after the service of the Statement of Claim in the Action), Alberta was a co-defendant in the Action. Therefore, Rule 196 did not apply. It could also not apply in 2013 or at any time since September 27, 2001, as the time set out in Rule 204 had expired well before the decision striking Alberta as a co-defendant.

[53] The only other Rule setting a time for the filing of a Third Party Claim is Rule 195 (see para. 16 above). It provides that a Third Party Claim against a co-defendant should be filed and served within 10 days after the filing of the Statement of Defence, which in this case was December 18, 2013. That was less than two months before the filing of the motion for leave. Again, on its face, this Rule did not apply, as Alberta was not a co-defendant at that time.

[54] Generally, the time set out in those two Rules applies to Third Party Claims filed as of right pursuant to Rule 193 (see para. 16 above). This latter Rule applies whether or not the third party is a co-defendant. Also, Rules 193 to 196 rarely apply to cases under active case management for, in most such cases, the time line to take the various procedural steps set out in the Rules are discussed and agreed upon during case management conferences, and set by Directions or Orders. This is even more so when leave is required under Rule 194 (a Rule that applies whether the third party is a co-defendant or not) because, in such cases, the Case Manager must set down dates for the hearing of the said motion, which are then included in the Notice of Motion. As mentioned, there is no evidence in that respect before us, but all this would have been within the specialized knowledge of the Case Manager.

[55] Similarly, in December 2013, Canada's Statement of Defence could not have been accepted for filing by the Registry without a Direction, oral or in writing, from the Case Manager. In most cases, this is done during or in the context of a case management conference. Thus, strictly speaking, there was no Rule setting the time for the filing of the motion for leave that applied here. This explains why the Prothonotary premised her brief comments in respect of the timeliness of the motion by stating: "to the extent an extension of time is required, I would grant it" (Prothonotary reasons at 7).

[56] As will be discussed later on, that is not to say that the period between 2001 and the filing of the motion is irrelevant, it is certainly part of the relevant considerations that arise from the special circumstances of this case. However, this would not fall under the fourth question referred to in paragraph 44 above.

[57] Coming back to the Prothonotary's comments with respect to the explanation of the delay and the continuing intention to pursue a Third Party Claim, they are exceedingly brief as is often the case in such matters. It is not clear exactly what period of time the Prothonotary was considering as relevant.

[58] Even if Alberta is correct that when Canada filed its motion to stay shortly before filing the Third Action, it was clear that Canada had no intention to commence third party proceedings in the Federal Court, it does not mean that the Federal Court made a palpable and overriding error in concluding that Canada had the appropriate intention to be considered under the first question set out in *Hennelly*, or that this question was in any way determinative in this case, considering its special circumstances.

[59] I agree with the Federal Court judge's finding that Canada always had the intention to seek indemnity or contribution from Alberta in whichever forum had the appropriate jurisdiction in that respect.

[60] In the present context, I am of the view that the most relevant time to consider the intention to file a Third Party Claim is after Canada was finally denied its motion for a stay. There was sufficient evidence in respect of that delay to answer the question in the affirmative.

[61] That said, even if I were to accept that the Federal Court (the Prothonotary and the Judge) made a palpable error in respect of the continuing intention to commence third party proceedings, I still believe that it would not be an overriding error in the present case. It is clearly

in the interest of justice that if an extension was required, it should be granted, so that leave pursuant to Rule 194 can be granted.

[62] Turning to the merits of the Third Party Claim, as mentioned Alberta raised two issues. First, the Federal Court has no jurisdiction. I have already dealt with this issue, and found that Canada certainly has an arguable case in that respect. Second, Alberta also submits that the Third Party Claim is an abuse of process. I cannot agree.

[63] There is no doubt that duplication of proceedings may amount to an abuse of process, but it is not so in all cases. Alberta relies on the decision of the Queen's Bench of Alberta in *Stoney Nakoda Nations v. Canada (Attorney General)*, 2015 ABQB 565 (*Stoney*). There is no doubt that the circumstances in the present case are distinguishable from those referred to at length by the Queen's Bench in *Stoney*. In the present case, what led to the institution of the Third Action is the uncertainty with respect to the jurisdiction of the Federal Court and the need to protect limitation, which was viewed as a potential issue by Canada.

[64] Inasmuch as concurrent jurisdiction of courts may provide useful tools to parties, it can also create some uncertainty and make procedural matters especially more complex. This is so, considering the position taken by the Supreme Court of Canada with respect to the jurisdiction of the Federal Court under other provisions of the FC Act, and the fact that there was never a detailed analysis of the Federal Court's jurisdiction under section 19 of the FC Act after *ITO*. Courts must be alert and alive to such issues and cannot simply ignore the fact that they may

create difficulties for a defendant when the various plaintiffs do not agree on the forum best suited to their needs.

[65] Canada took reasonable steps to accommodate Alberta's apparent desire to have this dispute litigated before the Queen's Bench of Alberta. Canada could not force the four plaintiffs, whose only action is before the Federal Court, to move their proceedings to the Alberta Court. To do so would at least have required an assurance that these plaintiffs would not be faced with any prejudice insofar as, for example, the limitation period is concerned. That is not to say that they should have an advantage but rather that, in whatever action they would agree to take before the Queen's Bench of Alberta, a waiver of limitation would apply for the period between the date they filed the Action and the date a new action would be instituted before the Alberta Court. Such matters are commonly done by agreement in cases involving the determination of the most appropriate forum (*forum non conveniens*). There is no evidence that there were any discussions in that respect so far, particularly as this would require the involvement of Alberta. The only avenue opened to Canada was to seek a stay. That stay was denied.

[66] In my view, Canada acted reasonably when it sought leave pursuant to Rule 194 to ensure that Alberta would be bound by the findings of the Federal Court between the plaintiffs and Canada (Rule 194(*b*)). This step is not meant to increase litigation, but rather to avoid duplication or re-litigation in respect of those issues between the plaintiffs in the Action and Canada.

[67] The nature of the Third Action is such that, as mentioned at the hearing before us, the said Action will not proceed until the Federal Court has determined the rights of the plaintiffs in the Action. There is thus little danger of contradictory judicial determination and it does not appear that Alberta would have to litigate before two different forums at the same time.

[68] Moreover, Canada has filed affidavit evidence confirming its intention to discontinue the Third Action once the jurisdiction of the Federal Court over the Third Party Claim is determined. Unfortunately, this cannot be done definitely in the context of Canada's motion for leave or any appeal thereon. This can only be done through the type of motions I have discussed earlier, after Alberta has filed its Statement of Defence. Obviously, Alberta is at liberty to file any such motion.

[69] Although Canada is now likely precluded from seeking a stay in the Action, Alberta can bring a motion to stay the Third Party Claim or even the Action if it believes that its motion has more chance of success than the one presented by Canada. This would especially be so if an agreement could be reached with the four other plaintiffs. This may even be done by consent if Alberta agrees to be bound by the findings of the Federal Court as provided in Rule 194(*b*).

[70] With respect to the merits of the Third Party Claim itself, there is no doubt, considering the wording of article 1 of the NRTA, that Canada has an arguable case for indemnity or contribution. This was not contested before us. I therefore find that the second question must be answered positively.

[71] With respect to the important question of prejudice, Alberta led no evidence. Instead, Alberta relies on the fact that the burden is on Canada to rebut the presumption of prejudice that arises from the delay of more than 12 years that occurred between the decision of the Prothonotary removing it from the Action and the filing of the motion for leave.

[72] In *Richard v. Canada (Attorney General)*, 2010 FCA 292 at paragraph 17 (leave to appeal to S.C.C. refused, 33980 (May 5, 2011)), this Court explains the rationale behind the rebuttable presumption of prejudice arising from long delays. If this presumption does apply to the type of case involved here, in my view, it has been rebutted.

[73] The Third Party Claim puts in play an agreement that was made in December 1929 as well as the fiduciary duty that may arise, as a result thereof. The trusts and rights upon the territory that was ceded to Alberta and is at issue are those existing prior to 1877 and the impact of Treaty 7 thereon. It is self-evident that the evidence in respect of those facts and the existence of any rights is historical evidence and a delay which might otherwise be regarded as long in usual civil matters is far from significant, when one considers the period of time relevant to determine the rights at issue here. Furthermore, considering the importance of the rights claimed in the Action and the plaintiffs' allegations referring to the NRTA and its effect, Alberta ought to have known, since the filing of the Action, that Canada had little choice but to seek indemnity or contribution from Alberta at some point. The pleadings in the Action are not even close and no significant steps have taken place since 2001 other than the filing of the Statement of Defence.

[74] Finally, Alberta has been directly involved since 2003 in the Second Action which involves three of the plaintiffs in the Action; that is a mere two years after it was removed from the Action.

[75] Hence, I conclude that the Federal Court made no reviewable error in confirming the Case Manager's finding that Alberta would suffer no substantive prejudice.

[76] The last question set out in *Hennelly* is the explanation of delay. As mentioned, it is not clear what period exactly the Case Manager focused on. It is clear that Case Managers should be given elbow room on such an issue, as they are tasked with ensuring that actions proceed as quickly as possible in light of all the particular circumstances of a case. As is apparent in *Stoney* at paras. 9, 55-63, and in *Canada v. Stoney Band*, 2005 FCA 15, prothonotaries of the Federal Court do not hesitate to dismiss actions where delay is not justified. Here the Case Manager had an intimate knowledge of the proceedings and the explanations given by all those concerned during the numerous case management conferences that took place since 2001. Thus, unless all the evidence as to what transpired during the various case management conferences is before the reviewing court, one should be particularly careful to intervene on this particular issue. Although the hard evidence in the Appeal Book is thin, it is, in my view, sufficient when taken into the context of the specialized knowledge of the Case Manager to justify the Prothonotary's conclusion.

[77] In any event, even if I were again to assume that the Prothonotary made a palpable error, it would not be one that is overriding. In the particular context, the absence of prejudice and the

fact that Canada was forced to take the steps that it did when it was denied a stay were sufficient to conclude that it was in the interest of justice that the extension be granted.

VI. CONCLUSION

[78] I propose that the appeal be dismissed. The parties agreed that costs be assessed at a lump sum of $4,000.00, whoever was entitled to costs. Costs should be awarded on that basis.

"Johanne Gauthier"
J.A.

“I agree.
D.G. Near J.A.”

“I agree.
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE PHELAN DATED JULY 19, 2016, DISMISSING ITS APPEAL FROM AN ORDER OF PROTHONOTARY MILCZYNSKI (2016 FC 817)

DOCKET:	A-271-16
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA ET AL.
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	OCTOBER 31, 2017
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	NEAR J.A. DE MONTIGNY J.A.
DATED:	APRIL 27, 2018

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