Federal Court of Appeal

Cour d'appel fédérale

Date: 20140228

Docket: A-204-13

Citation: 2014 FCA 55

CORAM: **NOËL J.A.**
MAINVILLE J.A.
WEBB J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CHIEF SHANE GOTTFRIEDSON, on his own behalf and on behalf of all the members of the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND and the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND,

CHIEF GARRY FESCHUK, on his own behalf and on behalf of all the members of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND,

VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE and RITA POULSON

Respondents

Heard at Vancouver, British Columbia, on February 10, 2014.

Judgment delivered at Ottawa, Ontario, on February 28, 2014.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: MAINVILLE J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Harrington J. (the Federal Court judge) denying a motion brought by the Attorney General of Canada (the Attorney General) seeking to stay a class proceeding. The class proceeding claims compensation from the Government of Canada (Canada or the Crown) for intentionally causing Indian day students attending Indian residential schools to lose their identity.

[2] The Attorney General brought the motion pursuant to section 50.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 alleging that the Federal Court does not have jurisdiction over related third party claims which he intends to file:

50.1 (1) The Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown where the Crown desires to institute a counter-claim or third-party proceedings in respect of which the Federal Court lacks jurisdiction.	**50.1** (1) Sur requête du procureur général du Canada, la Cour fédérale ordonne la suspension des procédures relatives à toute réclamation contre la Couronne à l'égard de laquelle cette dernière entend présenter une demande reconventionnelle ou procéder à une mise en cause pour lesquelles la Cour n'a pas compétence.

[My emphasis]

[3] The Federal Court judge dismissed the motion on the basis that the Attorney General had failed to establish that the Federal Court did not have jurisdiction over the proposed third party claims.

BACKGROUND

[4] The class proceeding (the main action) was initiated by the TK'emlúps Te Secwépemc Indian Band, the Sechelt Indian Band and members of those Bands communities (the plaintiff Bands). The period contemplated ranges from 1920 to 1979. The alleged fault is that the Crown conceived, implemented and administered a residential schools policy which was intended to and caused Indian day students to lose their identity.

[5] The third party claims seek contribution and indemnification from the religious organizations who ran the Indian residential schools with respect to any wrong which the Crown is found to have committed in the main action.

[6] In addition to refusing the stay, the Federal Court judge granted the plaintiff Bands leave to amend their statement of claim to make it clear that no compensation was being sought from the Crown with respect to any fault attributable to the religious organizations.

[7] The plaintiff Bands have since filed their amended statement of claim. The amended statement of claim reads in part:

> a. The [plaintiff Bands] expressly waive any and all rights they may possess to recover from Canada, or any other party, any portion of the [plaintiff Bands'] loss that may be attributable to the fault or liability of any third-party and for which Canada might reasonably be entitled to claim from any one or more third-party for contribution, indemnity or an apportionment at common law, in equity, or pursuant to the British Columbia *Neglicence Act* …, as amended; and

b. The [plaintiff Bands] will not seek to recover from any party, other than Canada, any portion of their losses which have been claimed, or could have been claimed, against any third-parties.

[8] At the hearing of the appeal, we were informed that the Federal Court judge has recently granted a further motion brought by the religious organizations and struck the third party claims on the ground that the Crown has no cause of action against them given the above waiver (2013 FC 1213). We were also advised that the Attorney General is appealing that decision.

[9] The fact that the third party claims have now been struck makes the present appeal moot. However, this will cease to be the case should the Federal Court judge's latest decision be overturned on appeal.

[10] In the circumstances, it is appropriate that we dispose of the appeal despite its mootness and settle the jurisdictional issue on the assumption that the third party claims remain in play.

DECISION ON APPEAL

[11] In order to determine if the Federal Court has jurisdiction over the third party claims, the Federal Court judge had to apply the test set out in *ITO-Int'l Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at p. 766 (*ITO*):

1) There must be a statutory grant of jurisdiction by the federal 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.

3) The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

[12] The Federal Court judge first considered the Federal Court's jurisdiction over the main action (reasons at paras. 26 to 28). He held that this condition was met given that subsection 17(1) of the *Federal Courts Act* gives the Federal Court "concurrent original jurisdiction in all cases in which relief is claimed against the Crown" (reasons at paras. 26 and 27).

[13] As for the other two elements of the test, the Federal Court judge found that two sources of federal law are essential to the disposition of the main action, namely the *Indian Act*, R.S.C., 1985, c. I-5 and the *sui generis* relationship between the Crown and Aboriginal peoples. This is the law on which the case is based (reasons at paras. 27 to 28).

[14] Turning to the third party claims, the Federal Court judge first noted that as for the main action, jurisdiction over these claims is granted by subsection 17(1) of the *Federal Courts Act* (reasons at para. 29). The issue therefore is whether the remaining elements of the ITO test are also met (reasons at para. 30).

[15] According to the Federal Court judge, the comparative fault of Canada and the religious organizations is at the heart of the third party claims (reasons at para. 31). Although the claims for contribution and indemnity are said to be based on the *Negligence Act*, R.S.B.C. 1996, c. 333, "one pleads the facts and not the law" (reasons at para. 32).

[16] Relying on a group of cases rendered pursuant to Canadian maritime law, the Federal Court judge held that there is federal common law dealing with contributory negligence which allows for

the disposition of the third party claims without referring to the *Negligence Act* of British Columbia (reasons at para. 33).

[17] Apart from the existence of this federal common law, there is another body of federal law underlying the third party claims. The religious organizations were retained on behalf of the Crown, pursuant to the *Indian Act*, to educate the Indian day students. The third party claims arise in the context of the administration of the *Indian Act* (reasons at para. 35).

[18] The Federal Court judge went on to hold that although the line is difficult to draw, the third party claims are more closely connected with federal law (reasons at para. 38). He ended his analysis with the following observation (reasons at para. 39):

> … The religious [organizations] were acting on behalf of Her Majesty and so were required to act honourably. Section 35 of the *Charter* applied. Non-government organizations may exercise delegated government powers or be responsible for the implementation of government policy. Such entities in carrying out those powers are part of "government" (*Elridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 (Q.L.) and *Onuschak v. Canadian Society of Immigration*, 2009 FC 1135, [2009] F.C.J. No. 1596 (Q.L.)).

<u>POSITION OF THE PARTIES</u>

- *The Attorney General*

[19] The Attorney General maintains that the third party claims are "overwhelmingly" based on provincial common law and provincial statutory law, and that the Federal Court judge erred in holding otherwise (Attorney General's memorandum at paras. 3 and 24 to 32).

[20] The Federal Court judge further erred in importing maritime law concepts into claims arising from the operation of the Indian residential schools (Attorney General's memorandum at

paras. 33 to 43). The Attorney General notes that this novel approach was advanced by the Federal Court judge on his own account, neither party having raised it in their submissions.

[21] The Federal Court judge also erred in finding that the *Indian Act*, and the fiduciary duty owed by the Crown to Aboriginal peoples are sufficient to confer jurisdiction on the Federal Court (Attorney General's memorandum at paras. 44 to 54).

[22] Finally, the Federal Court judge erred in finding that the religious organizations formed part of government and that section 35 of the *Charter* applied. No *Charter* issue was raised. Although the plaintiff Bands allege that the religious organizations were Canada's agent, no argument is raised based on the *Charter* (Attorney General's memorandum at paras. 55 to 60).

[23] Adopting another line of thought, the Attorney General made the point that the amendment brought to the statement of claim does not solve the jurisdictional problem (Attorney General's memorandum at paras. 61 to 65). The Attorney General adds that the Crown's *bona fide* desire to pursue the third party claims cannot be questioned particularly as the third party claims have now been filed (Attorney General's memorandum at paras. 65 to 75).

- *The plaintiff Bands*

[24] The plaintiff Bands first submit that the focus of the main action is Canada's residential schools policy, and that the Crown alone was responsible for the creation, implementation and management of this policy (respondent's memorandum at paras. 6 and 7).

[25] According to the plaintiff Bands, the third party claims arise from the implementation of this policy, the foundation and scope of which was governed by the *Indian Act* (respondent's memorandum at para. 10).

[26] While the purpose of the third party claims is to assess fault, contribution is only available if the third parties breached an obligation owed to the plaintiffs, and given that the third parties were acting on behalf of the Crown, "it is against that standard of conduct that the third parties will be measured" (respondents' memorandum at para. 25).

[27] The plaintiff Bands submit that the Federal Court judge was correct in holding that there are several sources of federal law that fulfill the second and third parts of the ITO test. According to the plaintiff Bands, the law of comparative fault developed in conjunction with Canadian maritime law extends to federal law generally (respondents' memorandum at paras. 28 to 37). In any event, the federal common law related to aboriginal rights is sufficient in and of itself to ground the third party claims on federal law (respondents' memorandum at paras. 38 to 45).

[28] The *Indian Act* is a further element of federal law on which the third party claims are grounded. The fact is that the Indian residential schools were established under the authority of the *Indian Act* and that policy was shaped by the federal Crown exercising its constitutional jurisdiction

over "Indians" (respondents' memorandum at para. 46). As such, the third party claims turn on the interpretation and application of federal law (respondents' memorandum at para. 52).

[29] Finally, the Federal Court judge properly held that the religious organizations can be viewed as an extension of government (respondents' memorandum at paras. 53 to 58). In so holding, the Federal Court judge was not inserting a *Charter* issue in the third party claims but merely pointing out that "non-government organizations may exercise delegated government powers …" (respondents' memorandum at para. 56).

ANALYSIS AND DECISION

[30] The first part of the ITO test is not in issue as it is common ground that the third party claims come within the statutory grant of jurisdiction found in paragraph 17(5)(*a*) of the *Federal Courts Act*.

[31] The issue therefore is whether the Federal Court judge correctly held that the second and third parts of the test were also met.

[32] The main action alleges that Canada caused the destruction of aboriginal language and culture. It focuses on Canada's role in the creation, implementation and management of Canada's residential schools policy. The plaintiff Bands' claim for compensation is grounded on Canada's breach of its fiduciary duty to act in the best interest of the Bands and their members.

[33] Canada's third party claims seek contribution and indemnity from the religious organizations for any fault for which Canada is found to be liable. They are based on the allegation that the religious organizations controlled, operated, administered and managed the Indian residential schools pursuant to agreements with Canada, and that they acted negligently and in breach of their contractual and fiduciary obligations. Vicarious liability is also alleged. The relief claimed is said to be based on the *Negligence Act* of British Columbia and the common law.

[34] Before turning to the analysis, the Federal Court judge properly noted that the three-part test must be applied to the third party claims independently of the action with which it is associated. This, however, does not mean that regard cannot be had to the main action if it assists in determining what is in issue in the related third party claims.

[35] It is important to understand from the onset that what is in issue in the main action is Canada's residential schools policy and not abuses that may have occurred in the course of its implementation (compare *Blackwater v. Plint*, 2005 SCC 58 (*Blackwater*)). According to the statement of claim, the intent of this policy was to educate Indian day students in a manner which caused them to lose their language and culture. This is the alleged wrong with respect to which compensation is sought.

[36] The underlying contention is that the Crown had a duty to ensure that Indian students were educated so as to preserve their identity and ensure their continued existence, as Indians. Rather than honouring this duty, the Crown implemented a residential schools policy which robbed Indian

day students of their identity. The responsibility of the Crown for the education of Indians under the *Indian Act* and federal common law relating to aboriginal rights is at the core of the main action.

[37] Although the third party claims make no reference to the Crown's fiduciary obligation and the honour of the Crown, the heightened duty which is cast on the Crown in its dealings with Aboriginal peoples will be central to these proceedings. Simply claiming that the religious organizations contributed to the loss of identity caused by the residential schools policy begs the question as to the standard against which their conduct will be measured in determining whether they are also at fault.

[38] While we do not have before us the statement of defence to be filed by the religious organizations, the outcome will necessarily turn in great part if not exclusively on the written and oral agreements which the religious organizations are alleged to have breached, and the steps taken by the Crown to insure that the heightened duty which it owed to the Indian day students and the plaintiff Bands was conveyed to the organizations charged with the operation of the Indian residential schools.

[39] Beyond the *sui generis* relationship between the Crown, the plaintiff Bands and their members, the *Indian Act* and in particular sections 114 and following, are also at the core of both the main action and the third party claims. These provisions, and their predecessors, make Canada responsible for the education of Indian day students. The religious organizations were retained by Canada in order to fulfill this responsibility.

[40] In that regard, there was extensive argument before us about the nature of the relationship between Canada and the religious organizations. The plaintiff Bands argued that the religious organizations were agents of the Crown and the Federal Court judge went as far as saying that the religious organizations were "part of 'government'" and that section 35 of the *Charter* applied.

[41] The Attorney General properly notes that the *Charter* was not raised in the main action or the third party proceedings. However, I do not think that the Federal Court judge was unaware of this. He was simply emphasizing his view that the religious organizations were acting for and on behalf of the Crown.

[42] The Attorney General relying on the analysis of the Supreme Court in *Blackwater* argues that the relationship was more in the nature of a "partnership" or a "joint enterprise" (*Blackwater* at paras. 38, 64 and 65). I note in this regard that in *Blackwater*, physical and sexual abuse was found to have been committed by members of the religious organizations, a finding which is consistent with the view that the religious organizations and/or their members acted on their own account. Furthermore, although the Supreme Court uses these words to describe the relationship, the reasons make it clear that the religious organizations were also acting "for the government of Canada" (*Blackwater* at para. 34).

[43] It is not appropriate at this stage to attempt to put a label on the precise nature of the relationship. However, it seems that whatever the relationship, the issue will turn on whether the Crown conveyed to the religious organizations the heightened duty that it had to educate Indian day students so as to preserve their identity. This determination will be wholly guided by the agreements

entered into by the Crown and the religious organizations under the authority of the *Indian Act*. The alleged contributory fault of the religious organizations, if any, depends on this determination.

[44] Significantly, the relationship between the Crown and the third parties in the present case only exists because the *Indian Act* casts on the Crown the responsibility for educating Indian day students and gives the Crown the authority to retain the religious organizations for that purpose. As was said by Mahoney J.A. in *Kigowa v. Canada*, [1990] 1 F.C. 804 (F.C.A.) (*Kigowa*) at p. 816, when:

> [t]he relationship of the parties [is] entirely a creature of federal law, the law to be applied in the resolution of disputes arising out of that relationship is also taken to be federal law, even though it is neither expressed nor expressly incorporated by federal statute.

[45] This proposition is consistent with the decisions of the Supreme Court in *Rhine v. The Queen* and *Prytula v. The Queen*, both reported at [1980] 2 S.C.R. 442, where the Federal Court was found to have jurisdiction over the recovery of debts contracted by private persons pursuant to federal statutes – *The Prairie Grain Advance Payments Act*, R.S.C. 1985, c. P-18 and *The Canada Students Loans Act*, R.S.C. 1985, c. S-23 – because even though the liability for the debts stood to be determined by the rules applicable to ordinary commercial obligations, the relationship between the Crown and the debtors had arisen solely by reason of federal law (*Kigowa* at p. 816).

[46] The present case can be usefully contrasted with the decision of this Court in *Stoney Band v. Canada (Minister of Indian Affairs and Northern Development),* 2005 FCA 220 at para. 56 (*Stoney Band*) on which the Attorney General places considerable reliance.

[47] In that case, the wrong alleged by the Stoney Band in the main action was the Crown's failure to prevent the unauthorized harvesting of timber on its reserve, in Alberta. The Crown was being sued for the breach of the fiduciary duty owed to the Stoney Band to protect the resources on the reserve. The *Indian Act* and the *Indian Timber Regulations,* SOR/94-690, s. 3(F) were also invoked.

[48] The Crown filed third party claims seeking indemnity and contribution from those who had harvested the timber from the reserve, namely loggers, saw mills operators and individual members of the Stoney Band acting in their individual capacity. The *Negligence Act* of Alberta, R.S.A. 2000, c. C-27 and the *Tort-Feasors Act* of Alberta, R.S.A. 2000, c. T-5 were invoked as well as the *Indian Act* and the *Indian Timber Regulations*.

[49] The Attorney General's motion to stay the main action was initially dismissed. This decision was eventually overturned by this Court in a split decision on the basis that although federal law was pled in support of the third party claims, it had no role to play in these proceedings.

[50] Specifically, what was in issue in the third party claims was a pure matter of trespass and conversion unassisted by the *Indian Act* (*Stoney Band* at para. 36), the *Indian Timber Regulations* (*Stoney Band* at para. 37) or the federal common law relating to aboriginal rights generally (*Stoney Band* at para. 44). Stated differently, the relationship between the Crown and the third parties had no connection whatsoever with federal law.

[51] A significant fact which is not made clear by the reasons in that case, but which I recall as a member of the panel who heard the appeal, is that beyond the third parties, the plaintiff in the main action also took the position that federal law had no role to play in the third party claims. Like the third parties, the Stoney Band was satisfied that the issue underlying the third party claims was a pure matter of trespass and conversion. The memorandum of fact and law filed by the Stoney Band in the course of that appeal, copy of which was provided to counsel during the hearing, bears this out (Stoney Band's memorandum, Court's file A-243-04 at paras. 42 and following). In short, *Stoney Band* is of no assistance to the Crown.

[52] For the above reasons, I am satisfied that the third party claims are governed by federal law and that any recourse to the laws of British Columbia to apportion the fault of the religious organizations, if any, will be incidental (compare *Fairford Band v. Canada (Attorney General) (T.D.)*, [1995] 3 F.C. 165 at p. 173, letter b)).

[53] I therefore conclude that the Federal Court judge came to the correct conclusion when he held that the Federal Court had jurisdiction over the third party claims. However, as is apparent from the foregoing reasons, I do not believe that it was necessary for him to rely on Canadian maritime law to support his conclusion, and I express no view about the opinion which he expressed in that regard.

[54] I would dismiss the appeal with costs.

"Marc Noël"
J.A.

"I agree
Robert M. Mainville J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-204-13

(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HARRINGTON OF THE FEDERAL COURT DATED MAY 24, 2013, DOCKET NUMBER T-1542-12.)

STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. CHIEF SHANE GOTTFRIEDSON, on his own behalf and on behalf of all the members of the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND and the TK'EMLÚPS TE SECWÉPEMC INDIAN BAND, CHIEF GARRY FESCHUK, on his own behalf and on behalf of all the members of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND, VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE AND RITA POULSON
PLACE OF HEARING:	VANCOUVER, B.C.
DATE OF HEARING:	FEBRUARY 10, 2014
REASONS FOR JUDGMENT BY:	NOËL J.A.

CONCURRED IN BY:	MAINVILLE J.A. WEBB J.A.

DATED: FEBRUARY 28, 2014

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