Federal Court  Cour fédérale

Date: 20130503

Docket: T-2579-91

Citation: 2013 FC 462

Ottawa, Ontario, May 3, 2013

PRESENT: The Honourable Mr. Justice Boivin

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

and

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

Third Party

REASONS FOR ORDER AND ORDER

Introduction

[1] The plaintiffs, Roger Southwind and members of the Lac Seul First Nation (the appellants), appeal pursuant to section 51 of the *Federal Courts Rules*, SOR/98-106 (the Rules) an Order rendered by Madam Prothonotary Aronovitch dated October 19, 2012.

[2] In her Order, Prothonotary Aronovitch granted the motion of Her Majesty the Queen in right of Ontario (Ontario) to extend the time for serving and filing a defence to the appellant's statement of claim.

Issue

[3] The issue raised in the present case is the following: Did the Prothonotary err in granting an extension of time to Ontario?

Standard of review

[4] The test setting out the standard of review for discretionary orders of Prothonotaries was outlined by the Federal Court of Appeal in *Canada v Aqua-Gem Investments Ltd.*, (FCA) [1993] 2 FC 425, 149 NR 273. This test was subsequently affirmed by the Supreme Court of Canada in *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, [2003] 1 SCR 450, and was then reformulated by the Federal Court of Appeal in *Merck & Co. v Apotex Inc.*, 2003 FCA 488 at para 19, [2004] 2 FCR 459:

> [19] … Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
> (a) the questions raised in the motion are vital to the final issue of the case, or

> (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[5] The Prothonotary's decision to grant Ontario's motion for an extension of time for serving and filing a defence is a discretionary decision that is not vital to the final issue of this case. As such, the Prothonotary's decision should only be disturbed in the event the Court was to find that the Prothonorary's Order is clearly wrong in the sense that her exercise of discretion was based upon a wrong principle of law or upon a misapprehension of the facts. However, even if the review were to be exercised *de novo*, the Court would adopt the same finding.

Facts

[6] In 1991, the appellants commenced a proceeding against Ontario in the Ontario Court (General Division) and another proceeding in the Federal Court against Her Majesty the Queen in right of Canada (Canada).

[7] Shortly thereafter, both actions commenced in 1991 were held in abeyance until 2008 while specific claim negotiations between the appellants and Canada proceeded.

[8] In November 2008, the action in the Federal Court was reactivated as a specially-managed proceeding. Prothonotary Aronovitch was appointed by the Federal Court's Chief Justice to case manage the action. On February 29, 2009, the appellants served and filed an Amended Statement of Claim in the within action. Canada filed its Statement of Defence on June 30, 2009.

[9] On January 14, 2010, Canada filed a third-party claim against Ontario and subsequently against Manitoba.

[10] It is noteworthy that Ontario did not file a defence and confirmed in a case conference, held on June 16, 2010, that it would not defend the appellants' claim. In July 2011, Ontario initiated discussions with the appellants as well as Canada and Manitoba about Ontario's interest in defending the main action. Manitoba and Canada were prepared at that time to consent to Ontario defending the main action. However, the appellants advised on August 2011 that they opposed the filing of Ontario's defence.

[11] Ontario accordingly brought a motion for an extension of time in order to file a defence to the main action. The motion was granted by Prothonotary Aronovitch. Her Order is appealed before this Court.

Analysis

[12] The appellants argue that Ontario's decision not to defend the main action was informed, considered and supported by an experienced and specialized team of counsel in aboriginal law. The appellants further argue that the reason for Ontario's change of position is merely a change of counsel and that the jurisprudence coupled with the *Hennelly* factors (*Canada (Attorney General) v Hennelly*, [1999] FCJ no 846, 244 NR 399 (FCA)) do not support the granting of an extension of time on that basis. As such, the appellants contend that the granting of an extension of time in the case at bar is unfair.

[13] In support of their position, the appellants refer to *Sawridge Band v Canada* [2005] FC 1476 at para 222, 275 FTR 1 (*Sawridge 2005*) in which my colleague Justice Russell decided the following:

> [222] … I believe the Court has merely taken the Plaintiffs at their word. I see nothing wrong with the Court continuing to rely upon the Plaintiffs' own representations to the Court in the absence of any (plausible or otherwise) explanation as to how or why the situation may have changed.

[14] However, the facts in *Sawridge 2005*, above, are distinguishable from the ones at bar. While counsel in *Sawridge 2005* was attempting to broaden the claim by including a claim for self-government and the evidence that would adduce it, Ontario argues that it does not purport to broaden the scope of the claim in the present circumstances. In fact, the record demonstrates that the change in Ontario's position stems solely from the appointment of a new counsel. The Prothonotary observed the following:

> … It would appear from its own evidence adduced in this motion that the more likely explanation for Ontario's change of position was that new counsel was appointed to the file who reconsidered Ontario's approach to this litigation.… (Appellants' Motion Record, Prothonotary's Order, p 41).

[15] While the Prothonotary did not excuse Ontario's delay to defend the main action, she turned her mind to the *Hennelly* decision and was satisfied that the prejudice to Ontario being barred from filing its defence "far outweighs any prejudice to the plaintiffs".

[16] The Court recalls that under Rule 8 of the *Federal Courts Rules* the decision to grant an extension of time is discretionary. Against this broad principle, the appellants argue that Ontario does not meet the test for an extension of time as enunciated in *Hennelly*, above at para 3 which sets forth the following four (4) factors:

1. a continuing intention to pursue his or her application;
2. that the application has some merit;
3. that no prejudice to the respondent arises from the delay; and
4. that a reasonable explanation for the delay exists.

[17] At the hearing before this Court, the appellants specified that the *Hennelly* factors represent a "road map" and are to be read "through a prism". The Court agrees with the appellants in this regard. Further, the approach with respect to granting an extension for time is a contextualized one and will depend on the circumstances of each case. The Court is also of the view that an important consideration in balancing whether or not to grant an extension of time is to do justice between the parties (*Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263 at p 8, 63 NR 106).

[18] Relying on *Sawridge 2005*, above, the appellants further contend that by allowing the extension for time, the Prothonotary in fact not only accepted a change in position of Ontario – due to the appointment of a new counsel – but she also allowed Ontario to bring a new issue late in the day: the issue of "taking up" pursuant to Treaty No 3.

[19] On this point, the Prothonotary who is familiar with the various issues that have been raised in this matter – she was indeed appointed in 1998 to case manage the file (*Sawridge Band v Canada*, 2001 FCA 338 para 11) – disagreed with the appellants and made the following observations:

> I disagree that Ontario's proposed defence raises new issues. Canada has already raised Ontario's role in the construction of the Lac Seul Project and its interpretation of Ontario's jurisdiction over "traditional territory" as defences to the plaintiff's action. The defence of "taking up" whether by Canada, or Ontario, is already before the Court. The existing pleading in the main action either explicitly or by inference raise the issues of the 1891

> legislation between Canada and Ontario, Treaty No. 3, as well as the meaning of section 91(24) of the *Constitution Act 1867*.'
> (Appellants' Motion Record, Prothonotary's Order, p 40).

[20] A closer look at Canada's Statement of Defence dated June 30, 2009 and more particularly paragraphs 86, 89, 91 and 93 satisfy this Court that the issue of "taking up" is addressed pursuant to Treaty No 3 (Canada's Statement of Defence dated June 30, 2009; *Keewatin v Ontario (Minister of Natural Resources)* 2011 ONSC 4801 at para 1, [2011] OJ No 3907 (QL)). The Court is therefore unable to accept the suggestion that the Prothonotary misapprehended the facts when she stated in her Order that the role of Ontario in the construction of the Lac Seul Storage Project as well as the issue of "taking up" was already pled. The Court agrees with Ontario that the "taking up" issue cannot be considered a new issue.

[21] The appellants' argument to the effect that in the event that the Prothonotary's decision were to stand, voluminous disclosure would be required as well as voluminous reports is also rejected by the Court. It is worthy of note that in her Order, the Prothonotary observed the following: (i) barring certain exceptions, Ontario does not intend to make further documentary discovery; (ii) Ontario intends to limit itself to the documentary production made to date in defending against Canada's third party claim; (iii) Ontario has undertaken to serve limited interrogatories and has given assurances that discovery would not be extensive; (iv) Ontario would be prepared to collaborate in sharing resources including experts. At hearing before this Court, counsel for Ontario reiterated these commitments and further acknowledged that Ontario has worked with Canada to contain a number of reports and, at this stage, there are no further discoveries, no further reports, and no

further interrogatories. Nothing leads the Court to believe that Ontario will depart from its representations.

[22] As part of the Order, the Prothonotary further reasonably observed that the action before the Ontario Court and the Federal Court arise out of the same factual matrix – i.e. the flooding of reserve lands and traditional territory in the construction of the Lac Seul Storage Project. The issue of duplication of process and additional costs in the case at bar constitutes a relevant consideration and allowing Ontario to defend the main action would provide a more complete factual record.

[23] In view of all of the above, the Court is satisfied that the Prothonotary turned her mind to the *Hennelly* factors, considered the issue of prejudice and came to the conclusion that the interest of justice would be better served in granting the extension of time. For all of these reasons and, in view of all the circumstances surrounding this matter, the Court concludes that the Prothonotary identified the applicable principles of law in the present case and did not err in applying these principles to the facts before her.

[24] Having considered the material and the representations of counsel, the Court is of the view that the Prothonotary's Order ought not to be disturbed since it is not clearly wrong in the sense that the exercise of her discretion was based upon a wrong principle or misapprehension of the facts. It follows that the Court's intervention is not warranted and the appeal will be dismissed.

ORDER

THIS COURT ORDERS that the appeal of the Prothonotary's Order dated October 19, 2012 is dismissed. Costs of this appeal by way of motion will be in the cause.

"Richard Boivin"

Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2579-91
STYLE OF CAUSE:	Roger Southwind et al v. Her Majesty the Queen in right of Canada et al
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 24, 2013
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APPEARANCES:

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