Yellowhorn v. The Queen, 1998.ca.ab.qb

1998-10-15

Action No.: 8601-06578

IN THE COURT OF QUEEN=S BENCH OF ALBERTA

JUDICIAL CENTRE OF CALGARY

BETWEEN:

PETER YELLOWHORN, CHIEF OF THE PEIGAN INDIAN BAND ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF THE PEIGAN INDIAN BAND

Respondents

(Plaintiffs)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Applicant

(Defendant)

REASONS FOR JUDGMENT OF

The Honourable Chief Justice W. K. Moore

INTRODUCTION

[1] Peter Yellowhorn, Chief of the Peigan Indian Band (the ABand@) started this action in 1986 against Her Majesty the Queen in Right of the Province of Alberta (AAlberta@). The underlying action is a claim by the Band and a counterclaim by Alberta. Both claim rights within Peigan Indian Reserve No.147 (the AReserve@) to water flowing in the Oldman River and to the land underlying the River. The claim was triggered by Alberta's proposed construction of a dam and reservoir upstream from the Reserve. Each of the Band and Alberta asks for a declaration that it has rights to the water and the underlying land for the portion of the River that is located within the Reserve.

[2] In this application, Alberta is asking that Her Majesty the Queen in Right of Canada (ACanada@) be added as a defendant. Alberta also asks leave to extend the time limit for it to file third party proceedings against Canada.

ISSUES

[3] 1. Should Canada be added as a defendant?

Is Canada a necessary defendant?

If so, is Alberta's delay a relevant factor?

[4] 2. Should Alberta be granted an extension to file a third party notice against Canada?

A. Are there valid reasons to add Canada as a third party?

B. Is there delay and prejudice so that an extension should not be granted?

FACTS

[5] The Statement of Claim was filed April 11, 1986, based primarily on Treaty No.7, concluded in 1877, and on certain legislative enactments. Alberta's Statement of Defence was filed October 21, 1986. The last amendment to pleadings was January 3, 1997.

[6] In July 1986, the Band filed a Statement of Claim against Canada in the Federal Court, claiming relief relating to Canada's position as fiduciary, and including some declarations similar to those claimed here. That action is currently in abeyance.

[7] On July 14, 1995, the Band filed Notice of Motion to add Canada as a party in this action. The Band says the application was to add Canada as a plaintiff; Alberta says it was to add Canada in an Aunspecified capacity@. The Band abandoned the application on December 21, 1995 when the Minister of Indian Affairs appointed a mediator. Since 1996, the Band states it has conducted discussions with Canada, during which Canada has allegedly learned confidential information about the litigation which would prejudice the Band if Canada were suddenly an adverse party in this litigation.

[8] The Band alleges that this application is a delay tactic. Alberta claims there are valid reasons to add Canada as a party at this stage.

ANALYSIS

Canada as a Defendant

A. Is Canada a necessary defendant?

i) Test

[9] Rule 38(3) of the Alberta ***Rules of Court*** deals with adding a party:

> (3) The Court may, either upon or without the application of any party and with or without terms order...that any person be added who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, or in order to protect the rights or interests of any person or class of persons interested under the plaintiff or defendant.

[10] The test under this Rule is generally phrased in one of two ways. First, under ***Bernhart v. Umisk Farms Ltd.*** (1983), 40 A.R. 549 (Q.B. - Master), a defendant will not be added if the plaintiffs claims against current defendants can be properly adjudicated without the proposed defendant. ***Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.*** (1993), 10 Alta. L.R. (3d) 325 (Q.B.) adds a second question to the test (at 329). The test of whether Canada is a necessary defendant can then be framed as follows:

> (1) Can the question between the Band and Alberta be effectually and completely settled without the addition of Canada? and
>
> (2) Will the relief sought by the Band directly affect Canada, not in its commercial interests, but in the enjoyment of its legal rights?

I note that in ***Amoco***, the parties wanted to be added as plaintiffs. Their application was denied both by the Master and on appeal to this Court.

[11] Alberta submits that both parts of the ***Amoco*** test are met. Alberta claims that Canada=s intention at the time of entering Treaty No. 7 and enacting the relevant legislation is crucial; therefore, that Canada must be a defendant. Moreover, Alberta states that the Peigan have not or could not answer questions relating to key documents. Alberta wants Canada to be a defendant so that those documents, and answers relating to them, will be available. Alberta also submits that Canada, as the only entity capable of extinguishing aboriginal interests, must be a party so that the extinguishment issues can be properly explored. Finally, Alberta wants Canada to be a defendant so that Canada will be bound by the results of this litigation.

[12] The Band disagrees with all of this reasoning. It emphasizes the discussion in ***Amon v. Raphael Tuck & Sons. Ltd.*****,** [1956] 1 All E.R. 273 (Q.B.) at 286 that a Anecessary party@ is not one which merely has relevant evidence. At 288, ***Amon*** states it is unlikely that a potential defendant will be Anecessary@ if the plaintiff has no cause of action against that potential defendant. ***Amon*** was applied in ***Amoco.*** In the

present case, the Band states it is not claiming any relief against Canada.

ii) Can the question be settled without Canada?

[13] In argument, Alberta went through the specifics of the pleadings as follows. It is interesting that while the pleadings were last amended on December 9, 1996 (reply and defence to counterclaim); December 23, 1996 (statement of claim); and January 3, 1997 (statement of defence), the amendments have tended to narrow the action, not expand it.

[14] In paragraph 11 of the December 23, 1996 statement of claim, the Band states that the Crown *(i.e.* Canada) concluded Treaty No. 7 with the Band on or about September 22, 1877. Alberta admits in paragraph 6 of the January 3, 1997 statement of defence that the Treaty was concluded. That paragraph further alleges that by signing Treaty No. 7, the Band gave up to Canada all its rights to the lands and water at issue here. Alberta submits that Canada must be a party to determine Canada's intention when entering Treaty No. 7. The Band argues that any information Canada has on this point can be obtained just as well from Canada the witness as from Canada the party. I agree with the Band.

[15] Paragraph 14 of the statement of claim alleges that water rights in and to the Oldman River were reserved for the Band's use and benefit, including the Band=s right to appropriate water for its reasonable needs. Moreover, paragraph 16 of the statement of claim alleges that the riverbed of the Oldman River farms part of the Band's Reserve. Alberta argues that this means the interests are under Canada's jurisdiction because s.91(24) of the ***Constitution Act, 1867*** (U.K., 30 & 31 Victoria, c.3) gives Canada jurisdiction over AIndians, and Lands reserved for the Indians@. The Band states that it does not need Canada's involvement to sue over Reserve interests. Alberta also claims that this allegation means the Band acknowledges Canada has a legal Interest in the outcome of this litigation. The Band, however, sees Canada's interest as fiduciary, not an Interest independent from the Band's interest. If anything, the Band says such an interest would make Canada a plaintiff, not a defendant, in this particular claim. I agree with the Band.

[16] Paragraph 23 of the statement of claim alleges that the construction of the dam and reservoir is inconsistent with and in conflict with the Band's water rights, partially because it changes the flow and quality of the Oldman River through the Reserve and interferes with the Band's water or riparian rights. Alberta submits that Canada is, therefore, involved, as it has jurisdiction over navigable waters and fisheries. The Band responds that this jurisdiction is irrelevant, as the Band is not making any claims relating to the navigable waters or fisheries aspects of the Oldman River. It did not plead any Issues on those points. I agree with the Band.

[17] The prayer for relief in the statement of claim asks for declarations and costs. If the Band wins, then Alberta states the Band will be found to have had rights for the last 121 years **B** *i.e.*, before Alberta was even a province. For this reason, Alberta thinks that Canada must be involved. The Band states that its claims do not include Canada and do not go back that far in time. Neither the prayer for relief nor the body of the statement of claim makes any reference to a claim against Canada. The Band has repeatedly stated that it is not pursuing a claim against Canada. I am not going to infer such a claim.

[18] Alberta further asserts that some of the submissions in the statement of defence show that Canada is a necessary party, not merely a bystander. For example, paragraph 5A states that any rights which may have been conferred on the Band by the Royal Proclamation of 1763 were extinguished prior to April 17, 1982. I note that while this paragraph was not in the original statement of defence, the original statement of claim did refer to the Royal Proclamation of 1763. As Canada has the sole power to extinguish aboriginal rights and title ***(Delgamuukw v. British Columbia*** (1997). 153 D.L.R. (4th) 193 (S.C.C.) at 267-72), Alberta argues that Canada is a necessary party.

[19] Alberta is also pleading that the Band is barred from asserting any claims because of laches and acquiescence (paragraph 16 of the statement of defence) and limitations (paragraphs 24 and 25 of the statement of defence). The Band argues that any information or evidence Canada may have relating to extinguishment, laches, acquiescence or limitations can be obtained from Canada as a witness, without requiring Canada to be a party. I agree with the Band.

[20] Alberta points to several paragraphs in the December 9, 1996 amended reply and amended defence to amended counterclaim. For example, Alberta argues that paragraphs 2 and 3 recognize Canada's involvement by stating that any rights are held by Canada for the use and benefit of the Band and could not have passed to Alberta. The Band emphasized before me that this refers to Canada holding the rights on behalf of the Band, not for itself. In paragraph 9, the Band alleges that there was no extinguishment of the Band's interests. Finally, the Band denies releasing or surrendering any rights to Canada (paragraph 14). In argument, the Band submitted that any information Canada may have on these points can be brought in through Canada as a witness. I agree with the Band.

[21] Alberta claims that various other federal enactments make Canada a necessary party. These enactments include the ***North-West Irrigation Act.*** 1894 S.C. 57-58 Vict., c.30; the ***Dominion Water Power Act,*** 1919, S.C. 9-10 Geo. V, c.19; the ***Constitution Act, 1930,*** S.C. 20-21 Geo. V, c.26; the ***Alberta Natural Resources Transfer (Amendment) Act, 1938,*** S.C. 2 Geo. VI, c.36; and the ***Alberta Natural Resources Act Amendment Act, 1938,*** S.A. 1938, c.14. Some of these passed natural resources from Canada to Alberta (with the exception, according to the Band, of the disputed interests). Alberta says that pursuant to federal enactments, Alberta passed the ***Water Resources Act,*** R.S.A. 1980, c.W-1, to which it claims the Band has adhered. The Band denies that any of the enactments make Canada a necessary party.

[22] I note that the ***Constitution Act, 1930*** was put into issue in the original statement of defence; the others were put into issue in the original statement of claim. On the question of intention at the time of entering the treaty and enacting the legislation, I agree with the Band and Canada that Canada's intention, if relevant, can best be determined from the treaty and legislation themselves. Because the treaty was entered into so many years ago, there are no living witnesses to offer any direct evidence on it. While there may be some witnesses able to give direct evidence on some of the legislation, it speaks for itself and is subject to judicial interpretation according to standard principles of construction. Even if there were any relevant direct evidence, it could be obtained from Canada as a witness, not a party.

[23] In addition to the pleadings, Alberta points to the existence of the Federal Court action and to materials filed by the Band in 1995 when it considered adding Canada as a party to the present action. As mentioned, the Federal Court action is in abeyance. Alberta asserts that the existence of the Federal

Court action allows me to infer that the Band has a claim against Canada in this action as well. The Band states that the Federal Court action is irrelevant, as it relates to different issues (*e.g.,* the Federal Court action relates to fiduciary duty), is unconnected to the present litigation, and is in abeyance. I agree with the Band.

[24] In December 1995, the Band abandoned its notice of motion to add Canada to this action. There is some dispute as to the capacity in which the Band sought to add Canada. Alberta urges me to consider the statements made by Brenda Gaertner in her July 13, 1995 affidavit in support of the Band's notice of motion, as detailed below. Alberta argues that this affidavit indicates the Band thought then that Canada was a necessary party. The Band submits the 1995 materials are irrelevant. I agree with the Band.

[25] Alberta refers to two recent B.C. cases where the defendant Provincial Crown successfully applied to add Canada as a defendant to aboriginal litigation proceedings. In ***Kispiox Band of Indians V. British Columbia*** (1994), 25 C.P.C. (3d) 121 (B.C.S.C.), a band sued for damages for trespass by the province on a road through reserve lands. The issue was whether an order in council had reconveyed lands from the province to Canada. The relevant land was a road running through the band's reserve. Canada did not oppose being added as a party. The plaintiff opposed the application because of undue protraction and because the plaintiff had made no claim against Canada. In adding Canada, the court cited a need to have the band's fiduciary involved.

[26] The statement of claim in ***Kispiox*** alleged that Canada might have an interest in the road in question, as it had possibly been transferred from the province to Canada. This is different than the present case, where resources were undoubtedly transferred to Alberta. The question in the present case is whether the disputed interests belong to Alberta or to the Band. There is no allegation that the disputed interests belong to Canada.

[27] ***Kispiox*** was followed in ***Boothroyd Indian Band v. British Columbia (Attorney General)***, [1994] B.C.J. No. 2247 (S.C.), where Canada took no position on the application. The facts in ***Boothroyd*** are unclear. I note, however, that the lands in question were in the ARailway Belt@, and there was some issue over a conveyance and reconveyance of those lands between the province and Canada.

[28] In my view, these two cases are distinguishable because there was an issue in both over Canada's interest in the precise matter being disputed. Here, there is no such issue. Either Alberta received all of the relevant interests, including the disputed Interests, in the transfer from Canada (which leaves Canada out of the equation), or Alberta received all of the relevant Interests, except any of the disputed interests which belong to the Band (again, leaving Canada out of the equation).

[29] Alberta states that Canada is a necessary party because it has documents that Alberta needs. I am satisfied that most, if not all, of the documents relating to this action are in public archives or otherwise available to Alberta. Moreover, the Band states that all documents relating to the natural resources transfer legislation are available to Alberta from Canada. For example, s.23 of the Schedule to the ***Alberta Natural Resources Act,*** 1930, S.C. 20-21 Geo. V, c.3 provides that Canada will deliver to Alberta, or allow Alberta access to, all relevant documents. Alberta gave no satisfactory response to this contention. Alberta is a sophisticated and represented party, with extensive resources. It has the knowledge, ability and finances to locate the documents on its own through searching the archives or

requesting the documents. Even if Canada does have some documents that are not otherwise available to Alberta, the simple fact is that Canada can be required to produce such documents without having to be a party.

iii) Legal rights versus commercial interests

[30] In ***Amoco,*** the court held that commercial interests, not legal rights, were affected, Alberta claims that Canada's rights here are legal, not commercial. In ***Amoco,*** the potential plaintiffs (TCPL and Encor) had legal rights against the plaintiff (Amoco), not against the defendants. Amoco sued one defendant for breach of contract for failing to purchase an agreed amount of natural gas per year, and for inducing the second defendant to breach its contract with Amoco. TCPL and Encor applied to be added, claiming they had an interest in Amoco's contracts. The court held that TCPL and Encor had no contractual relationship with the defendants, and that their legal rights were only against Amoco. As against the defendants, therefore, the court found TCPL and Encor had only commercial interests.

[31] In my view, ***Amoco*** supports the Band. Here, Canada may be affected by the decision in this action, but that is not sufficient to establish legal rights. Canada does not have, and is not alleged to have, a legal right to the disputed Interests. Consequently, Canada's legal rights to the disputed interests cannot be affected by a declaration on the disputed Interests as between Alberta and the Band.

B. Is delay a relevant factor?

[32] Because Alberta did not prove that Canada is a necessary party. I need not address whether Alberta's delay is significant in this context.

2. Canada as a Third Party

A. Are there valid reasons to add Canada as a third party?

i) Test

[33] Alberta accepts that its application for filing third party proceedings is very late. Rule 66 requires a third party notice within 6 months of the statement of defence. Alberta refers to the reasons for denying an extension as set out by Purvis J. in ***Edmonton & Rural Auxiliary Hospital & Nursing Home District No. 24 v. Ellis-Don et al.*** (1981), 33 A.R. 60 (Q.B.), reversed [1981] AUD 711 C.A.). I note that the Court of Appeal did not disturb the trial judge's underlying rationale, although it reversed the decision. It allowed an extension because the defendant could not have ascertained the claim earlier. As indicated below, that is not the situation here, as Alberta could have ascertained a claim against Canada earlier.

[34] At 63, Purvis J. in ***Ellis-Don*** set out three reasons for refusing to extend time: "(1) inordinate

delay; (2) absence of credible excuse; and (3) prejudice@. I discuss these factors in the Adelay@ section of these Reasons. At 62 of ***Ellis-Don,*** the trial judge set out the benefits of the third-party procedure: (1) to avoid a multiplicity of actions; (2) to avoid contrary or inconsistent findings; (3) to allow the third party to defend the plaintiff's claim against the defendant; (4) to save costs; and (5) to determine the issues between the defendant and the third party as soon as possible. I discuss the first, second and fifth points later in this section; the other two are irrelevant (Canada has no interest in defending the claim against Alberta, and costs would actually increase at this stage).

[35] The Court of Appeal recently allowed a third party to be added in ***Dilcon Constructors Ltd. v. ANC Developments Inc.*** (1994), 155 A.R. 314 (C.A.). The case there had not proceeded to the same stage as the present case. The court was able to avoid a multiplicity of proceedings by allowing the third party notice, stating (at 317):

> In this case, it is unthinkable that, if Dilcon tomorrow issued a separate claim against the engineers, the two suits would not be consolidated or, at least, tried together. Third party procedure is a simple method of consolidation in cases that cry out for it. It may be seen by a plaintiff as a distracting cause of delay, but that is not the only consideration. The proper administration of justice is also a factor. It is therefore not in keeping with the object of the rule to limit its application in the arbitrary way suggested by the respondent.

[36] Alberta urges me to use the Astriking out@ test - *i.e.,* that the third party notice must be allowed unless it is clearly invalid and unable to succeed. However, that is not the proper test to apply in deciding whether to allow a late third party notice.

ii) Discussion

[37] Alberta does not specifically address why it considers Canada to be a proper third party, apparently relying on its arguments as to why Canada should be added as a defendant. Canada and the Band submit that Canada is not a proper third party because Alberta has no Independent cause of action by Alberta against Canada. As mentioned, they state that if the court finds the disputed interests were transferred to Alberta, that is the end of the matter. Conversely, if the court finds the disputed Interests were set aside for the Peigan and not transferred to Alberta, that is the end of the matter. Alberta would have no claim against Canada in either case. In addition, the Band submits that the allegations in the proposed third party notice essentially mirror those in the Statement of Defence. If the facts in the proposed third party notice are taken as proved, they would be a complete defence to the main action. The Band states that is not a proper third party notice. I need not address this last issue.

[38] Alberta's strongest point is that if Alberta loses it should be able to seek damages or indemnification from Canada, as Alberta alleges Canada represented it was transferring all interests, including the disputed interests, free and clear to Alberta. The Band submits that any alleged intentions or representations outside of the legislation are irrelevant. In my view, this is an argument for another day. It is also an argument Alberta has been aware of since the issuance of the original statement of claim. In light of my findings on delay, it is unnecessary for me to address this point.

[39] I m not convinced that the proposed third party notice would be beneficial under the three categories of benefits (from ***Ellis-Don)*** that are relevant here. First, it is important to avoid a multiplicity of actions, where possible. Alberta, relying on ***Dilcon,*** argues there would be an unacceptable multiplicity of actions if Canada were not made a third party here. In my view, however, these circumstances do not Acry out@ for consolidation, as was the case in ***Dilcon.*** The third party application in ***Dilcon*** took place at a much earlier stage. Here, it is not obvious to me that an action by Alberta against Canada, if started now, would be consolidated with a 12 year old action almost ready for trial.

[40] Similarly, the desire to avoid contrary findings does not require me to allow the proposed third party notice at this time. This is not a case where Alberta has a parallel action against Canada, in which different facts may be found. If Alberta were to start an action against Canada, that action would logically be tried after this action, and would be based on the results in this one. The two results would therefore not be inconsistent.

[41] While it is also desirable to determine any issues between Canada and Alberta as soon as possible, Alberta has hardly expedited this action so far. For the reasons discussed below, I cannot give much weight to this time factor.

B. Is there delay and prejudice?

[42] The Band and Canada submit that there has already been inexcusable, inordinate delay, and that there would be prejudice if the extension were granted. These are the ***Ellis-Don*** factors cited earlier.

i) Delay

[43] Alberta submits that any delay is justified on several bases. First, Alberta claims that it could not have added Canada as a party prior to February 1.1992, as the Federal Court had exclusive jurisdiction where relief was claimed against Canada. This was changed to give concurrent jurisdiction to the provincial courts, including the Alberta Court of Queen=s Bench. The Band disputes this, claiming that Canada could have been added as a party in Queen's Bench prior to 1992, as long as no relief was claimed against Canada. Regardless of which argument I accept, it would not affect my decision. I still find, as discussed below, that there was inexcusable and inordinate delay from 1992.

[44] Second, Alberta says that any delay prior July 1995 is obviously justified, as the Band itself applied to add Canada at that time. In my view, this time frame is irrelevant. There is no guarantee that the Band=s application, if pursued, would have been granted. The fact remains that Alberta could have applied at least any time after 1992 to add Canada as a party. While I do not take 1995 as the appropriate date from which to start calculating Alberta's delay, any delay after December 1995 (when the Band discontinued its application) further exacerbates the problems with this late application. The issue, by that point, was or should have been foremost in everyone=s minds.

[45] Third, while Alberta admits that in hindsight it could have made its application in December 1995

when the Band withdrew its application, Alberta says that little had happened in the litigation until that point anyway, particularly since the pleadings were being amended until January 1997. Moreover, the majority of examination for discovery has occurred since 1995. Alberta did not obtain most of the documents from the Band until February 1997. Alberta seems to imply that it was not aware, until then, that the Band may not be able to answer all of Alberta's questions relating to all of the relevant documents.

[46] The Band disputes these contentions. It claims that Alberta exaggerates the complexity of the issues. It points to other delays by Alberta, and to the significant efforts expended by the Band before 1995. The evidence before me does not support Alberta's contention that the litigation was essentially moribund until 1995. A great deal had happened before that time, including court applications, considerable research and extensive document analysis. Although the pleadings were not finalized, the amendments tended to narrow the action's scope. Alberta was not taken by surprise. I also note that Alberta did not make this application until after a trial date was set for the action.

[47] The Band cites several cases. In ***Lister v. Calgary,*** [1997] A.J. No.42 (C.A), the court denied an extension after 4 **2** years because the party seeking the extension called no evidence to justify the delay. That is not the issue here; the issue here is whether Alberta=s reasons are adequate. In ***Labell v. R. Jo Enterprises,*** [1990] A.J. No. 430 (C.A.), the Master rejected an extension, the Justice dismissed the appeal, and the Court of Appeal allowed the appeal and sent the matter back to the Master. There, the potential third party conceded there was no prejudice, and the plaintiff did not intervene to claim any prejudice. The Court of Appeal stated it was generally reluctant to deny an extension unless there was an inexcusable delay with serious prejudice.

There, the Court of Appeal awarded costs as a Asanction@ for this lesser delay.

[48] It is interesting to note ***E.S.M. Transport V. Western Mack Truck (Edmonton) Ltd.*** (1988), 59 Alta. L.R. (2d) 115 (C.A.), where the Master extended time for the defendant vendor of a truck to third party a manufacturer for alleged defects in the truck. The plaintiff had consented to the extension. No other material had been filed. The Justice dismissed the appeal, but the Court of Appeal allowed the appeal and disallowed third party proceedings. The statement of claim was filed in August 1983, and the statement of defence In November 1983. The discoveries occurred in February 1984. In November 1985, the defendant invited the proposed third party to participate, but that party declined. In June 1987, the plaintiff and defendant signed a certificate of readiness, with the trial set for October 1987.

[49] The court held at 117:

> Here the delay is inexcusable, The defendant has known from the time it filed its defence that it has a potential third party claim. It chose not to exercise it ...But nowhere did it assert against the third party that it was going to pursue a claim for indemnity.
>
> Moreover, in this case, there is substantial prejudice. It will fall on either the plaintiff or the third party. If the third party's rights to discovery and production are accommodated, the plaintiff loses its trial date. The Court of Queen's Bench was forced into the position of accommodating the rights of the plaintiff, or the third party, or compromising them. The usual advantage of combining third party proceedings with the steps being taken by the

> parties to the main action was lost.
>
> The defendant, on the other hand, is not irredeemably prejudiced as is often the case where a court considers extending time for serving a statement of claim or dismissing an action for want of prosecution. The cases dealing with these situations are of limited assistance. The third party concedes that the defendant, if it loses its action, is free to proceed with a claim for indemnity. The question here is not, then, one of the loss of substantive rights to either party. [emphasis added]

[50] Here, Alberta knew from the beginning about Canada's potential as a third party. I note the defences have remained essentially the same since the beginning particularly in relation to Treaty No. 7 and to the relevant legislation.

[51] In my view, the litigation=s general direction was evident from the beginning. The relevant enactments were plead. It should have been obvious to Alberta at that time that those enactments were or could be at issue. The subsequent amendments to the pleadings are not relevant in this context, as they did not change the general direction of the litigation nor expand the issues.

[52] Based on all of these considerations. I find that Alberta's delay, even dated only from 1992, is inordinate and not justifiable.

ii) Prejudice

[53] Ultimately, Alberta's contention is that the proper administration of justice requires Canada to be a party (as stated in ***Dilcon, supra***), and that that outweighs any delay to this point and the prejudice of delaying the trial further. Alberta claims Canada is a vital party to the proper determination of this complex and important case.

[54] The Band claims several categories of prejudice if the third party notice were allowed. In addition to the typical manifestations of prejudice (witnesses forgetting, aging and dying; right to have the issues settled expeditiously; and increased expense), the Band also cites several other reasons.

[55] First**,** the Band claims that it has held discussions with Canada since 1996, during which Canada has learned confidential information from the Band. The Band states that Canada=s knowledge would therefore prejudice the Band if Canada were suddenly an adverse party. Alberta states that the Band's description of the allegedly confidential information is too vague. Moreover, Alberta states that the Band cannot claim Canada is in possession of such confidential information at the same time that it is pursuing other actions against Canada. I disagree. The affidavit evidence indicates that confidential information has been shared with Canada. Alberta is obviously not entitled to a detailed description of that allegedly confidential information. As for the existence of other actions, it is not uncommon for parties to be on the same side in one action and on different sides in another action. In this specific case and in these specific circumstances, the Band shared confidential information with Canada after it seemed apparent that

Canada would not be a party in the action. Presumably, the Band would not have disclosed anything that would be relevant in other actions where Canada is an adverse party.

[56] Second, the disputed interests relate to water, which the Band alleges is being continually depleted. A delay of potentially several years while Canada is brought into the action could result in significant depletion.

[57] Finally, I note again that Alberta did not bring this application until the eve of trial. While the trial date would not have proceeded in any event, this application is one reason for yet another delay in this action coming to trial. It is possible that delay, at some point, cannot be adequately compensated by costs.

DISPOSITION

[58] Alberta's applications to add Canada as a defendant and to extend the time for filing a third party notice are denied.

[59] The plaintiffs are entitled to costs in any event of the cause. In my view, the costs, payable to the plaintiffs, should be determined by the trial judge.

DATED at Calgary, Alberta this 15th day of October, 1998.

C.J.C.Q.B.

Counsel: S. Rush, Q.C. Rush Crane Guenther & Adams Vancouver, B.C. c/o Burnet Duckworth & Palmer

Calgary, Alta. M. L Mandell, Q.C. Mandell Pinder Vancouver, B.C. for the Plaintiffs E.L. Bunnell, Q.C.

A.P. Argento Parlee McLaws Calgary. Alberta for the Defendants P.G. Hodgkinson Ms. M. L. King

Department of Justice, Canada for Her Majesty the Queen in Right of Canada Yellowhorn v. The Queen, 1998.ca.ab.qb

19981015

Action No. 8601 06578

IN THE COURT OF QUEEN:S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

BETWEEN:

PETER YELLOWHORN,

CHIEF OF THE PEIGAN INDIAN BAND

ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS

OF THE PEIGAN INDIAN BAND

Respondents

(Plaintiffs)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Applicant

(Defendant)

REASONS FOR JUDGMENT

OF THE HONOURABLE CHIEF JUSTICE W. K. MOORE