Federal Court  Cour fédérale

Date: 20100528

Docket: T-2579-91

Citation: FC 2010 588

Ottawa, Ontario, May 28, 2010

PRESENT: Madam Prothonotary Roza Aronovitch

BETWEEN:

**ROGER SOUTHWIND, FOR HIMSELF,
AND ON BEHALF OF THE MEMBERS OF
THE LAC SEUL BAND OF INDIANS**

Plaintiffs

and

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

Defendant

and

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

Third Party

REASONS FOR ORDER

[1] The Moving Party, Her Majesty the Queen in Right of Canada (Canada), brings a motion to extend the time for the issuance and service of Canada's third party claim against Her Majesty the

Queen in Right of Manitoba (Manitoba). In response, Manitoba maintains that the Federal Court does not have jurisdiction to entertain this third party claim and, in the alternative, that Canada has not met the criteria that would warrant an extension of time to issue its claim.

[2] On the standard enunciated by the Federal Court of Appeal in *Hodgson v. Ermineskin Indian Band No. 942*, [2000] F.C.J. No 2042 (F.C.A.), namely, whether it is plain and obvious that the Federal Court does not have jurisdiction in respect of the proposed third party claim, I have concluded that it is not plain and obvious. However, neither party addressed the applicable standard in the context of this motion and if that is not the standard to be applied, for the reasons below, I would in any case have found that the Court has jurisdiction.

[3] For the reasons below I find, in addition, that the extension of time is warranted.

Background

[4] The underlying claim by the plaintiffs, Roger Southwind, for himself and on behalf of the Lac Seul Band of Indians, is for compensation for damages to reserve lands and infrastructure arising out of the construction of a dam and subsequent flooding of Lac Seul. The following is the relevant background.

[5] Canada, Ontario, and Manitoba are signatories to the 1928 Lac Seul Storage Agreement (the Agreement). It provided for the construction of a dam on Lac Seul, in north-western Ontario, to store water for use in generating hydroelectric power (the Project). Ontario would construct the dam

and bear two fifths of the capital costs of the Project, Canada would bear the remaining three fifths. The Agreement was ratified by and made a schedule to the federal *Lac Seul Conservation Act*, 18-19 George V, c. 32 (*LSCA*) and the Ontario *Act Respecting Lac Seul Storage*, 18 George V, c. 12.

[6] The Manitoba Natural Resources Transfer Agreement (MNRTA) is an agreement dated December 14, 1929 respecting the transfer of rights in natural resources in the province of Manitoba which to that date had been administered by Canada.

[7] The MNRTA was ratified by Canada by the *Manitoba Natural Resources Transfer Act*, 20-21 George V, c. 29 and by Manitoba by the *Manitoba Natural Resources Transfer Act*, C.C.S.M., c. N30. The MNRTA, section 8 of which is the basis of Canada's third party claim against Manitoba is a Schedule to both Acts. The MNRTA was ratified by the Parliament of the United Kingdom by the *Constitution Act, 1930* (formerly *British North America Act, 1930*), 20-21 George V, c. 26 (U.K.) and as such, forms part of the *Constitution Acts, 1867 to 1982*.

[8] Pursuant to s.8 of the MNRTA, Manitoba, after the coming into force of the MNRTA, was to pay the sums which "have been or shall hereafter be expended by Canada" pursuant to the Agreement which had been ratified by the *LSCA*. Thus, Manitoba became responsible for Canada's share of the capital costs of the Project.

[9] The generating station served by the Project began operation in 1930. The plaintiffs claim that in July 1934, the lake level was raised to five feet above its highest natural level, and that in August 1938, it was further raised to ten feet above its highest natural level.

[10] Canada admits that the increase in the lake level had the effect of flooding and damaging the plaintiffs' reserve lands and improvements thereon. The plaintiffs claim that the flooding made part of the reserve into an island and submerged other parts. In addition, the plaintiffs claim that the "Traditional Territory" was flooded and damaged. This refers to land surrendered by the plaintiffs but over which they retained certain hunting and fishing rights pursuant to Treaty no. 3 that was entered into by Canada and the plaintiffs in 1874. The geographical area of the Traditional Territory and the exact nature and scope of the plaintiffs' rights there are disputed between the parties.

[11] On November 25, 1942, Canada and Ontario negotiated a settlement of their respective claims arising from the Project. They agreed to a $72,539 compensation package for the plaintiffs. After other debts were offset, $50,263 was deposited to the plaintiffs' capital trust account on November 17, 1943.

[12] Manitoba says that it has paid Canada all of the capital costs it owed under the Agreement as of 1956, pursuant to s.8 of the MNRTA.

The Underlying Action

[13] The plaintiffs allege that Canada breached its fiduciary duties, Treaty no. 3, and the *Indian Act*, R.S.C. 1985, c. I-5, in authorizing the Project without taking adequate steps to protect the plaintiffs, and in failing to adequately compensate them.

The Proposed Third Party Claim

[14] Canada's proposed third party claim against Manitoba is for indemnification for any amounts awarded to the plaintiffs that fall within the definition of "capital costs" in the Agreement referenced in s.8 of the MNRTA.

[15] The definition of "capital costs" includes "compensation for timber, buildings and improvements, including . . . Indian Lands . . . taken or in any way injuriously affected in connection with the proposed work." Canada alleges that the plaintiffs are claiming compensation for Indian Lands injuriously affected by the Project. Therefore, at least part of the damages awarded will be "capital costs" for which Manitoba is liable.

History of This Action and the Specific Claim

[16] The plaintiffs filed a specific claim though Canada's Specific Claims Process on September 24, 1985. The Statement of Claim in this action was issued on October 9, 1991 based on the same facts that underlay the specific claim.

[17] On May 26, 1995, Canada accepted the specific claim for negotiation. Accordingly, by Order dated December 8, 1998, this Court exempted the present action from rule 380 of the *Federal Courts Rules*, SOR/98-106 (the Rules), which had the effect of suspending these proceedings while the specific claims process was ongoing.

[18] In a letter dated August 15, 2003, Canada invited Manitoba to participate in its negotiations with the plaintiffs on the specific claim and later that year, on October 23, 2003, provided Manitoba with relevant historical documentation. In a further letter dated December 29, 2003, Canada advised Manitoba of the Federal Court action and requested that Manitoba agree to a "standstill agreement," whereby limitation periods would not run. Manitoba did not agree to a standstill agreement, but a third party claim was not commenced.

[19] Canada kept Manitoba up to date on the progress of the specific claim between 2003 and 2007, but Manitoba was not a participant in the negotiations.

[20] By Order dated November 28, 2008, the Court ordered that the Federal Court action continue as a specially managed proceeding. The plaintiffs thereafter issued an amended statement of claim on February 24, 2009. Canada filed its statement of defence on June 30, 2009, the date that its third party claims should have been issued. Canada did not issue the claims in time, ultimately resulting in this motion to extend time.

The jurisdiction of the Federal Court over the proposed third party claim

[21] The parties cite *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.* (1986), 28 D.L.R. (4th) 641 (S.C.C.) at page 650, (*ITO*) for the following elements that are necessary to found Federal Court jurisdiction:

1. There is a statutory grant of jurisdiction by Parliament.
2. There is an existing body of federal law essential to the claim.

3. The law in question is a "law of Canada" within the meaning of s.101 of the Constitution Act 1867.

[22] Admittedly, Section 17 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 is not a grant of jurisdiction for claims made by the Crown in right of Canada against the Crown in right of a province, (*Lubicon Lake Indian Band v. Canada* (1981), 117 D.L.R. (3d) 247 (F.T.D.)), section 19 of the *Federal Courts Act* and Manitoba's *Federal Courts Jurisdiction Act*, C.C.S.M., c. C270, however, grant the Court jurisdiction over "controversies" between Manitoba and Canada.

[23] Manitoba submits that section 19 of the *Federal Courts Act* is not sufficient to grant jurisdiction as in its view that there is no "controversy" in this case. The province says that s.8 of the MNRTA requires it to pay sums expended by Canada pursuant to the Lac Seul Storage Agreement, but none of the plaintiffs' alleged causes of action are related to the Agreement. Instead, they relate to Canada's independent obligations under Treaty no. 3, the *Indian Act*, and common law fiduciary duties. For that reason, there is no live controversy over whether Manitoba has failed to meet its obligations under the MNRTA.

[24] Manitoba further submits that there is no body of federal law essential to the third party claim, which is a separate proceeding from the underlying action. The third party claim is founded in contractual indemnification under the MNRTA, which is a contract between Canada and Manitoba; thus subject to provincial law of contract.

[25] The plaintiffs adopt Manitoba's submission that the second and third branches of the *ITO* test are not met, since the third party claim is based on the provincial law of contract.

[26] With respect to Manitoba's argument that there is no "controversy" in this case, the definition of "controversy" in s.19 of the *Federal Courts Act* was considered by the Federal Court of Appeal in *The Queen (Canada) v. The Queen (P.E.I)*, [1978] 1 F.C. 533. Le Dain J., as he then was, held as follows at paragraph 67:

> The term "controversy" is broad enough to encompass any kind of legal right, obligation or liability that may exist between governments or their strictly legal personification. It is certainly broad enough to include a dispute as to whether one government is liable in damages to another.

[27] Canada's third party claim for indemnity and Manitoba's position that it does not have an indemnity obligation in respect of the damages claimed, in my view, is a dispute between governments which falls squarely within Justice Le Dain's definition of "controversy."

[28] As to whether the second and third branches of the *ITO* test are met, the Federal Court of Appeal in *Fairford First Nation v. Canada (Attorney General)*, [1996] F.C.J. No. 1242 (Q.L.) (*Fairford)* (CA), expressed doubt that any substratum of federal law beyond s.19 of the *Federal Courts Act* is required to give the Federal Court jurisdiction. The Court took the view that s.19 provides a complete grant of jurisdiction and suggested that the second and third branches of the *ITO* test need not be considered where s.19 applies.

[29] Canada also referred to several other cases to argue that s.19 is unique, that controversies under s.19 are fundamentally different from disputes that rely on provincial contract law. In

Ontario v. Canada, [1909] S.C.J. No. 28 (Q.L.), the Supreme Court of Canada held that the predecessor to s.19 requires courts to decide claims on some legal or equitable ground. It dismissed Canada's claim against Ontario for not disclosing any such ground. The Supreme Court suggested in its judgement that had a contract or quasi-contractual agreement existed between Canada and Ontario, that may have provided a ground on which the Court could have found in Canada's favour. Further support for the view that s.19, on its own, grants the Federal Court jurisdiction to hear disputes involving agreements between governments.

[30] While the views of Federal Court of Appeal as expressed in *Fairford* (CA) are sufficient to conclude that the Court has jurisdiction to decide the third party claim, if an additional substratum of federal law is necessary, one exists in this case. First, the main claim rests on federal aboriginal law.

[31] Second, and more to the point, Canada claims an indemnity against Manitoba for amounts awarded to the plaintiffs that are "capital cost", as set out in the *Lac Seul Conservation Act*, that are moreover payable by Manitoba pursuant to s.8 of *Manitoba Natural Resources Transfer Act*, both federal statutes and federal law within the meaning of the *ITO* test. S.8 on which Canada rests its claim and which Manitoba says is purely contractual, has no independent standing, and can not be severed from the federal law which gives it effect.

[32] Put another way, it may be said that the "contract" ratified by federal statute, is thereby a "legislated contract" which derives its force from the statutes that give it affect and validity, and is therefore federal law: *Cree Regional Authority v. Canada* (*Federal Administrator*), [1991] 3 F.C. 533 (F.C.A.).

[33] It is therefore not plain and obvious that there is no jurisdiction in this Court over the proposed third party claim.

Extension of time to issue a third party claim against Manitoba

[34] The parties are *ad idem* that to secure an extension of time, an applicant must meet the test set out in *Canada (A.G.) v. Hennelly*, 244 N.R. 399 (F.C.A.) (*Hennelly*), and answer to the following factors, not all of which have to be established in any particular case. In applying *Hennelly*, the Court must consider whether the applicant can show a continuing intention to pursue the claim; whether the claim has some merit; whether prejudice to the responding party arises from the delay; and finally, whether there is a reasonable explanation for the delay.

[35] These factors are to be considered and the test applied with a view ultimately to ensuring that justice is done between the parties: *Canada* (*A.G.*) v. *Pentney*, [2008] 4 F.C.R. 265.

[36] Before discussing the factors, the following further facts are relevant to the delay in issuing the third party claim. As noted above, this proceeding came under case management on November 28, 2008. On February 2, 2009, an order issued, on consent, granting leave to the plaintiffs to amend their statement of claim, which was then issued on February 24, 2009.

[37] A timetable was set for the exchange of affidavits of documents and the close of pleadings. Canada was due to file its defence on May 31, 2009. On June 15, 2009, the plaintiffs provided a status report to the Court. They indicated they would consent to an extension of time for Canada to

file its defence, and mentioned that Canada had advised them of its intention to bring a third party action against the Province of Ontario and Ontario Power Generation. Thus, with the consent of the plaintiffs, the Order of February 2, 2009 was varied on June 22, 2009, to give Canada until June 30, 2009 to file its defence.

[38] That same order of June 22, 2009 provided that Canada was to advise the plaintiffs as to how it intended to proceed with its third party claims, and requested the availability of the parties for a case conference. Canada believed that a case management conference would be scheduled in early September 2009, and that jurisdictional issues would be addressed at that time.

[39] In essence, Canada wished to bring third party claims against Manitoba, Ontario, and Ontario Power Generation. The Federal Court would likely not have jurisdiction over Ontario Power Generation, and the Ontario Superior Court would not have jurisdiction over Manitoba without Manitoba's consent. This called for consultations and securing consent, if possible.

[40] A case conference was fixed for September but had to be adjourned due to the unavailability of counsel. In the interim, on September 28, 2009, Canada served draft third party claims on Manitoba and Ontario, and asked Manitoba if it would consent to the jurisdiction of the Ontario Superior Court.

[41] The case management conference was held on October 6, 2009. Canada was directed to file a "game plan" relating to how it would proceed with respect to the various parties sought to be impleaded. To that end, Canada consulted with Manitoba on a variety of occasions.

[42] In an e-mail dated November 26, 2009, Manitoba confirmed that it would not consent to be added as a party to the litigation. Canada understood that it would not be possible to transfer the action to the Ontario Superior Court. Accordingly, on December 16, 2009, Canada filed the present motion for an extension of time to add Manitoba as a third party to the Federal Court action. Canada also made a motion on December 7, 2009 for an extension of time to add Ontario as a third party to the Federal Court action. Ontario consented. An order issued on consent on January 8, 2010, extending time to serve a third party claim on Ontario, without prejudice to Ontario's defences.

[43] The first of the *Hennelly* factors to be considered is that of Canada's continuing intention to commence third party proceedings against Manitoba. The test in that regard is whether the intention arose before the expiry of the relevant time period, being June 30, 2009, and continued thereafter: *Tait v. Canada (Attorney General)*, 2009 FC 1278. It is clear from the Order of June 22, 2009, by which Canada was obligated to advise the plaintiffs how it would proceed with its third party claim, that Canada's intention to implead Manitoba arose prior to the expiry of the time limit for so doing and continued thereafter. I am satisfied that at the relevant time Canada had, and continues to have, the requisite intent.

[44] In the circumstances, I also find the explanation for the delay to be reasonable. Time was needed to obtain instructions and consult. In the period prior to June 30, 2009, Canada was focused on its defence and had to seek an extension of time to comply with its obligations to produce it within the time limits ordered by the Court. The plaintiffs were well aware of Canada's intentions, the jurisdictional issues, and the choices to be made by Canada regarding venue. What is more,

Manitoba was served with the claim by September 28, 2009, not a great deal of time beyond the deadline for filing the claim of June 30, 2009.

[45] As to whether the third party claim has merit, Canada need only show that it has an "arguable case": *Maax Bath Inc. v. Almag Aluminum Inc.*, 2009 FCA 251; *Bird v. Salt River First Nation*, 2009 FC 25; *Spencer v. Canada (Attorney General)*, 2008 FC 1395. On this standard, and for the following reasons, I am satisfied that Canada's claim does have merit.

[46] Section 8 of the MNRTA provides that Manitoba must pay any sums expended pursuant to the Agreement. Manitoba says this cannot create an obligation to indemnify Canada for damages arising from a failure to fulfill fiduciary, treaty or statutory duties and that those damages are not sums expended pursuant to the Agreement. Canada, on the other hand, points out that the Agreement contemplated that Canada would pay "capital costs," which were defined to include compensation for "Indian Lands" injuriously affected.

[47] Though the plaintiffs' action is for damages for breach of fiduciary duty, the damages sought are to compensate the plaintiffs for injury to their land, including reserve land and improvements. Arguably this is in respect of injury to "Indian Lands" as defined, and the damages fall within the definition of "capital costs" as defined in the *LSCA*. These costs, moreover, were intended to be shared by Ontario and Manitoba, as beneficiaries of the Project.

[48] Manitoba also alleges that the third party claim does not have merit because it is limitations barred. Canada says that it is inappropriate to raise limitations issues on a preliminary motion. I

agree with Canada's submissions that the effect of a statute of limitation can be determined only after the filing of a defence, either at trial or on a summary judgment motion: *Watt v. Canada (Transport)*, [1998] F.C.J. No. 49 (Q.L.); *Kibale v. Canada (F.C.A.)*, [1990] F.C.J. No. 1079 (Q.L.); *Villeneuve v. Canada*, 2006 FC 456. That determination requires a factual context and cannot be made on a motion to extend time. It is open to Manitoba to raise limitations arguments in its defence.

[49] I now turn to whether there is prejudice arising from the delay in commencing the third party claim. In my view, the delay was not great, and I do not believe that Manitoba will be prejudiced as the renewed proceeding is at an early stage, pleadings having only recently closed. While Manitoba will need time to review the documents, it has been in possession of them for some time. Indeed, Manitoba is not a stranger to this case. Between 2003 and 2007, although Manitoba did not participate in negotiations, it was made aware of the issues in the case and it was kept up to date on the specific claim. Manitoba's lengthy involvement in this case suggests that it will not be prejudiced by having to prepare in the timeframe of a case-managed proceeding. More to the point, Manitoba has not made out a case to show that the prejudice to the province, if any, is attributable to the delay in commencing the third party claim. At this juncture, moreover, Manitoba is on similar footing with Ontario which has only recently been added as a party.

[50] The plaintiffs also maintain that they will be prejudiced by the addition of a third party. They have already invested substantial time and money in pursuing their claim, since the specific claim was filed in 1985. They say that introducing a third party will inevitably cause further delays. They add that the third party claim being based on the MNRTA, which is not at issue in the main

action, will add unnecessary complication and cost, cost being a significant factor for the Indian band. As with Manitoba, the plaintiffs suggest that Canada's recourse is to start a separate claim against Manitoba in the provincial court.

[51] I note first Canada's response that it is not expanding the lawsuit far beyond the scope of the plaintiffs' claim. In their amended statement of claim, the plaintiffs pled most of the facts relevant to the third party claim: the *LSCA* and the Agreement; the definition of "capital costs"; the costs splitting agreement between Canada and Ontario and the negotiations between Canada and Ontario in the 1940s on compensating the plaintiffs.

[52] In addition, says Canada, the main issue on the third party claim is a question of law about the interpretation of the *LSCA* and MNRTA. It may not require the parties to bring much additional evidence or to prove many additional facts which might slow down the proceedings. The point is worth noting as Manitoba may choose not to defend against the plaintiffs.

[53] While the addition of Manitoba will add some delay and complication, it will be only incremental to the delay and complexity that the addition of Ontario brings to the litigation. Indeed this is one of two important factors that distinguish this case from the circumstances in *Fairford First Nation v. Canada (Attorney General)*, [1995] F.C.J. No. 1227 (T.D.) (Q.L.), in which Justice Gibson found prejudice to the plaintiffs sufficient to preclude a third party claim from going forward. Also, in that case, discovery had already been ongoing for 20 days while here, discoveries though in the planning stage, have not yet started.

[54] I would also point out, as I did with respect to Manitoba's prejudice arguments, that the added complexity and costs cannot be said to be attributable to Canada's delay in bringing its third party claim. The plaintiffs would have had to bear the same burden, unwelcome though it may be, if the third party claim had been served some three months earlier, in accordance with the Rules.

[55] In the circumstances, I conclude that it would be in the interests of justice to grant Canada an extension of time to issue and serve its third party claim. Canada has an arguable case on the merits and a continuing intention to pursue the third party claim. The prejudice that accrues by way of complexity and delay is merely incremental to the late addition of Ontario as a party to the action. More to the point, it cannot be said to have resulted from the delay in commencing the action against Manitoba.

[56] Though the relationships and grievances between the parties are longstanding, the litigation, as I have said, has more recently been renewed. It is, in my view, in the interest of the parties, and of judicial economy, that the issues arising from this litigation be adjudicated together, in the same venue, without further unnecessary proliferation of litigation. That said, every effort will be made in the context of case management to promote the expeditious and least costly prosecution of the plaintiffs' claims.

Conclusion

[57] A separate order will issue granting Canada's motion for an extension of time to issue a third party claim against Manitoba without prejudice to any defences Manitoba may assert, with

costs of the motion to be borne by Canada and payable to the plaintiffs and Manitoba, in any event of the cause.

"R. Aronovitch"

Prothonotary