CITATION: Ontario Federation of Anglers and Hunters v. Ontario, 2015 ONSC 7969
COURT FILE NO.: 318/15
DATE: 20151218

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ONTARIO FEDERATION OF ANGLERS AND HUNTERS, Applicant

AND:

ONTARIO (MINISTER OF NATURAL RESOURCES AND FORESTRY), Respondent

THE MISSISAUGAS OF ALDERVILLE FIRST NATION, THE BEAUSOLEIL FIRST NATION, THE CHIPPEWAS OF GEORGINA ISLAND FIRST NATION, THE MNJIKANING FIRST NATION, THE CURVE LAKE FIRST NATION, THE HIAWATHA FIRST NATION AND THE MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION ("WILLIAMS TREATIES FIRST NATIONS"), Moving Parties

BEFORE: MOLLOY J.

COUNSEL: *William B. Henderson and Ceyda Turan*, for the Moving Parties

Tim Danson and Marjan Delavar, for the Applicant (Responding Party)

Lisa LaHorey and Kristina Gill, for Ontario (Respondent (Responding Party)

HEARD: December 16, 2015 in Toronto

ENDORSEMENT

Introduction

[1] The Williams Treaties First Nations ("First Nations") apply under Rule 5 of the *Rules of Civil Procedure* for an Order adding them as party respondents in this judicial review proceeding, with all the same rights and responsibilities as if they had been named as respondents in the first instance. Alternatively, they seek leave to intervene in the proceeding pursuant to Rule 13.01(1), with the full rights of a party.

[2] The Applicant Ontario Federation of Anglers and Hunters ("OFAH") is a charitable non-profit organization with considerable interest and expertise in issues of conservation particularly in relation to fish and wildlife. OFAH submitted that the First Nations motion should be dismissed in its entirety and that they should not be added as either a party respondent or intervenor. Alternatively, OFAH argued that if the First Nations are permitted to intervene, their role should be restricted to filing written argument and making submissions on the ultimate

hearing. In particular, OFAH objects to the First Nations being permitted to bring any motions, file any evidence, or add any issues to the proceeding.

[3] The Respondent Ontario consents to the First Nations being added as party respondents, with all the attendant rights.

[4] At the conclusion of the argument, I ruled that the First Nations met the requirements to be added as respondents to this proceeding and stated that I would deliver brief written reasons for this decision in due course. In my view, the within proceeding has a direct and substantial impact on the rights of the First Nations. The court cannot effectively and completely adjudicate on the issues raised without the involvement of the First Nations. My reasons for this conclusion are set out below.

Background

[5] For the past 23 years the First Nations have been involved in litigation ("the Alderville action") in the Federal Court against the Governments of Canada and Ontario in respect of rights flowing from two 1923 Treaties covering large areas of Ontario. In particular, at issue in that action is the hunting, fishing, trapping and gathering rights of the First Nations signatories to those Treaties. The trial of the Alderville action began in May 2012 and is expected to continue into April, 2017.

[6] Initially, the Alderville action was focused on any monetary compensation to which the First Nations involved might be entitled. Until recently, both Canada and Ontario took the position that in the 1923 Treaties the First Nations had surrendered all of their pre-existing treaty rights to hunt, fish, trap and gather in the subject lands. However, as the litigation progressed, Ontario came to the conclusion that this position might not be historically correct. Accordingly, Ontario changed its position and amended its pleading to state that the government "did not seek a surrender of all of the Plaintiffs' pre-existing treaty rights to hunt, fish, trap and gather in the lands … and the Plaintiffs did not surrender any such pre-existing treaty rights". Canada also amended its pleading in a similar manner. Those amendments were made in September 2014 and June 2015.

[7] Consistent with this shift in position, Ontario issued an Interim Enforcement Policy ("IEP") applying to the lands covered by the 1923 Williams Treaties until the issues involved in the Alderville action are resolved. The effect of the IEP is to permit the First Nations to hunt and fish for food, social and ceremonial purposes in their traditional territories, subject to some limited exceptions (*e.g.* hunting or fishing in an unsafe manner, commercial harvesting without a license, and hunting on private lands would not be protected from enforcement proceedings.)

[8] OFAH commenced this judicial review proceeding in September 2015 seeking declarations that the IEP: was made without jurisdiction and is void; is invalid as it relates to the 1923 Williams Treaties lands; is contrary to binding Supreme Court of Canada rulings on the 1923 Williams Treaties; and violates s. 15 of the *Canadian Charter of Rights and Freedoms.* OFAH also seeks a declaration that the Minister of Natural Resources and Forestry has a legal

duty to enforce various pieces of legislation and regulations governing conservation, hunting and fishing that would otherwise apply to the First Nations but for the IEP.

Joinder as a Necessary Party

[9] Rule 5.03(1) provides for the mandatory joinder of every person "whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding." Where a necessary party has not been named, the court may order that person be added as a party under Rule 5.03(4).

[10] In determining whether a person is a "necessary party" the court must consider whether they are likely to be affected or prejudiced by the order being sought. If the order sought will determine the rights of a person who is not a party, that person is entitled to be added so that his voice will be heard before his rights are determined.[1]

[11] One of the main purposes underlying these Rules is to ensure that all parties are before the court when an order is made affecting their rights. This will avoid a multiplicity of proceedings and the risk of inconsistent results.[2]

[12] The OFAH maintains that the First Nations surrendered all of their hunting, fishing and harvesting rights under the 1923 Treaties. In this judicial review proceeding OFAH seeks a declaration that, on the authority of the Supreme Court of Canada decision in *R v. Howard*[3] and subsequent cases that have applied it, the signatories to the 1923 Williams Treaties surrendered their treaty rights to hunt and fish and are subject to the same laws as non-aboriginal users. In other words, the OFAH seeks a determination of the rights of the First Nations flowing from the Williams Treaties to which they were parties, but OFAH was not. Such a declaration would directly affect the First Nations. Further, it is the same issue currently being litigated in the Federal Court in the Alderville action, to which Ontario and the First Nations are parties, but OFAH is not. There is a significant risk of inconsistent findings, making it even more important that the First Nations be a party to this judicial review proceeding.

[13] Although the OFAH maintains that the result it seeks is mandated by binding Supreme Court of Canada precedent, that remains to be seen. I recognize that in *Howard* the Supreme Court of Canada upheld the conviction of a First Nations member for fishing off the reserve and catching a few pickerel fish out of season, and in the course of that decision held that all fishing rights had been surrendered in the 1923 Williams Treaties. However, legal precedents may

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[1] *School of Dance (Ottawa) Pre-Professional Programme Inc. v. Crichton Cultural Community Centre*, [2006] O.J. No. 5224, at para. 9; *Amon v. Raphael Tuck Sons Ltd.*, [1956] 1 Q.B. 537 (Eng.), at p. 380; *Stevens v. Canada (Commission of Inquiry)*, [1998] 4 F.C. 125 (C.A.), at para. 20.

[2] *Meaford (Municipality) v. Grist*, 2010 ONSC 2288, at paras. 32-33; *3714683 Canada Inc. v. Parry Sound (Town)*, [2004] O.T.C. 1085 (S.C.), at para. 16.

[3] *R v. Howard*, [1994] 2 S.C.R. 299; *Hiawatha Indian Band v. Ontario (Minister of Environment)* (2007), 221 O.A.C. 113 (Ont. Div. Ct.).

change as the law and our societal understandings evolve. Sometimes, a different evidentiary record may result in changing the law, as happened recently, for example, on the issue of assisted suicide.[4] If a legal precedent that so fundamentally affects the rights of the First Nations involved is to be reconsidered in this case, it is important that the First Nations have the full opportunity to be involved, not merely to make argument, but as full parties.

[14] In this judicial review proceeding, the OFAH seeks a declaration that the IEP is void, invalid, and of no force and effect. The IEP grants rights to the First Nations and to nobody else. If those rights are to be taken away, the First Nations must be before the court.

[15] In this judicial review proceeding, the OFAH seeks declaration that Ontario should prosecute First Nations people who are hunting and fishing with the protection of the IEP. It is hard to imagine relief that more directly affects the rights of the First Nations. Indeed, they are the ones most directly affected by the relief sought.

[16] Likewise, in this judicial review proceeding, the OFAH seeks a declaration that the IEP is contrary to the equality rights guaranteed under the *Charter*. The OFAH maintains that the IEP discriminates on the basis of race, presumably because non-aboriginal people are subject to hunting and fishing restrictions from which the First Nations are exempt by virtue of the IEP. In its Notice of Application, the OFAH states:

> (nn) The race-based distinction created by the IEP creates a disadvantage by perpetuating both prejudice and stereotyping against the claimant group. The stereotyping results in a perpetuation of the prejudice and disadvantage, particularly in that it uses an impermissible dispensation power to surrender the rule of law to an arbitrary political agenda.
>
> (oo) The IEP imposes burdens and denies benefits in a manner that has the effect of reinforcing, perpetuating and exacerbating the claimant's disadvantage.
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> [Emphasis added.]

[17] In this judicial review proceeding, the OFAH delivered a Notice of Constitutional Question. Included in that document are the following assertions:

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[4] In *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, the Supreme Court found that s. 241(b) of the *Criminal Code* that prohibits giving assistance to commit suicide is not unconstitutional for violating ss. 7, 12, and 15(1) of the *Charter*, as was argued by the terminally ill appellant. That decision was recently distinguished in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, where the Supreme Court held that the trial judge was entitled to revisit the *Rodriguez* decision as lower courts can reconsider higher court rulings where either a new legal issue was raised or "there was a change in the circumstances or evidence that fundamentally shifted the parameters of the debate."

> 39. The IEP in no way enhances substantive equality of the [First Nations] nor is there a correlation between the IEP and any purported or perceived disadvantage allegedly suffered by the [First Nations] following the signing of the said Treaties in 1923.
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> …
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> 41. On the specific facts herein, the IEP, as applied to the [First Nations], cannot be justified under s. 15(2) of the *Charter* as an affirmative action program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups. There is no credible ameliorative purpose. To the contrary, it offends the rule of law.
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> [Emphasis added.]

[18] These are issues fundamental to the First Nations as a people. It would be highly inappropriate, perhaps even impossible, to make such findings, or even entertain such arguments, in the absence of the people against whom they are directed. This entire proceeding is directed towards obtaining rulings that are contrary to the rights asserted by the First Nations. Those challenged rights include hunting, fishing and harvesting rights, but also include even more fundamental rights under the *Charter*. Such adjudications should never be made in the absence of the persons whose rights are at stake. Even without a request by the First Nations to be added as parties, I would expect a court to be reluctant (to say the least) to make such pronouncements in their absence. In my opinion, the First Nations are clearly necessary and proper parties to this proceeding.

Intervenor Status Under Rule 13.01

[19] Although I have found that the First Nations meet the test to be added as party respondents under Rule 5.03, I would also have found they meet the test under Rule 13.01(1) to be added as an intervenor. There are two types of intervenors contemplated under Rule 13: a public interest or "friend of the court" intervenor under Rule 13.02; and an intervenor with an interest in the litigation who is added as a party under Rule 13.01.

[20] Rule 13.01 states:

> 13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
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> (a) an interest in the subject matter of the proceeding;
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> (b) that the person may be adversely affected by a judgment in the proceeding; or

> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
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> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

[21] In order to be granted intervenor status as a party under this Rule, it is only necessary to meet one of the three criteria.[5] The First Nations meet all of them. First, they clearly have an "interest" in the subject matter. It directly affects their rights. Indeed, their rights are the target of the proceeding. Second, they may be adversely affected by the outcome of the proceeding which could result in them losing rights to hunt and fish under the IEP, or in being prosecuted for hunting and fishing although covered by the IEP. Third, the issues raised in the proceeding between OFAH and Ontario have issues of fact and law in common with the issues in the Alderville action to which the First Nations and Ontario are parties.

[22] I do not consider that adding the First Nations would unduly delay the proceeding; it is at its very early stages. Neither would the involvement of the First Nations prejudice the determination of the rights of any party.

[23] If I had made the First Nations a party under Rule 13.01, I would have a discretion under 13.01(2) as to the terms of their involvement. Given the extent to which the subject matter of the proceeding directly impinges on their rights, I would have awarded them all the same rights as a party, similar to the status given to East Durham Wind in *Durham Area Citizens*.[6] In my view, this is the only effective way to respect the rights of the First Nations and ensure they are fully protected in the proceeding.

Arguments of the OFAH

[24] In the argument of this motion, the OFAH advanced three main points. First, OFAH argued that the First Nations had failed to demonstrate that they added anything to the proceeding that was not already adequately covered by Ontario. Second, OFAH took exception to the First Nations being added as an intervenor in this proceeding, given the fact that the First Nations strongly and successfully opposed a motion by OFAH to be added as an intervenor in the Alderville action in the Federal Court. Third, OFAH most strenuously objected to the First

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[5] *Durham Area Citizens for Endangered Species v. Ontario (Minister of Natural Resources and Forestry)*, 2014 ONSC 7167, 330 O.A.C. 61, at paras. 32-33.
[6] *Supra*, Note 5.

Nations being able to bring motions in the proceeding, pointing in particular to the fact that the First Nations had already indicated their intention to bring a motion to dismiss this proceeding for the delay in having commenced it.

[25] With respect to the first issue, this relates mainly to the kind of intervenor who is added as a friend of the court to assist the court by way of argument. That is the situation contemplated by Rule 13.02. That is not this case. The First Nations seek to be added as necessary parties, or at the very least as a party intervenor under Rule 13.01. In any event, I cannot accept the argument that the First Nations do not bring a different perspective from the government, nor that they have nothing to add to the proceeding. Indeed, I find it astounding that a party would even seriously advance the argument that the government can and should speak for and represent the interests of the First Nations, particularly on issues that are raised here. It must also be remembered that the First Nations and Ontario are actually opposing parties in the Alderville action in which some of the same issues are raised.

[26] I understand the frustration of the OFAH in having lost its bid for intervenor status in the Alderville action, only to have the First Nations seek to be added to this proceeding. However, at the time OFAH was seeking intervenor status in the Federal Court, the pleadings had not yet been amended to reflect the change in position by the government. Therefore, there was considerably less force to the basis of OFAH's request to intervene, which was, at least in part, to argue that these issues had been conclusively determined by the Supreme Court in *Howard*. Subsequently, positions changed and the pleadings were amended. It is now clear that hunting and fishing rights are at issue in the Alderville action. If OFAH has a remedy flowing from that change in position, it lies with the Federal Court. It has no bearing on whether or not it is appropriate for the First Nations to be a party before the proceeding in this Court.

[27] The addition of the First Nations as respondents to this proceeding brings with it all the rights and responsibilities of a party, including the right to file evidence and to bring interlocutory motions. However, even as intervenors I would have extended such rights to the First Nations given the extent to which the proceeding affects their rights.

Costs

[28] As full parties, the First Nations will be liable for costs and may be entitled to costs, all in the discretion of the court. In addition, the First Nations seek costs of this motion to be added as a party on a substantial indemnity basis. Mr. Henderson, on behalf of the First Nations, provided a Bill of Costs for the motion in which his claim for fees was: $17,000 on a partial indemnity basis; $26,000 on a substantial indemnity basis; and $29,000 on a full indemnity basis. He also filed material demonstrating that before commencing the motion, he sought the OFAH's consent to be added as a party, which was refused. Further, he gave notice to the OFAH that that he would be seeking full indemnity for any costs incurred if the motion was contested. In the alternative, Mr. Henderson submitted that, at a minimum, an appropriate award would be $7500 all in.

[29] Mr. Danson, on behalf of OFAH submits that there should be no order as to costs, or alternatively that costs should be left to the Panel hearing the application on its merits. He argued that the First Nations obtained costs in the Federal Court when the OFAH motion to intervene was dismissed, based on a position that was later abandoned, and that it would therefore be unfair for the First Nations to receive costs here. He also submitted that the hours spent and costs claimed were excessive for an intervention motion. He stated that costs of between $5000 and $7500 were more the norm in cases of this nature.

[30] Any costs awards made in the Federal Court are wholly irrelevant to the appropriate costs award in this Court.

[31] The First Nations have been wholly successful on this motion and are entitled to their costs. Their status as proper parties is irrelevant to whether they are successful in the proceeding as a whole. There is no reason for costs to await the disposition of the judicial review proceeding.

[32] Mr. Danson submitted that Mr. Henderson's claim for costs, even on a partial indemnity basis, was excessive. However, when asked if he had prepared his own Bill of Costs, Mr. Danson produced one he had prepared in the event he had been successful on the motion. In that bill he claimed $15,000 as costs for this motion on a partial indemnity basis. That being the case, it cannot be said that costs of $17,000 for the moving party would not have been within the reasonable expectation of the responding party.

[33] This was not an intervention motion; it was a motion to be added as a necessary and proper party. I agree with Mr. Henderson's submission that it is "plain and obvious" that the First Nations are proper parties. They should have been added as parties in the first instance, or at the very least, the OFAH should have consented to their being added when given that opportunity. From the outset, the First Nations agreed they would be liable for costs if unsuccessful. The OFAH were on notice that full indemnity costs were being sought, but assumed that risk by vigorously resisting the motion. I recognize that an award of costs on a substantial indemnity basis is unusual on a motion of this nature. This is not an appropriate case for full indemnity costs. However, in all these circumstances, I find that substantial indemnity costs are warranted. This motion should not have been necessary.

[34] In my view, the amounts claimed are appropriate and the time spent is understandable, given what is at stake. I award costs to the First Nations payable by the OFAH in the amount of $26,000.00, payable forthwith. Ontario did not seek costs and none were sought against it.

MOLLOY J.

Date: December 18, 2015