



Date: 20160719

Docket: T-340-99

Citation: 2016 FC 818

Ottawa, Ontario, July 19, 2016

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

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

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

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

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

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

**CHINIQUI BAND AND CHIEF PAUL
CHINIQUAY, SUIING ON HIS OWN BEHALF
AND ON BEHALF OF THE MEMBERS OF
THE CHINIQUI BAND**

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

Plaintiffs

and

**HER MAJESTY THE QUEEN IN RIGHT OF
CANADA**

Defendant (Respondent)

And

**HER MAJESTY THE QUEEN IN RIGHT OF
ALBERTA**

Proposed Defendant (Respondent)

**ORDER AND REASONS
(Re: Alberta as Defendant)**

I. Introduction

[1] This is an appeal by Kainaiwa Nation (Blood Tribe) and Chief Chris Shade, suing on his own behalf and on behalf of the Members of the Kainaiwa/Blood Tribe [Kainaiwa], of Prothonotary Milczynski's decision of June 11, 2015, in which the Learned Prothonotary dismissed Kainaiwa's motion to add Her Majesty the Queen in Right of Alberta [Alberta] as a defendant in the action.

[2] The factual basis and governing law were set out in the Reasons in *Kainaiwa Nation v Canada*, 2016 FC 817. For ease of reference, the Background is set out here again. The applicable Federal Court Rule is Rule 104:

104 (1) At any time, the Court may

(a) order that a person who is not a proper or necessary party shall cease to be a party; or

(b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.

(2) An order made under subsection (1) shall contain directions as to amendment of the originating document and any other pleadings.

104 (1) La Cour peut, à tout moment, ordonner :

a) qu'une personne constituée erronément comme partie ou une partie dont la présence n'est pas nécessaire au règlement des questions en litige soit mise hors de cause;

b) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne.

(2) L'ordonnance rendue en vertu du paragraphe (1) contient des directives quant aux modifications à apporter à l'acte introductif d'instance et aux autres actes de procédure.

II. Background

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

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

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

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

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

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

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

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

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

[11] Canada's stay application was originally scheduled for May 18-19, 2010, but was adjourned when the Court was advised that some of the Plaintiffs were in the process of finalizing instructions to resolve the application. The motion was rescheduled for February 23 and 24, 2012.

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

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

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

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

[16] On June 9, 2015, Prothonotary Milczynski granted Canada's motion for leave to commence a Third Party Claim against Alberta. On June 19, 2015, Alberta filed a Notice of Motion to appeal this decision. This is the matter of *Kainaiwa Nation v Canada*, 2016 FC 817.

[17] On June 11, 2015, Prothonotary Milczynski denied Kainaiwa's motion for leave to add Alberta as a Party Defendant. On June 19, 2015, Kainaiwa filed a Notice of Motion to appeal this decision. This is the matter to which these Reasons are directed.

A. *Relevant Legislation*

[18] The pertinent provisions are:

Federal Courts Act, RSC 1985, c F-7

19 If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies.

19 Lorsqu'une loi d'une province reconnaît sa compétence en l'espèce, — qu'elle y soit désignée sous le nom de Cour fédérale, Cour fédérale du Canada ou Cour de l'Échiquier du Canada — la Cour fédérale est compétente pour juger les cas de litige entre le Canada et cette province ou entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable.

Federal Courts Rules, SOR/98-106

204 A defendant shall defend an action by serving and filing a statement of defence within

204 Le défendeur conteste l'action en signifiant et en déposant sa défense :

(a) 30 days after service of the statement of claim, if the defendant is served in Canada;

a) dans les 30 jours après avoir reçu signification de la déclaration, si cette signification a été faite au Canada;

(b) 40 days after service of the statement of claim, if the defendant is served in the United States; and

b) dans les 40 jours après avoir reçu signification de la déclaration, si cette signification a été faite aux États-Unis;

(c) 60 days after service of the statement of claim, if the defendant is served outside Canada and the United States.

c) dans les 60 jours après avoir reçu signification de la déclaration, si cette signification a été faite à l'extérieur du Canada et des États-Unis.

Natural Resource Transfer Agreement, SC 1930, c 3

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

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

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

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

...

10 All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the

...

10 Toutes les terres faisant partie des réserves indiennes situées dans la province, y compris celles qui ont été choisies et dont on a mesuré la superficie, mais qui n'ont pas encore fait l'objet d'une ratification, ainsi que celles qui

<p>Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.</p>	<p>en ont été l'objet, continuent d'appartenir à la Couronne et d'être administrées par le gouvernement du Canada pour les fins du Canada, et, à la demande du surintendant général des Affaires indiennes, la province réservera, au besoin, à même les terres de la Couronne inoccupées et par les présentes transférées à son administration, les autres étendues que ledit surintendant général peut, d'accord avec le ministre approprié de la province, choisir comme étant nécessaires pour permettre au Canada de remplir ses obligations en vertu des traités avec les Indiens de la province, et ces étendues seront dans la suite administrées par le Canada de la même manière à tous égards que si elles n'étaient jamais passées à la province en vertu des dispositions des présentes.</p>
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Judicature Act, RSA 2000, c J-2

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

(a) in controversies between Canada and Alberta;

...

[Emphasis added]

B. *Impugned Order*

[19] The Learned Prothonotary noted that Prothonotary Hargrave ordered on September 27, 2001, that the claim against Alberta as a Party Defendant be struck. This decision was not appealed.

[20] As the Learned Prothonotary noted, not much has changed since the Hargrave Decision except that Canada had moved to third party Alberta. While that proceeding may address the issue of a controversy between Canada and Alberta, it is not a basis for Kainaiwa's motion.

[21] The gravamen of the Learned Prothonotary's decision is that the matter is *res judicata*. Whether the Federal Court has jurisdiction over Alberta as a defendant was decided taking into account *Federal Courts Act* s 17(4) and s 19 arguments that are essentially the same as raised in the motion (and in this appeal).

[22] The Learned Prothonotary referred to *Canada v Toney*, 2013 FCA 217 at paras 24-25, [2015] 1 FCR 184, to the effect that s 19 (and thus s 27 of the *Alberta Judicature Act*) cannot be invoked if an individual commences an action against both the federal and provincial governments. It may only be invoked in an action against the federal government where that government commences a third party proceeding against the provincial Crown.

[23] Ultimately, the Learned Prothonotary concluded that the Hargrave Decision was final, the parties to both motions are the same and circumstances have not changed such that there is not a discretionary basis to apply issue estoppel.

III. Analysis

[24] The issues in this appeal are as framed by Alberta:

- Did the Learned Prothonotary err in finding that Kainaiwa's motion under Rule 104(1)(b) is subject to issue estoppel?
- If the Learned Prothonotary erred in the above, does this Court have jurisdiction over Alberta as a party defendant in this action?

[25] The standard of review of a prothonotary's decision was canvassed at paras 32-33 of *Kainaiwa Nation v Canada*, 2016 FC 817. Unless the matter is vital to the final issue in the case or the decision is clearly wrong (discretion exercised on a wrong principle or misapprehension of facts), this Court will not intervene.

[26] The issue before the Learned Prothonotary was whether *res judicata* was applicable. In these circumstances, it is not vital to the case of the federal government's liability to the Blood Tribe.

[27] I can find no basis to conclude that the Learned Prothonotary decided the matter on a wrong principle or a misapprehension of the facts. She exercised her discretion not to reopen a

decision which had canvassed the relevant law and remained in place for approximately 14 years.

[28] As there was no error, the Court will not address the second issue.

IV. Conclusion

[29] For these reasons, this appeal is dismissed with costs.

ORDER

THIS COURT ORDERS that the appeal is dismissed with costs.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-340-99

STYLE OF CAUSE: KAINAIWA NATION (BLOOD TRIBE) AND CHIEF CHRIS SHADE, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE KAINAIWA/BLOOD TRIBE, PEIGAN NATION AND CHIEF PETER STRIKES WITH A GUN, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE PEIGAN NATION, SIKSIKA NATION AND CHIEF DARLENE YELLOW OLD WOMAN MUNROE, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE SIKSIKA NATION, TSUU T'INA NATION AND CHIEF ROY WHITNEY SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE TSUU T'INA NATION, BEARSPAW BAND AND CHIEF DARCY DIXON, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE BEARSPAW BAND, CHINIKI BAND AND CHIEF PAUL CHINIQUEY, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CHINIKI BAND, WESLEY BAND AND CHIEF JOHN SNOW SR., SUING ON HIS BEHALF AND ON BEHALF OF THE MEMBERS OF THE WESLEY BAND v HER MAJESTY THE QUEEN IN RIGHT OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: DECEMBER 8, 2015

ORDER AND REASONS: PHELAN J.

DATED: JULY 19, 2016

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