# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Haida Nation v. British Columbia (Attorney General),* 2018 BCCA 462

Date: 20181204
Docket: CA45170

Between:

**The Council of the Haida Nation and Peter Lantin, suing on his own behalf and on behalf of all citizens of the Haida Nation**

Appellants
(Plaintiffs)

And

**Her Majesty The Queen in Right of the Province of British Columbia and The Attorney General of Canada**

Respondents
(Defendants)

Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated February 22, 2018 (*The Council of the Haida Nation v. British Columbia)*, 2018 BCSC 277, Vancouver Docket No. L20662).

Counsel for the Appellants: M. Jackson, Q.C.
D. Paterson
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E. Christie

Place and Date of Hearing: Vancouver, British Columbia
October 5, 2018

Place and Date of Judgment: Vancouver, British Columbia
December 4, 2018

**Written Reasons by:**
The Honourable Mr. Justice Hunter

**Concurred in by:**
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Willcock

***Summary:***

*The Haida Nation sought and obtained a severance order in an Aboriginal rights and title case. The severance order divided the issues to be addressed in the two phases differently than had been proposed by the Haida Nation. The Haida Nation appeals the part of the order that specifies which issues are to be resolved in each phase. Held: appeal dismissed. A high degree of deference is owed to a case management judge in determining how a trial should proceed. No error of principle was identified that warrants interference by this Court.*

**Reasons for Judgment of the Honourable Mr. Justice Hunter:**

[1] The Council of the Haida Nation has commenced a lawsuit in which Aboriginal rights and title are claimed over the Haida Gwaii and the surrounding waters. Given the size and complexity of the litigation, the action is being case managed.

[2] The Haida Nation has proposed that certain issues be severed such that the case will be heard in two phases. All parties agree that severance is appropriate and the case management judge has issued a severance order. There is disagreement, however, about the terms of the severance, and specifically the dividing line between what will be decided in the first phase and what will be left for a subsequent phase. The case management judge has drawn the line differently than was proposed by the Haida Nation. The Haida Nation appeals to this Court for a variation of the severance order to be consistent with the original application to the Court.

[3] Decisions as to trial management are accorded significant deference by this Court, both because they are discretionary and because decisions concerning trial management are best made at the trial level. This Court should interfere only when there has been an error in principle in the reasoning of the judge responsible for the management of the trial.

[4] For the reasons that follow, I am of the opinion that no errors of principle have been identified that would justify interference by this Court. Accordingly, I would dismiss the appeal.

## Background

[5] This litigation was commenced in 2002, but placed in abeyance by agreement in December 2008 to permit negotiations to take place. The negotiations were unsuccessful, and the action resumed in 2012.

[6] In 2016, all parties filed amended pleadings, modifying the claims and defences and bringing the pleadings in line with the new *Supreme Court Rules*. The current Notice of Civil Claim was filed April 17, 2017. The central claim is set out in paragraph 1 of Part 2 of the Notice of Civil Claim as follows:

> [1] A declaration that the Haida Nation has Aboriginal Title and Rights to Haida Gwaii, within the meaning of Section 35 of the *Constitution Act*, 1982.

[7] The remaining claims concern damages and compensation for breach of the asserted rights of the Haida Nation.

### *The Severance Application*

[8] On November 30, 2017, the Haida Nation filed an application for an Order to sever the trial of the action into two phases. The first phase was to address "all matters related to the proofs required in respect of the declaration of Aboriginal Title and Rights to Haida Gwaii as sought in paragraph 1 of Part 2 of the Notice of Civil Claim". In addition, the first phase would address infringements of title and rights asserted in respect of five marine species, seven alienated properties and one Timber Licence area (the "representative interests"), justification of infringements, if any, and other defences, and the method for determining remedies including compensation.

[9] The second phase would address all other issues in the litigation, including infringements of title and rights (apart from the representative interests), defences to those infringements, remedies and the division of liability between British Columbia and Canada.

[10] The application was heard by the case management judge, Justice Mayer, who is expected to be the trial judge.

[11] All parties supported a severance of the issues into two phases, and further agreed that issues of Aboriginal title over the entire claim area should be decided in Phase 1. With respect to the Aboriginal rights claim, the Attorney General of Canada supported the proposal of the Haida Nation as to the precise division of the issues. British Columbia, however, proposed that the first phase address issues relating to the claim for Aboriginal rights in respect of the representative interests only, leaving the broader Aboriginal rights claim for the second phase. This was the division of issues accepted by the case management judge.

[12] On this appeal, the Haida Nation asks this Court to alter the division of issues to be addressed in Phase 1 to accord with their original application. British Columbia supports the approach taken by the case management judge, and urges this Court to defer to the judge on how the trial should proceed. Canada takes no position on this appeal.

***The Severance Order***

[13] The case management judge stated that he was "satisfied that the plaintiffs have demonstrated that there is a real likelihood that an order severing this trial into two parts will result in a considerable saving of time and expense" (para. 30). He identified the issue in dispute as "whether issues of Aboriginal rights, beyond those relating to the Representative Interests, should be decided in Phase 1" (para. 34).

[14] The case management judge then set out the basis for British Columbia's position in this way:

> [36] British Columbia contends that Aboriginal rights claims cannot be appropriately characterized in Phase 1 in isolation from an evaluation of the circumstances of alleged interference with those rights and potential justification for that interference, which are intended to be dealt with in Phase 2. For this proposition British Columbia relies upon the observations of the Court of Appeal in *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539.
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> [37] In *Cheslatta*, the Court of Appeal considered an appeal of an order striking out the plaintiff's statement of claim on the basis that it failed to disclose a reasonable cause of action. The plaintiff had alleged an Aboriginal right to fish for a number of species of fish in the Cheslatta Lake area but failed to plead how such rights had been infringed. The Court of Appeal

> upheld the decision of the trial judge. Newbury [J.A.] said as follows at paragraph 19:
>
> > … it is clear that any aboriginal "right to fish" that might be subject of a declaration would not be absolute. Like other rights, such a right may be subject to infringement or restriction by government where such infringement is justified. The point is that the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself.

[15] He then pointed out that the Haida Nation had not set out in its pleading the specific Aboriginal rights for which they seek a declaration, and referenced the methodology for analysis of a rights claim as explained by the Supreme Court of Canada in *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56:

> 1) at the characterization stage, identify the precise nature of the claim based on the pleadings;
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> 2) determine whether the claimant has proved, based on the evidence:
>
> > a) the existence of a pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and
> >
> > b) that this practice was integral to the distinctive pre-contact aboriginal society;
>
> 3) determine whether the claimed modern right has a reasonable degree of continuity with the "integral" pre-contact practice; and
>
> 4) if an aboriginal right to trade commercially is found to exist, the court, when delineating such a right, should have regard to the objectives in the interest of all Canadians and aimed at reconciliation.

[16] He concluded as follows:

> [42] The Aboriginal rights claimed in this action are general in nature and include claimed rights to fish and harvest trees, manage such resources within Claim Area and to trade commercially in fish, other marine resources and forest products. The Claim Area is a large terrestrial area, and includes the waters and subsurface within the terrestrial area, and extends to the territorial seas surrounding Haida Gwaii and beyond to the limits of Canada's Exclusive Economic Zone to the west. In my view, a determination of Aboriginal rights within this area can not be practically disentangled from an evaluation of alleged infringements of those rights including an assessment of the justification for any such alleged infringements. Seeking to do so would make it impractical to carry out the methodology for analysis of a rights claim set out in *Lax Kw'alaams*.
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> [Emphasis added.]

[17] The Haida Nation submits that the underlined passage in para. 42 is erroneous in principle, and more generally that the case management judge erred in limiting considerations of Aboriginal rights to the representative interests.

**Role of the Appellate Court reviewing Severance Orders**

[18] The severance order was made pursuant to Rule 12-5(67), which reads as follows:

> [67] The court may order that one or more questions of fact or law arising in an action be tried and determined before the others.

[19] Review of a severance order made by a case management judge is constrained in two respects. First, a severance order is a discretionary order. It is well settled that this Court will not interfere with a discretionary order unless there has been an error of law or principle or the judge has failed to consider or weigh all the relevant circumstances: *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations),* 2013 BCCA 24 at para. 19.

[20] The approach to be taken in respect of a discretionary decision has been described as “even more deferential where, as here, the order is made by a case management judge”: *Swiss Reinsurance Co. v. Camarin Ltd.*, 2018 BCCA 122 at para. 25.

[21] This point was explained by Donald J.A. in *Robak Industries Ltd. v. Gardner*, 2006 BCCA 395 (in Chambers):

> [11] It is well settled that with appeals against discretionary interlocutory orders, the burden on an applicant is to show an error in principle or a clearly wrong result or a serious injustice: *Yang v. Yang*, 2000 BCCA 486.
>
> [12] The test is even more stringent when the order in question was made by a case management judge. In this regard I refer to the decision of Mr. Justice Goldie in chambers in *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.* [(1992), 75 B.C.L.R. (2nd) 31 (C.A.)] at paras. 9 and 10:
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> > 9. In my view, where one judge has continuing responsibility for pre-trial management for an action such as this, a much stronger case than is present here would have to be made out before this Court would interfere with his discretion. In that respect I note that Mr. Justice Wallace said in *Aylsworth v. Richardson Greenshields of Canada Ltd.* (December 24, 1987), Docs. Vancouver CA008575 and CA008583 (B.C.C.A.), on an application for leave to appeal:

> It has been the general practice of this Court respecting appeals from interlocutory orders to not intervene with such orders or to substitute its view for that of the trial judge, where such orders involve the exercise of the chambers judge's discretion and he has applied appropriate legal principles…
>
> In my view, it would be even less appropriate for this Court to intervene where the discretion exercised by the [pre-trial] judge is concerned with giving directions incidental to the case-management of complex litigation. Without attempting to state an exhaustive list of conditions which would justify this court interfering with an order of a pre-trial judge, it is my opinion that unless such direction finally disposes of a fundamental issue in the lawsuit or contravenes the rules of natural justice this Court would not review the pre-trial judge's exercise of his discretion.
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> 10. In my view, it is clear that if there are changed circumstances or if circumstances which now appear to be fact turn out to be otherwise a further application will, in the normal course, be made to Mr. Justice Lowry and he will be able to apply to that application the experience he has gained well over a year.
>
> [13] This Court's policy of non-intervention derives from the obvious reason that the orderly pre-trial processes in complex cases should be interrupted by this Court as seldom as possible given the power of the case management judge to adjust to evolving circumstances and even to re-visit directions when necessary.
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> [Emphasis added.]

[22] In *Director of Civil Forfeiture v. Lloydsmith*, 2014 BCCA 72, this Court dismissed an appeal from a bifurcation order separating out issues of *Charter* breaches, commenting that "it is for the judge to consider and assess the issue of efficiency, both as to judicial economy and as to the parties' time and effort that will be expended and potentially will be saved by the proposed manner of proceeding" (para. 25). Justice Saunders went on to explain the reluctance of this Court to interfere with the pre-trial assessment of the trial court as to the most efficient means of trying the case:

> [26] Nor, in my view, should we interfere with the aspect of the order permitting consideration of the s. 24 issues at this stage. At the end of the day, it may be established that the procedure adopted was not optimum. However, now, in February 2014, I cannot say this is apparent given the manner in which these *Charter* issues come to court, the nature of the litigation, the high values protected by the *Charter*, and the broad latitude generally given to the trial court to manage its own processes. It seems to me that we should not interfere with either aspect of the bifurcation order.
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> …

> [29] … the correctness of the bifurcation procedures, if correctness is the right term to use, is not beyond our review once the litigation is concluded. As I have said, whether the contemplated procedure is efficient is an assessment that I would not interfere with at this stage.

[23] The effect of these principles is that this Court must approach the review of an order made by a case management judge concerning trial management with a high degree of deference.

## Analysis

[24] The Haida Nation has alleged that the case management judge erred in:

(i) failing to consider and apply the correct test for the proof of Aboriginal rights, conflating constitutionally protected rights with the manner or extent to which these rights may be exercised at a given time;

(ii) fragmenting the Appellants' case about Aboriginal rights, taking from them the opportunity to present their case from their perspective;

(iii) limiting the trial of Aboriginal rights in the first phase of trial to examples unsuitable for that purpose; and

(iv) frustrating the purposes for severance, including economies of time and resources, and promoting the possibility of settlement.

[25] I would summarize the grounds of appeal of the appellants as raising two distinct issues:

(i) whether the case management judge erred in law by failing to apply the correct test for the proof of Aboriginal rights, and

(ii) whether the case management judge erred in principle by limiting consideration of Aboriginal rights in Phase 1 to the representative interests.

### Proof of Aboriginal Rights

[26] In explaining why he was not prepared to accede to the Haida Nation's proposed treatment of the Aboriginal rights claims, the case management judge

stated that “a determination of Aboriginal rights within this area cannot be practically disentangled from an evaluation of alleged infringements of those rights including an assessment of the justification for any such alleged infringements” (para. 42).

[27] The Haida Nation argues that this proposition conflates constitutionally protected rights with the manner or extent to which those rights may be exercised at a given time. These two concepts are characterized by the Haida Nation as “two distinct ways in which the term ‘Aboriginal rights’ is commonly used”. They argue that Aboriginal rights, properly understood, applies to those “practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans”, and say that no part of this definition requires a determination or even a consideration of infringements or justification.

[28] I agree with the Haida Nation that the term “Aboriginal rights” is commonly used in two distinct ways, depending on the context. The Haida Nation describes the distinction as being between “the presently exercisable right” and “the underlying right which existed before there were any Canadians”. The presently exercisable right is one in which issues of infringement and justification have been considered. It is this concept of Aboriginal rights to which the case management judge was referring in the passage criticized by the Haida Nation.

[29] What the Haida Nation refers to as the “underlying right” is the modern-day manifestation of a practice, custom or tradition that was integral to the distinctive culture of the Aboriginal group at the time of contact. This is the concept of Aboriginal rights which is embedded in s. 35 of the *Constitution Act: R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 63. In theory, this can be described independently of issues of infringement and justification. It does not follow, however, that a court should grant a declaration of rights on this basis.

[30] The leading case on the distinction between these two concepts in a juridical context is this Court’s decision in *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539. In *Cheslatta*, the First Nation brought an action for “a declaration that the Cheslatta have an existing aboriginal right to carry out the Cheslatta Fisheries” without alleging that such right was being infringed or seeking any remedial order

(para. 3). This Court affirmed an order striking out the action on the ground that in the absence of claims of infringement, the action had not pleaded a dispute which would be resolved by the declaration sought. This Court held that in the context of civil litigation, Aboriginal rights "cannot be properly defined separately from the limitation of those rights" (para. 18).



[31] The passage from para. 19 of *Cheslatta* cited by the case management judge bears repeating:

> … it is clear that any aboriginal "right to fish" that might be subject of a declaration would not be absolute. Like other rights, such a right may be subject to infringement or restriction by government where such infringement is justified. The point is that the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself.

[32] I do not take Justice Newbury as saying in this passage that an Aboriginal right is incapable of description in broad terms, such as a fishing right, but rather that a Court will not issue a declaration of rights in such broad terms. For a declaration of rights issued by a court of law, any limitation on the right must normally be included as part of what the Court declares to be the right.

[33] In the case at bar, the Haida Nation has sought both a declaration of Aboriginal rights (para. 1 of the Relief Sought) and compensation for interference with the claimed rights (paras. 2 and 3) but seeks to have only the declaration in para. 1 adjudicated in Phase 1. The declaration they seek is to define the rights separately from the limitation of those rights. This approach directly engages the principle in *Cheslatta*.

[34] The Haida Nation has argued that it would be helpful for negotiation purposes following the decision in Phase 1 to have a determination of Aboriginal rights without the necessity of determining whether those rights are exercisable. A similar argument was made in *Cheslatta*, and dismissed by this Court in these terms:

> [11] I have little doubt that having in hand a declaration of the kind sought here would give the plaintiff a distinct tactical advantage in any discussions that may be ongoing between the Cheslatta and the government or other parties who may have conflicting interests with those of the plaintiff. But that tactical advantage does not by itself decide the question of whether a court of

> law would or should entertain an action for a declaration of right in the general terms sought here.

[35] In focusing on the *Cheslatta* judgment, I do not say that it would have been an error in principle for the case management judge to have acceded to the Haida Nation's proposal as to how Phases 1 and 2 would be defined. It would have been open to the case management judge to accept the Haida Nation proposal if he was of the view that it resulted in greater efficiency in resolving the issues the Haida Nation had raised, or otherwise met the goals of severance. But in my view it was also open to him to conclude that deciding the Aboriginal rights claim in the abstract in Phase 1, particularly on the undifferentiated manner in which they have been pleaded, would give rise to concerns similar to those that were raised in *Cheslatta*. I do not consider it to be an error of law or principle for him to have chosen the approach he regarded as more suitable for the trial of this action.

[36] The Haida Nation has also raised the concern that there will be an inevitable overlap in evidence supporting Aboriginal title, which is to be determined in Phase 1, and Aboriginal rights, which as a general claim are to be left to Phase 2. The management order provides that evidence led in Phase 1 can be relied upon in Phase 2. It was open to the case management judge to conclude that such a procedure would be an efficient way of approaching the Aboriginal rights claims, particularly as these claims have been pleaded.

[37] For these reasons, I would not give effect to this ground of appeal.

**Use of "representative interests"**

[38] The error of principle alleged in relation to the representative interests is the decision of the case management judge to limit consideration of Aboriginal rights in Phase 1 to the rights referable to the representative interests. Under the trial management order, a determination will be made as to whether the specific claims referable to the representative interests are the modern-day extension of pre-contact practices but also whether those rights have been infringed and if so, whether the infringement is justified. Remedial issues in relation to these representative examples will also be addressed.

[39] The appellants submit that the purpose of identifying the representative interests was not to confine consideration of Aboriginal rights to those interests, but to use those interests to address in a focused way the principles pertinent to justification and remedies, including the assessment of compensation.

[40] The use of the representative interests as envisaged by the Haida Nation was explained in their factum in this way:

> 54. The Haida proposed consideration of these limited representative examples in the first part of the trial to aid the negotiation of a reconciliation agreement. The rationale was that having a determination of title and rights entitlement together with the finding of infringements, justification and remedies with respect to the representative examples, including the applicable principles for compensation across representative examples, would assist the parties to reach agreement and obviate the need for a second phase of the trial, or at least minimize its extent.
>
> [55] In the present severance decision, the representative examples will be used for a purpose to which they are not suited. …

[41] The distinction as I understand it may be expressed this way. The Haida Nation intended that their entire case on Aboriginal rights be determined in Phase 1, with the exception of issues relating to infringement, justification and remedies. However, to assist in negotiations following a decision in Phase 1, the Haida Nation proposed that the rights claims in relation to the representative interests would be resolved fully, including issues relating to infringement, justification and remedies. Under the current severance order, the only rights claims that would be resolved would be the rights claims in relation to the representative interests, but those claims would be considered fully. As a consequence, no declaration in relation to Aboriginal rights would be made in Phase 1, other than in relation to the representative interests.

[42] The question for this Court is whether it was open to the case management judge to divide the issues in that way, and in particular, whether the use of the representative examples in this way was inappropriate.

[43] The representative examples selected by the Haida Nation related to three major areas of potential interests: forestry, fisheries and land alienation. In each case, reports were filed by the Haida Nation explaining the nature of the

representative examples. A brief reference to those reports will assist in assessing whether the proposed use of these representative interests is inappropriate or unfair.

***Forestry Interests***

[44] The purpose of the report concerning forestry interests was explained by its author in this way (p. 5-6):

> I have been asked to prepare a report for the Council of the Haida Nation in the Haida Title case suggesting a discrete area of Haida Gwaii forests which might serve as a model for examining impacts on these forests over the years. … The purpose of the selection is to be able, in microcosm, to identify and quantity the damages sustained by the Haida in relation to forestry in Haida Gwaii. Valuation of the losses in the selected areas should provide a mechanism for valuing the losses throughout the territory. …
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> …
>
> While this study focuses on a small part of the Islands, the nature of the issues can be scaled up to fairly represent impacts across all of Haida Gwaii.
>
> [Emphasis added.]

[45] The Haida Nation has expressed a concern that limiting consideration of forestry rights to this one area marks a return to a "small spots" theory of Aboriginal rights, but the selection of the area appears to have been done in such a way that the results "can be scaled up to fairly represent impacts across all of Haida Gwaii". The purpose, for example, of identifying damages in relation to the selected area is not to fix damages for infringement of any forestry rights in a particular area, but "to identify and quantify the damages sustained by the Haida Nation in relation to forestry in Haida Gwaii" (emphasis added).

[46] That being so, in my view it was open to the case management judge to conclude that it would be useful to determine Haida forestry rights in the selected area for purposes of subsequent negotiation following Phase 1, and for subsequent determination of Aboriginal rights in the forest sector throughout the territory should that be necessary after Phase 1.

***Fisheries Interests***

[47] The Haida Nation, with Canada's concurrence, selected five species of fish as representative of their interest in the Haida Gwaii fishery. Again, the report explained the selection of the species in terms of the larger fishery (p. 29):

> This report is prepared in response to a request to identify two case studies that might serve as models to examine impacts of management decisions on marine species health, fisheries sustainability, and Haida culture and economy. …
>
> The purpose of the selection of these case studies is to be able, in microcosm, to identify and quantify damages sustained by the Haida Nation in relation to fisheries in Haida Gwaii waters. …
>
> [Emphasis added.]

[48] For similar reasons, it was open to the case management judge to conclude that it would be useful to determine Haida fishing rights in relation to the selected species, together with issues of infringement, justification and remedies, even if the full range of fishing rights were left to Phase 2.

***Land Alienations***

[49] The third representative example of land alienations is arguably more related to Aboriginal title than Aboriginal rights. The report that was before the case management judge does little more than identify the representative example, identify its use and specify its current assessed value. This appears to be an analysis that could readily be scaled up if necessary.

[50] I accept that the proposed use of the three representative examples is not precisely the use intended by the Haida Nation, but it seems to me that on the evidence before the case management judge, it was open to him to conclude that it would meet the objectives of the severance order to have a full determination of Aboriginal rights in relation to these limited areas in Phase 1, notwithstanding that the entire Aboriginal rights claim was left to Phase 2. It is reasonable to anticipate that resolving the issues raised by the representative interests may assist in the process of addressing the full range of Aboriginal rights claimed.

## Conclusion

[51] It is well known that Aboriginal rights cases impose significant demands in time and resources on a trial court. Previous experience has demonstrated that there is no one correct way of hearing the evidence and deciding the issues in an efficient manner. The proposal to issue a severance order so that issues of fact and law could be addressed in two phases was supported by all, and is clearly a sensible way to handle the vast amount of evidence that may be expected in this case. The precise manner in which the phases are to be designed is the kind of determination best made at the trial level. Absent error in principle, this Court should defer to the trial court on such matters.

[52] For the reasons given in this judgment, I am of the view that no error of law or principle has been established to warrant interference by this Court. It was open to the case management judge to make the order he made as to the conduct of the trial. He will be in a position to make any necessary adjustments to the trial plan as pre-trial preparation continues.

[53] I would dismiss this appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Willcock"