Federal Court  Cour fédérale

Date: 20160629

Docket: T-195-92

Citation: 2016 FC 733

Toronto, Ontario, June 29, 2016

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ALDERVILLE INDIAN BAND NOW KNOWN AS MISSISSAUGAS OF ALDERVILLE FIRST NATION, AND GIMAA JIM BOB MARSDEN, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE MISSISSAUGAS OF ALDERVILLE FIRST NATION

BEAUSOLEIL INDIAN BAND NOW KNOWN AS BEAUSOLEIL FIRST NATION, AND GIMAA RODNEY MONAGUE, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE BEAUSOLEIL FIRST NATION

CHIPPEWAS OF GEORGINA ISLAND INDIAN BAND NOW KNOWN AS CHIPPEWAS OF GEORGINA ISLAND FIRST NATION, AND GIMAANINIIKWE DONNA BIG CANOE, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CHIPPEWAS OF GEORGINA ISLAND FIRST NATION

CHIPPEWAS OF RAMA INDIAN BAND NOW KNOWN AS MNJIKANING FIRST NATION, AND GIMAANINIIKWE SHARON STINSON-HENRY, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE MNJIKANING FIRST NATION

CURVE LAKE INDIAN BAND NOW KNOWN AS CURVE LAKE FIRST NATION, AND GIMAA KEITH KNOTT, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CURVE LAKE FIRST NATION

HIAWATHA INDIAN BAND NOW KNOWN AS HIAWATHA FIRST NATION, AND GIMAANINIIKWE LAURIE CARR, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE HIAWATHA FIRST NATION

MISSISSAUGAS OF SCUGOG INDIAN BAND NOW KNOWN AS MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION, AND GIMAANINIIKWE TRACY GAUTHIER, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Third Party

ORDER AND REASONS

[1] Pursuant to the May 3, 2016 oral direction, the Plaintiff First Nations seek leave to introduce the April 18, 2016 Reply Report of Dr. J. Michael Thoms, as redacted and re-filed on June 3, 2016, written in response to the Report of Dr. Gwen Reimer regarding the honour of the Crown.

[2] The Defendant Canada submits Dr. Thoms' Report is an attempt to reiterate, rehabilitate and expand on evidence he has already given in the proceedings. Canada says Dr. Thoms uses this report to articulate a distinct argument that the Crown has failed to uphold the honour of the Crown in its failure to implement the pre-confederation treaties. In doing so Dr. Thoms again covers ground presented in his original evidence or ties new evidence to his previous evidence to buttress arguments previously made.

[3] Canada submits the First Nations must meet the test for re-opening their case. Since the First Nations' application was by way of an abbreviated motion unaccompanied by evidence other than this new report and the trial record, Canada's position is that the Court can determine the matter of leave only if the Court also implements mitigative measures. Otherwise a full motion based on an evidentiary record is required.

[4] The Third Party Ontario does not object to the Court determining the First Nations application on the basis of the materials filed in the abbreviated motion. Ontario characterizes Dr. Thoms' Report as a response on the honour of the Crown rather than a reply to Dr. Reimer's report. Ontario submits that its willingness not to oppose the Court granting leave subject to appropriate measures to mitigate any prejudice that might arise on the filing of Dr. Thoms' Report.

[5] In the main, I agree with Ontario's submissions for the reasons that follow. I will grant leave to the First Nations to file Dr. Thoms' Reply Report with appropriate mitigative measures as set out below.

I. **Background**

[6] The First Nations introduced the issue of the honour of the Crown in the Sixth Further Statement of Claim in October 2013. This amendment, introduced mid-trial, was occasioned by the Supreme Court of Canada's decision in *Manitoba Metis Federation Inc. v Canada*, 2013 SCC 14, which effectively decided that a failure to uphold the honour of the Crown could be a basis for a cause of action.

[7] In their motion for leave to amend their statement of claim to incorporate a claim of a failure to uphold the honour of the Crown, the First Nations stated their evidence in relation to their claim of Canada's breach of its fiduciary obligations also constituted the evidence they were advancing in relation to the new claim that Canada failed to uphold the honour of the Crown in its negotiation and signing of the 1923 Williams Treaties. They advised they did not intend to call further new evidence in support of the allegation relating to a failure to uphold the honour of the Crown.

[8] Notwithstanding the First Nations' statement that they did not intend to call further evidence on the issue of the honour of the Crown, both Canada and Ontario elected to produce expert reports on the issue of the honour of the Crown. Canada advised it commissioned a new expert report by Dr. Paul McHugh. This report has not yet been provided to the other parties or the Court. Ontario commissioned Dr. Reimer to also produce a new expert report on the honour of the Crown. Dr. Reimer's report was filed May 25, 2015.

[9] Following the filing of Dr. Reimer's report on the honour of the Crown on May 25, 2015, the First Nations advised the Court they anticipated filing Dr. Thoms reply by October 1, 2015. Subsequently, they revised that advice to December 2015.

[10] Although witnesses have been heard out of order to advance the trial process of hearing evidence, both Canada and Ontario had insisted they could not proceed with their principal liability witnesses unless the First Nations closed their case. Accordingly, the First Nations, after reiterating their intention to file a reply report by Dr. Thoms, closed their case on April 8, 2016. The First Nations finally provided Dr. Thoms' Report to Canada and Ontario on April 19, 2016.

[11] After hearing submissions on the issues arising in trial management on May 3, 2016, I directed the First Nations to apply for leave to file the Dr. Thoms' Report by way of an abbreviated motion, with the initial question being whether the application for leave to file should be by way of a full motion.

II. **Issues**

[12] In my view, the issues are as follows:

a) Is a full motion necessary?

b) How is Dr. Thoms' Report to be regarded?

c) Should leave be granted to file the Thoms' Report?

d) What mitigative measures, if any, are necessary?

III. **Analysis**

A. *Is a Full Motion Necessary?*

[13] I am of the view that a full motion is not required to address the First Nations application for leave to file Dr. Thoms' Report. The First Nations signalled their intention to have Dr.

Thoms reply to Dr. Reimer's Supplemental Report while their case was open. They closed their case as part of the measures to keep this proceeding moving, having regard to the looming limitation of judicial resources available to complete this trial.

[14] The First Nations counsel has said the very long delay in producing the report related to Dr. Thoms' health issues but counsel did not offer evidentiary support for this question. However, Dr. Thoms' earlier testimony had been delayed or interrupted for health reasons. Neither Canada nor Ontario have chosen to directly challenge the representations on this point by counsel for the First Nations. Accordingly, I will accept the explanation proffered for the delay.

[15] The parties have had adequate notice of the abbreviated motion concerning the application for leave to apply. Dr. Thoms' Report was provided to Canada and Ontario on April 19, 2016. I had provided a direction on the way of proceeding on May 3, 2016. The abbreviated motion was heard on May 19, 2016.

[16] I also find that the information available in the reports by Dr. Reimer and Dr. Thoms together with the trial record is sufficient to assess the usefulness of Dr. Thoms' Report without the need for additional affidavit evidence. Any prejudice to Canada or Ontario can be addressed in the mitigative measures I will discuss later in these reasons.

[17] Given the length and complexity of this proceeding, it was appropriate that the application for leave be addressed in an abbreviated motion. Rules 3, 53, and 55 provide me with sufficient discretion for proceeding by way of the abbreviated motion. I will consider the First Nations' application for leave to file Dr. Thoms' Report on the basis of the material before me.

B. *How is Dr. Thoms' Report to be Regarded?*

[18] The First Nations had represented the Dr. Thoms' Report would be in the nature of a reply which suggests that the report would be advanced in the course of the reply phase of the First Nations' case. Dr. Thoms titles his report as a 'Reply Report'. However, in their submissions, the First Nations describe the report as a 'Rebuttal Report'.

[19] Dr. Thoms Report is more in the nature of the First Nations' resiling from their statement that they did not intend to call evidence on the allegation of a failure to uphold the honour of the Crown. Instead of merely disputing the factual evidence offered in Dr. Reimer's Supplemental Report, Dr. Thoms is advancing an alternate approach to assessing whether the honour of the Crown has been upheld. While Dr. Reimer focussed on the process by which the Crown's officials entered into pre-confederation treaties, asking whether the Crown properly adhered to its procedures established for treaty making, Dr. Thoms looks to whether the Crown fully implemented the pre-confederation treaties entered into with the First Nations.

[20] In advancing his alternate approach, Dr. Thoms goes over his previous evidence relating to the allegation of breach of fiduciary duties but now does so through the lens of the alleged failure to uphold the honour of the Crown.

[21] The First Nations initially chose not to call evidence on the honour of the Crown, only deciding it was necessary to do so when Ontario produced Dr. Reimer's Supplemental Report on the topic. Since Dr. Thoms does introduce an alternate theory on the honour of the Crown with new evidence coupled with references to his previous evidence, his report is in response rather than in reply. Such would have been ordinarily introduced in the course of the First Nations' main case rather than in reply.

[22] The result of the First Nations' choice not to lead on the topic of the honour of the Crown is that Ontario leads off on the subject and gets to further reply after the First Nations' response. This is the consequence of the First Nations' election in this matter.

[23] Canada and Ontario identified Dr. Thoms' references to his earlier testimony as problematic. Canada characterizes Dr. Thoms' repetition as an attempt to rehabilitate his evidence after cross examination. Dr. Thoms appears to have meticulously identified wherever he makes statements that relate to his previous testimony. I should think those references are of assistance should Canada or Ontario wish to cross examine on those references.

[24] Ontario has proposed Dr. Thoms not repeat any previous testimony. The references to his previous testimony contained within Dr. Thoms' Report should remain but not be reiterated in any examination in chief. However, he should be allowed to respond if the references are raised in cross examination.

[25] Considering the foregoing, I agree with Ontario that Dr. Thoms' Report must be considered part of the First Nations' case.

C. *Should leave be granted to file Dr. Thoms' Report?*

[26] The First Nations say they must have the opportunity to respond meaningfully to expert evidence of the opposing parties, especially having regard to the fact that Dr. Reimer's report was filed after the conclusion of testimony by the First Nations' corresponding experts, Mr. Morrison and Dr. Thoms.

[27] The issue of an allegation to fail to uphold the honour of the Crown is relatively new in Canadian jurisprudence. The concept of the honour of the Crown first arose in *R v Taylor and*

Williams, [1981] 3 CNLR 114, in 1982. In that case it was used as an aid in the interpretation of an 1818 Indian treaty, one of the First Nations' pre-confederation treaties. The principle was more closely examined in *R v Badger,* [1996] 1 SCR 771, in 1996 where it was held to be a fundamental feature of Crown - First Nations treaty relations. The concept was reinforced in *Mikisew Cree First Nation v Canada,* 2005 SCC 69, in 2005 where it was related to post treaty relationships between the Crown and the First Nation in question. It received its most recent examination in *Manitoba Metis Federation* in 2013 where the Supreme Court of Canada set out the honour of the Crown as central in the overall context of Crown-Aboriginal relationships.

[28] While the First Nations initially took the position that they would rely on the evidence they were leading in support of the breach of fiduciary duties, the choice by Ontario to commission Dr. Reimer to provide an expert report on the honour of the Crown reopened the door for the First Nations to respond with Dr. Thoms' Report. As I have already noted, the approach adopted by the First Nations results in Ontario being entitled to reply to Dr. Thoms' Report.

[29] The issues arising with respect to the honour of the Crown are important and must, in my view, be addressed fully in evidence and, ultimately, in submissions grounded in evidence. I am satisfied that the issues involving the honour of the Crown necessarily require examination of the facts involved. In this regard, I am assisted by receiving evidence from the Parties on this important question.

D. *Other Issues*

[30] Ontario raises issues with Dr. Thoms' resorting to the original Haldimand records, which comprise some 90,000 original documents. Dr. Reimer had referred to the Haldimand records but

relied in the main on secondary sources. It is for the expert witnesses to decide how they would access historical documents, either by relying on secondary sources considered to be reliable or by examining original source documents. In any event, neither Dr. Reimer nor Dr. Thoms are canvassing the entirety of the Haldimand documents. Both focus in on a select range of documents relating to matters they consider significant. In any event, the mitigative measures on timing would address any prejudice arising by Dr. Thoms' use of primary documents.

[31] Both Ontario and Canada object to passages in Dr. Thoms' Report which they consider to be legal opinion. Ontario helpfully identified those specific passages to which they had objection.

[32] The First Nations volunteered to review the Report with Dr. Thoms and redact any passages that may be at controversy. Dr. Thoms' redacted Report is now filed. All but one of the passages objected to have been either redacted or reworded. The remaining passage can be addressed after that matter comes under cross-examination.

E. *Mitigative Measures*

[33] Given the late production of Dr. Thoms' Report after the closing of the First Nations' case, I agree that mitigative measures are necessary to offset any prejudice.

[34] Canada proposes if leave is granted, appropriate responsive mitigative measures are required to adjust the trial process to the real impact of introducing Dr. Thoms' Report. Canada submits the Parties should confer on scheduling and the Court make available a prothonotary as a facilitator. Failing agreement, the prothonotary would prepare a report for the Court.

[35] I do not see any advantage in making available a prothonotary to facilitate the Parties working out scheduling. The legal and judicial resources available for this extensive trial are limited and referring the Parties to a prothonotary merely diverts the Parties' efforts away from moving on with the trial.

[36] I agree with the approach proposed by Ontario. In particular Ontario proposed that Dr. Thoms:

a. testify before Dr. Reimer and Mr. Dewhurst;

b. not be permitted to repeat any testimony he addressed previously.

I agree with both these propositions.

[37] Canada had speculated Dr. Thoms may have to be on the stand as much as twenty days. I consider that to be excessive. Ontario also submitted Dr. Thoms examination in chief be not more than four days. The First Nations had offered to forego examination in chief and simply present Dr. Thoms for cross-examination by Canada and Ontario. Both Canada and Ontario considered the First Nations offer as feasible.

IV. **Conclusion**

[38] I consider it appropriate to grant the First Nations request:

a. dispensing with the requirements of a full motion.

b. granting leave to file Dr. Thoms' Report.

c. granting leave to include Dr. Thoms' Report and testimony as part of the First Nations' case.

[39] I further consider it appropriate to grant Ontario's request:

a. for leave to file a reply by Dr. Reimer without the necessity of making a motion;

b. for Dr. Thoms to testify before Dr. Reimer;

c. for Dr. Thoms not to repeat any evidence covered in prior testimony;

[40] Finally, I will direct the First Nations to forego an examination in chief and present Dr. Thoms for cross examination.

V. **Costs**

[41] Canada asks for costs of the motion be awarded to Canada (and Ontario). The First Nations long delay in producing Dr. Thoms' Report has clearly complicated matters. However, I have accepted the health reason proffered by the First Nations as contributing to the delay and there are other reports that are approaching delays of similar lengths. Further, the First Nations has offered significant measures to alleviate any prejudice arising on the delay.

[42] Accordingly, I conclude costs will be in the cause.

ORDER

THIS COURT ORDERS that:

1. leave to file Dr. Thoms' Report is granted without the further necessity to fulfil the requirements of a full motion under Rule 359;
2. leave is granted to include Dr. Thoms Report and corresponding testimony as part of the First Nations' case;
3. Ontario is granted leave to file a reply by Dr. Reimer to Dr. Thoms' Report without the necessity of making a motion for leave;
4. Dr. Thoms must testify before Dr. Reimer;
5. the First Nations will forego an examination in chief for Dr. Thoms and present him for cross examination;
6. Dr. Thoms is not to repeat any testimony covered previously unless raised in cross examination; and
7. costs in the cause.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-195-92
STYLE OF CAUSE:	ALDERVILLE INDIAN BAND, ET AL v HER MAJESTY THE QUEEN AND HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

MOTION HELD VIA VIDEOCONFERENCE ON MAY 3, 2016 FROM OTTAWA AND TORONTO

ORDER AND REASONS:	MANDAMIN J.
DATED:	JUNE 29, 2016

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