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Indexed as:

Wuskwi Sipihk Cree Nation v. Canada (Minister of National Health and Welfare)

Between
The Wuskwi Sipihk Cree Nation, The Mathias Colomb Cree Nation, The Opaskwayak Cree Nation, The Sapotewayek Cree Nation, The Mosakahiken Cree Nation, The Grand Rapids First Nation, and The Chemawawin Cree Nation, plaintiffs, and
Her Majesty the Queen in right of Canada, as represented by the Minister of National Health and Welfare, defendant

[1999] F.C.J. No. 82

Court File No. T-383-98

Federal Court of Canada - Trial Division
Winnipeg, Manitoba

Hargrave, Prothonotary

January 21, 1999

(11 pp.)

Crown -- Actions by and against Crown in right of Canada -- Practice -- Stay of proceedings -- Pleadings -- Courts -- Federal Court of Canada -- Jurisdiction -- Indians -- Provision of health services.

Motion by the defendant Minister of National Health and Welfare for a stay of the action brought by Wuskwi Sipihk Cree Nation for deficiencies in the health care. The action arose out of the government's decision to share jurisdiction

and responsibility for Native health care with the Province of Manitoba. The Cree Nation claimed that the federal government's delegation of responsibility for Native health care violated its treaty and constitutional rights. It sought declaratory and mandatory relief in order to obtain adequate and continuous health care. The Minister argued that the Federal Court had lost jurisdiction over the matter as the government sought to bring a third party claim against the Manitoba Crown for indemnity. The government argued that the Federal Court had no jurisdiction because health care was a provincial matter, and mandamus was a remedy to be applied only to federal boards, commissions and tribunals. The Minister failed to set out its arguments in written representations submitted to the court.

HELD: The motion was dismissed. The Minister's failure to provide written submissions outlining the government's arguments was sufficient reason to deny a stay of proceedings. In addition, the Federal Court had jurisdiction to hear the action, including the proposed third party claim, as the Province of Manitoba had passed legislation granting the Federal Court jurisdiction to hear actions involving the Province and the Federal Government. There was ample case law and statutory support for applying the remedy of mandamus to the Federal Government. Pursuant to the Constitution Act, the Minister and the federal government were responsible for health care relating to First Nations.

Statutes, Regulations and Rules Cited:

Constitution Act, 1867, ss. 91(24), 92, 92(7).

Constitution Act, 1982, s. 35(1).

Federal Court Act, ss. 17, 18, 19, 44, 50.1(1).

Federal Courts Jurisdiction Act, R.S.M. 1987, c. 270, s. 1.

Federal Court Rules, Rules 364(2), 364(2)(e).

Counsel:

Michael Jerch, for the plaintiffs.
Antoine Fréchette, for the defendant.

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1 HARGRAVE, PROTHONOTARY (Reasons for Order):-- I decided the Defendant's motion at the conclusion of argument, for I felt the law was clearly against granting a stay of the proceeding, pursuant to section 50.1(1) of the Federal Court Act, by reason of the intent of the Defendant to bring third party proceedings against the Manitoba Crown. Counsel requested reasons.

BACKGROUND

2 The action is grounded on perceived deficiencies in health care provided to the Plaintiffs. The Plaintiffs plead various treaties, including Treaty No. 6, a general understanding that the federal government has provided and will continue to provide health care where treaties are silent, section 91(24) of the Constitution Act, 1867 reserving to the Federal Crown matters dealing with Indians, section 35(1) of the Constitution Act, 1982, confirming the existing Aboriginal and Treaty Rights and the general fiduciary obligation of Canada to the First Nations. However, as I have noted, there is also provincial involvement.

3 In 1964, the Federal Crown, through the Medical Services Directorate of the Department of National Health and Welfare agreed, with the Department of Health of the Province of Manitoba, to divide jurisdiction and responsibility for

public health services to various communities, including First Nations communities, in Manitoba, between the Government of Canada and the Province of Manitoba. The Plaintiff First Nations say this delegation is improper. They seek declaratory and mandatory relief with a view to obtaining adequate and continuous health care.

4 The Federal Crown now wishes to bring a third party claim against the Manitoba Crown in order to obtain, if necessary, an indemnity. This brings into play section 50.1(1) of the Federal Court Act:

> 50.1(1) The Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown where the Crown desires to institute a counter-claim or third-party proceedings in respect of which the Court lacks jurisdiction.

The Defendant submits that a stay should be granted, as a matter of course, and indeed, that as the Court has no jurisdiction to hear the matter, a stay is mandatory. This view is on the basis that the obligation at stake is merely health care which, on the basis of section 92(7) of the Constitution Act, 1867, is a provincial matter.

CONSIDERATION

5 The Defendant's line of argument is not set out or even suggested by counsel in the written representations contained in the motion record. Other than try to distinguish Fairford First Nation v. Canada (1996), 96 F.T.R. 172, upheld on appeal (1997) 205 N.R. 380, counsel for the Defendant did not refer to any other case law. This failure to set out meaningful written representations in a motion record, particularly where an applicant's counsel had ample time to consider what representations ought to be made, should be fatal in itself, for arguments not at least touched upon in an applicant's written representations in a motion record, ought neither to be made nor accepted. Indeed, Rule 364(2) makes it mandatory that there be written representations, subject to the requirement that, in certain instances, the motion record shall contain a memorandum of fact and law, instead of merely written representations. I take Rule 364(2)(e), requiring written representations, to mean that there must at least be an outline of the points counsel will raise, for otherwise an ambush may result, wasting everyone's time, a point which I made in Westwood Shipping Lines Inc. v. Geo International Inc., [1998] F.C.J. No. 902, (reasons of 9 June 1998 in action T-359-98). In the present instance there clearly was an ambush. Yet, there is also a substantive answer why a stay ought to be denied.

6 Section 50.1(1) of the Federal Court Act, set out above, makes it clear that a stay is mandatory only where the Federal Court lacks jurisdiction to hear a third party proceeding. In the present instance, the Federal Court of Canada has jurisdiction to hear the proposed third party claim, for the Province of Manitoba has passed the legislation allowed under section 19 of the Federal Court Act, that section providing:

> 19. Inter-governmental disputes - Where the legislature of a province has passed an Act agreeing that the Court, whether referred to in that Act by its present name or by its former name of the Exchequer Court of Canada, has jurisdiction in cases of controversies (a) between Canada and that province, or (b) between that province and any other province or provinces that have passed a like Act, the Court has jurisdiction to determine the controversies and the Trial Division shall deal with any such matter in the first instance.

The jurisdiction granted is a broad one, relating to "controversies". The term controversy "... is broad enough to encompass any kind of legal right, obligation or liability that may exist between governments...": see the reasons of Mr. Justice of Appeal LeDain in The Queen (Canada) v. The Queen (P.E.I.), [1978] 1 F.C. 533 at 583.

7 The Province of Manitoba has, obligingly, passed the Federal Courts Jurisdiction Act, R.S.M. 1987, c. 270, section 1 of which provides for the determination of controversies between Canada and the Province of Manitoba in the Federal

Court:

> Jurisdiction
> 1. The Supreme Court of Canada and the Federal Court of Canada, or the Supreme Court of Canada alone, according to the provisions of the Acts of the Parliament of Canada known as the Supreme Court Act and the Federal Court Act have or has jurisdiction in cases of
> (a) controversies between Canada and the Province of Manitoba;
> (b) controversies between any other province of Canada, that may have passed an Act similar to this Act, and the Province of Manitoba.

8 Counsel for the Plaintiffs, building on this legislation, referred to the Fairford case (supra) in which Mr. Justice Rouleau, in the first instance, dealt with an action in which the Fairford First Nation sued the Attorney General of Canada alleging adverse effects resulting from the construction and operation of a water control structure. As in the present instance, the Attorney General of Canada had applied for a stay of proceedings on the grounds that the Government of Canada wished to commence third party proceedings against the Government of Manitoba, a matter in respect of which the Federal Court would, outside of provincial enabling legislation, have had no jurisdiction. Mr. Justice Rouleau was satisfied that a combination of section 19 of the Federal Court Act and the Manitoba Federal Courts Jurisdiction Act conferred jurisdiction on the Federal Court to entertain third party proceedings (see page 176 of the Trial decision). The Federal Court of Appeal in Fairford agreed that section 19 of the Federal Court Act, together with the Federal Courts Jurisdiction Act of Manitoba gave the Federal Court jurisdiction over the proposed third party claim against the Province of Manitoba. The Federal Court of Appeal went on to raise the question of the need of a substratum of federal law other than section 19:

> Assuming, which we doubt, that s. 19 requires a substratum of federal law other than s. 19 itself, we also agree with the judge that the respondents' action against the appellant will turn primarily on issues of aboriginal title, the Indian Act, and the Crown's fiduciary obligation to aboriginal peoples, all undisputably matters of federal law. [emphasis added] [page 382]

9 The Defendant raises this point by, in effect, maintaining that the Federal Crown has no jurisdiction over those living on First Nation Reserves within a province. Yet counsel for the Defendant cautions against deciding any constitutional issues before hearing from the Province of Manitoba, the Province not yet being a party. For better, or for worse, for the purposes of the present motion, the jurisdiction point can not be decided without coming to some conclusions from a constitutional view point. Should the proposed third party wish to revisit the question, it may have to do so before a judge. I now turn to the issue of jurisdiction over health care to First Nations.

10 Even if the Federal Court of Appeal erred in assuming that section 19 of the Federal Court Act did not require "a substratum of federal law" beyond that contained in section 19 itself, there is federal law to support the claim of the Plaintiffs in this matter. Now this is the point raised which ambushed counsel for the Plaintiffs, for counsel did not come prepared to argue the issue raised by the Defendant in oral argument, the obligation to provide health care to First Nations as between the Federal Crown and the Provincial Crown. Yet there is clearly law which at least counsel for the Defendant ought to have noted and tried to distinguish. Here I begin by referring specifically to the interpretation of what is called the "medicine chest" clause in Treaty No. 6, one of the treaties upon which the Plaintiffs rely. The Treaty provides, in part, that:

> ... a medicine chest shall be kept in the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.

11 The starting point in any consideration of the medicine chest clause in Treaty No. 6 is the unreported 10 April 1935 Exchequer Court of Canada decision of Mr. Justice Angers in Dreaver v. The King. Mr. Justice Angers' view of the medicine chest clause was an extended one:

> ... the treaty stipulates that a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of the Agent. This, in my opinion, means that the Indians were to be provided with all the medicines, drugs or medical supplies which they might need entirely free of charge .... I do not think that the Department [of Indian Affairs] had, under the treaty, the privilege of deciding which medicines, drugs and medical supplies were to be furnished to the Indians gratuitously and which were to be charged to the funds of the band. The treaty makes no distinction; it merely states that a medicine chest shall be kept at the house of the Indian Agent for the use and benefit of the Indians. The clause might unquestionably be more explicit but, as I have said, I take it to mean that all medicines, drugs or medical supplies which might be required by the Indians of the Mistawasis Band were to be supplied to them free of charge.

12 The Dreaver case was referred to in The Queen v. Johnston (1966), 56 D.L.R. (2d) 749, by the Saskatchewan Court of Appeal. The Saskatchewan Court of Appeal there dealt with an Indian, not living on a reserve, who had failed to pay a hospitalization tax levied by the Province. Now the Johnston case stands for the proposition that in 1966 the medicine chest clause did not entitle an Indian, living off a reserve, to claim exemption from the payment of the hospitalization tax. The Court of Appeal went on to question the broad interpretation given to the medicine chest clause by Mr. Justice Angers in the Dreaver case, but that is a gratuitous comment, which was unnecessary to the decision in the Johnston case. However, of importance is the comment by the Court of Appeal in Johnston that treaty provisions must be given a literal meaning and essentially that the Crown only undertook to maintain a medicine chest for the benefit of Indians at the direction of the Indian Agent. In the view of the Court of Appeal, the clause did not contemplate the provision of medical services, including hospital care. In the light of The Queen v. Sparrow, [1990] 1 S.C.R. 1075, a decision in which the Court was able to take into account the Constitution Act of 1982, concluding that aboriginal rights ought to be interpreted in a flexible manner in order to permit their evolution rather than leaving such rights frozen at a past time, this dicta in Johnston is now in all probability wrong.

13 The concept of looking at rights in a contemporary form is touched upon by the Chief Justice at page 1093 and 1099 of the Sparrow decision. Moreover, both treaties and statutes relating to Indian matters should be liberally construed and doubts resolved in favour of Indians: see for example Nowegijick v. The Queen, [1983] 1 S.C.R. 29 at 36:

> ...treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

14 To sum up this aspect, Mr. Justice Angers took a proper approach in his 1935 decision in Dreaver (supra), reading the Treaty No. 6 medicine chest clause in a contemporary manner to mean a supply of all medicines, drugs and medical supplies. Certainly, it is clear that the Saskatchewan Court of Appeal took what is now a wrong approach in its literal and restrictive reading of the medicine chest clause in the 1966 decision in Johnston (supra). In a current context the clause may well require a full range of contemporary medical services. Thus, to the extent that it is required, given the Federal Court of Appeal's view in Fairford First Nation at page 382 (supra) doubting that a substratum of federal law is required, there is that substratum so far as those Plaintiffs who rely on Treaty No. 6 are concerned.

15 The balance of the Plaintiffs say they have long understood that the federal government had assumed

responsibility for Indian health and medicine and that the Defendant, by signing the 1964 Health Services Off-loading Agreement with the Province of Manitoba, recognized its responsibility for the provision of clinics, nursing stations and public health services to First Nations. The Plaintiffs refer to many constitutional documents, ordinances and enactments, including section 91(24) of the Constitution Act, 1867, by which the federal government is responsible for "Indians, and Lands reserved for the Indians".

16 In contrast, the Defendant would like to interpret the federal jurisdiction over Indians and Indian Lands restrictively and, if I understand the submissions correctly, suggests that health services for First Nations fall within the Provincial jurisdiction, under section 92 of the Constitution Act, 1867. Here I would echo the opening comment of Mr. Justice McKeown in Loring v. The Queen, [1998] F.C.J. No. 572, a 29 April 1998 decision in action T-3001-94, that this is an excellent example why a motion should never be heard without a proper motion record, and copies of authorities. In this instance, counsel for the Defendant merely says that Hogg confirms that health services are a provincial matter, presumably referring to Hogg on Constitutional Law of Canada, perhaps the third or fourth edition, published by Carswell. Now Hogg makes the point, at section 18.4 of both editions, referring to Schneider v. The Queen, [1982] 2 S.C.R. 112, that all three judges who wrote reasons "... were at pains to emphasize that "health" was not a single matter assigned by the Constitution exclusively to one level of government." and generally points out that the federal government may enact health legislation where a federal jurisdiction is engaged.

17 I look upon the apparent federal excursion into health relating to First Nations as coming within section 91(24) of the Constitution Act, 1867. This establishes a further substratum of federal law, if such is needed, pursuant to section 19 of the Federal Court Act and the action and proposed third party claim in this instance.

18 Counsel for the Defendant also went on to suggest other areas of want of jurisdiction on the part of the Federal Court. Counsel suggested that Court could not grant mandamus in the present instance, under section 18 of the Federal Court Act as this section applies only to federal boards, commissions and tribunals: this view overlooks section 44 of the Federal Court Act. Similarly the Crown also objects to the Plaintiffs seeking declaratory relief against the Crown in an action, ignoring section 17 of the Federal Court Act and substantial case law which has developed over the years, much of it recently considered and summed up by Mr. Justice Muldoon in Harris v. The Queen, [1998] F.C.J. No. 1831, a 30 December 1998 decision in action T-2407-96.

CONCLUSION

19 Counsel for the Defendant failed to convince me either that the principle in Fairford First Nation does not apply or that this action ought to be stayed. On the contrary, it would appear that the Plaintiffs are indeed in the correct Court and that this Court would have jurisdiction to hear a third party claim by the Federal Crown against the Manitoba Crown by virtue of section 19 of the Federal Court Act and section 1 of the Manitoba Federal Courts Jurisdiction Act. I thus dismissed the Defendant's motion, but allowed an extension of time within which to bring third party proceedings against the Manitoba Crown.

HARGRAVE, PROTHONOTARY

cp/d/scl/qlcvs