IN THE SUPREME COURT OF YUKON

Citation: *Ross River Dena Council* v. *The Attorney General of Canada,* 2008 YKSC 45

Date: 20080603
S.C. No. 06-A0092
Registry: Whitehorse

Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

THE ATTORNEY GENERAL OF CANADA

Defendant

-And-

Between

ROSS RIVER DENA COUNCIL

Plaintiff

And

THE ATTORNEY GENERAL OF CANADA
On behalf of and as the representative for
Her Majesty the Queen in right of Canada

Defendant

Before: Mr. Justice L. F. Gower

Appearances:

Stephen L. Walsh	Counsel for the Plaintiffs
Suzanne M. Duncan and Anne McConville	Counsel for the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Ross River Dena Council ("RRDC") under Rule 34(1) of the *Rules of Court* seeking leave to set down the following point of law for determination:

> "Having regard to the Defendant Crown's ["Canada's"] pleadings in paragraph 20(a) of its Amended Statement of Defence, do the terms and conditions of the *Rupert's Land and North-Western Territory Order* of June 23, 1870 (the "*1870 Order*") have force as constitutional provisions capable of being enforced by [an] order of this Court?"

[2] Such applications are dealt with in two phases: the first is to seek leave to have the point of law set down for determination; and the second is to actually argue and decide the point: see *Fink* v. *British Columbia (Public Guardian and Trustee)*, 2002 BCSC 438. The factors to be considered the first phase of the application are set out in the commonly cited case of *Alcan Smelters and Chemicals Ltd.* v. *Canadian Assn. of Smelter and Allied Workers, Local No. 1,* [1977] B.C.J. No. 35 (S.C.), at para. 5:

> "The following principles must be observed in considering an application under Rule 34:
>
> 1. The point of law to be decided must be raised and clearly defined in the pleadings: see Dutton-Williams Brothers Limited v. Inland Natural Gas Co. Limited et al. (1960), 31 W.W.R. 575 (B.C.C.A.);
>
> 2. The rule is appropriate only to cases where, assuming allegations in a pleading of an opposite party are true, a question arises as to whether such allegations raise and support a claim or a defence in law: see Reichl and Weisz v. Rutherford-McRae Ltd. et al. (1964), 47 W.W.R. (N.S.) 227 at 231.

> 3. The facts relating to the point of law must not be in dispute and the point of law must be capable of being resolved without hearing evidence: see Dutton-Williams Brothers Limited v. Inland Natural Gas Co. Limited (supra); Banks Industrial Supply Ltd. v. Ritchie Brothers Auctioneers Ltd. et al., [1972] 1 W.W.R. 231; and Armstrong v. Levine (1964), 47 W.W.R. 635 at 636-7.
>
> 4. Whether a point of law ought to be decided before the trial of the action is discretionary, and it must appear that the determination of the question will be decisive of the litigation or a substantial issue raised in it: see Banks Industrial Supply Ltd. v. Ritchie Brothers Auctioneers Ltd. (supra).
>
> 5. In deciding whether the question is one which ought to be determined before trial the Court will consider whether the effect of such a decision will immeasurably shorten the trial, or result in a substantial saving of costs: see Dutton-Williams Brothers Limited v. Inland Natural Gas Co. Limited (1959), 30 W.W.R. 421 at 425-6."

[3] In *Can-Dive Services Ltd*. v. *Pacific Coast Energy Corp.* [1993] B.C.J. No. 626, the British Columbia Court of Appeal referred to *Alcan Smelters* as the "leading authority" in applications under Rule 34(1). The Court also confirmed, at para. 23, that "A point of law may only be decided on undisputed facts," and further, that "the Chambers judge has a discretion not to decide such a point unless it will be decisive of the litigation or of a substantial issue."

[4] Canada opposes the application and submits that RRDC fails on each of the points in *Alcan Smelters*.

OBJECTION TO CLEWLEY AFFIDAVIT

[5] A preliminary issue arose at the outset of the hearing regarding the admissibility of a responsive affidavit filed by Canada a few days prior. The affidavit is sworn by Roger Clewley and is 23 pages and 65 paragraphs long. Mr. Clewley identifies himself as an "experienced researcher" on contract with the Department of Indian Affairs and

Northern Development, Litigation Management and Resolution Branch. He further says that he has “degrees in History and Geography from the University of Victoria” and has “undertaken research for a range of clients since 1997.” He deposes that he has made his affidavit “in support of Canada’s opposition to the motion” and says that the affidavit “provides a brief chronology of the events that marked the evolution of negotiation process that led to the enactment” of the *1870 Order*. He says it also sets out “examples the kinds of primary and secondary sources that speak to that negotiation process, and indicates how these kinds of sources provide a factual basis for researchers to present to their clients so that an evaluation can be made on the assertions and conclusions these sources provide.” At para. 6, Mr. Clewley lists what he refers to as the “standard texts and publications” which have informed his chronological outline.

[6] Counsel for RRDC objected to this Affidavit and asked that it be entirely struck from the record, for the following reasons:

1. It purports to express expert opinion evidence from a deponent who has not yet been qualified as an expert in the area.
2. Much of the affidavit’s contents are the personal opinions and argument of Mr. Clewley.
3. Much of the information in the affidavit is based on information and belief without identifying the source of that belief or that the belief is in the truth of the information.

[7] Canada’s counsel responded to these objections by stating that the purpose of the affidavit was to provide some structure and context to the issues on this “leave” application, which in itself is only the first stage of an overall interlocutory application under Rule 34. Counsel further says that the pleadings do not currently set out

sufficient facts to allow this Court “to know what it needs to know” in order to decide the issue. She said that there was no intention to have Mr. Clewley qualified as an expert or to have him give opinion evidence. Rather, counsel filed the affidavit to underscore her argument that, in order to decide whether to set the point of law down for determination, this Court will require evidence. Finally, Canada’s counsel says that she is not seeking to enter the documents referred to by Mr. Clewley for the truth of their contents, but rather to simply establish that they exist and are relevant to the point of law at issue.

[8] After hearing these initial submissions, I indicated that I would rule on the admissibility or weight to be attached to this affidavit, or portions thereof, in my reasons for judgment on the application.

[9] Rule 51(10) of the *Rules of Court* states:

> “(10) An affidavit may state only what a deponent would be permitted to state in evidence at a trial, except that, if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made
>
> (a) in respect of an application for an interlocutory order, or
>
> (b) by leave of the court under Rule 40 (52) (a) or 52 (8) (e).”

The sub-rule permits hearsay evidence, providing the source is given and identified: *Trus Joist (Western) Ltd.* v. *United Brotherhood of Carpenters and Joiners of America, Local 1598*, [1982] B.C.J. No. 87 (S.C.) at para. 5; *Meier* v. *Canadian Broadcasting Corp.*, [1981] B.C.J. No. 182 (S.C.) at para. 4. In this case, Mr. Clewley has identified the various texts and primary and secondary sources which he refers to.

[10] However, my concern is with Mr. Clewley's expressions of opinion and argumentative statements throughout the affidavit. Indeed, in many instances, he appears to be holding himself out as an expert in making these statements.

[11] In *Chamberlain* v. *the School District No. 36 (Surrey)*, [1998] B.C.J. No. 2923 (S.C.), Saunders J. stated, at para. 28:

> "***In general, opinion evidence is not admissible except when authored by an expert witness. Nor is it proper to submit argument in the guise of evidence.*** Personal opinions or a deponent's reactions to events generally should not be included in affidavits; argument on issues from deponents serves only to increase the depth of the court file and to confuse the fact finding exercise. To the extent that objection is taken to inclusion of argument or opinion from persons not qualified as expert, the objection is valid and those portions of affidavits have been disregarded." (my emphasis)

[12] In *Johnson* v. *Couture,* 2002 BCSC 1804, Master Doolan held, at paras. 13 – 16, that the courts have the power to strike or ignore paragraphs in affidavits which offend the basic rule that a deponent should state facts only. However, he also stated that courts will accept opinion evidence given in affidavit form, "providing of course that the expertise of the deponent is set out together with the foundation for or basis of the opinion."

[13] In *Ulrich* v. *Ulrich*, 2004 BCSC 95, Bouck J. commented, at para. 40, that deponents often include inadmissible personal opinions in affidavits. He cited *Creber* v. *Franklin*, [1993] B.C.J. No. 890 (S.C.), where Spencer J. stated that deponents should not add their descriptive opinions of the facts deposed to and that affidavits should not be "larded with adjectives."

[14] With these authorities in mind, I find that the vast majority of Mr. Clewley's affidavit is either argumentative or an expression of his personal opinions about the negotiation process that led to the *1870 Order* and the various scholars and authors who have written about aspects of those negotiations. Further, to the extent that Mr. Clewley purports to express expert opinions on these matters, Canada has failed to qualify him as an expert and Mr. Clewley has not, in many instances, stated the foundation for these opinions. I will cite a few examples to make my point (the emphasis in each is mine):

- para. 8 – "To address the ***ruinous competition*** between the HBC and the Northwestern Company…."
- para. 9 – "The renewal re – authorized the HBC's administration (under Crown authority) of Crown land in British North America that was defined only by what Crown lands were not included in it: not land in the Crown colonies (Canada etc.), not land in the United States or any foreign country, and ***probably*** not land in Rupert's land though that territory is not explicitly mentioned…. The License ***probably*** can be taken to apply to the lands of the future Yukon Territory."
- para. 16 – "… In the communication accompanying the proposals the HBC was made aware by the Imperial Government that court litigation could be used to challenge their claims to those parts of British North America they held and that it was ***probably better*** for the HBC to reach an accommodation with the Government of Canada. This proposal thereafter was accepted by the negotiators of Canada and HBC in March 1869. ***It does not appear that the aboriginal interest played any significant role during the negotiations up to this point.***
- para. 44 – "The evolution of the literature on the Rupert's Land Order can best be seen as having evolved in ***two distinct categories of written works*****.** The first group….consists of works that examine the historical evolution Confederation, and present in greater or less detail the process by which the RLO lands entered Canada. ***Rarely does this body of work examine the aboriginal interest as impacted by the expansion of Canada to the***

> ***West in more than a cursory manner. Principally, if considered at all, they portray that if there were any obligations put upon Canada by the RLO, they would have been met by the treaty process carried out after 1870****…"*

- para. 53 – "This addition of A.S. Morton's work, originally published in 1939, remains ***the most comprehensive history*** of the RLO lands up to Confederation. While offering *a* ***useful analysis*** of the transfer arrangements, Morton's account also places the transfer within the context of the interests held by the parties to the negotiations.…"
- para. 62 – "…**A*****s an experienced researcher, I can note that none of the authors reviewed here has laid down a particularly strong foundation of historically documented facts that would substantiate the conclusions they have asserted in regards to the aboriginal interest in the terms and conditions of the Rupert's Land – and the North-Western Territory Order****…."*

[15] Unfortunately, the affidavit is also replete with adjectives and qualifiers which underscore Mr. Clewley's various arguments and opinions. A few additional examples are as follows:

- "The most important communications to this effect"
- "There was considerable effort placed in"
- "the massive amount of"
- "but seemingly geographically undefined"
- "the active pursuit of"
- "The growing movement"
- "a significant public policy objective"
- "the key parties to the negotiation process were"
- "became an active policy objective of"
- "Foremost amongst these was"
- "the key constitutional legislation that"
- "An extensive selection of"
- "there is a great deal of documentation that"
- "that dealt with aboriginal interests in some measure"
- "considerable documentary evidence to prove"

- “one important realization that”

[16] By and large, I find the affidavit offends the general rule against the inclusion of opinion and argument in affidavits. In the result, rather than attempting to go through and strike the problematic portions of the affidavit, I elect to give it no weight on this application.

ANALYSIS

Background to the point of law

[17] The facts important to this application are pleaded by RRDC at paras. 16 – 21 of the Amended Writ of Summons and Statement of Claim on file 06-A0092 (the “ ’06 Action”). Here, RRDC refers to the 1867 joint Address from the House of Commons and the Senate to Her Majesty. The following passage from that Address is at issue in this litigation, and it sets out the key “terms and conditions” this application is centered around:

> “…that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered as settled in conformity with equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.”

[18] This 1867 Address is referenced in the *1870 Order*, which provides, among other things, that “…the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first herein-before recited [1867] Address…” The Address is attached as Schedule “A” to the *1870 Order*. RRDC pleads that the *1870 Order* “is a part of the Constitution of Canada and

is listed as the third item in the schedule referred to in s. 52(2)(b) of the *Constitution Act, 1982*."

[19] RRDC further pleads that, by virtue of their reference in the *1870 Order*, the terms and conditions I just quoted from the 1867 Address are also "a part of the Constitution of Canada and are enforceable as such."

[20] In specific reply to these pleadings by RRDC, Canada's Statement of Defence says that, "the *Addresses, Imperial Order in Council* and the *Constitution Act, 1982*, speak for themselves." (para. 18). Canada has not denied that the *1870 Order* is "a part of the Constitution of Canada". However, Canada also pleads that it:

> "…specifically denies that any terms or conditions referred to in the *Rupert's Land and North-Western Territory Order* of June 23, 1870, concerning the settlement of claims for compensation by the Indian tribes were intended to have legal force and effect and says that, further, those terms and conditions are not precise enough to have force as constitutional provisions and, that they do not, in fact and law, have force as constitutional provisions capable of being enforced by the order of this court…" (para. 20(a))

[21] It is interesting that, in his original Notice of Motion, counsel for RRDC framed the question of law by asking "were the terms and conditions of the [*1870 Order*] intended to have legal force and effect, and do those terms and conditions have force as constitutional provisions capable of being enforced by the order of this Court?" That language, of course, tracked, in part, Canada's pleading excerpted above. However, RRDC subsequently amended its Notice of Motion by deleting the reference to the issue of intention, such that the question now simply reads "do the terms and conditions of the [*1870 Order*] have force as constitutional provisions capable of being enforced by the order of this Court?"

Application of the *Alcan* principles

1. *Is the point of law raised and clearly defined in the pleadings?*

[22] The first principle in *Alcan Smelters* is expressed by requiring that the point of law "be raised *and* clearly defined in the pleadings." (my emphasis). While the amended question of law is technically "raised" by para 20(a) of Canada's Statement of Defence, it is significantly narrower than Canada's complete defence on this point. While Canada has clearly pleaded that the subject terms and conditions do not "have force as constitutional provisions capable of being enforced" by this Court, it *also* pleads that terms and conditions were not *intended* to have legal force and effect and are not precise enough to have force as constitutional provisions. [1] Thus, I understand Canada's defence here is that the terms and conditions do not have constitutional force, in part, because they were not intended, and are too imprecise, to have such force. Therefore, I am not satisfied that, as phrased by RRDC, the point of law is "clearly defined" by the pleadings.

[23] Also, determining whether a term and condition was intended to have legal force and effect is a question of historical fact, requiring evidence, which I will discuss further below. In my view, it would be artificial and of little use to surgically excise a narrow point of law from the pleadings for determination, when there are broader issues raised by these same pleadings, that will need to be resolved in conjunction with the narrow point. In short, RRDC has not met its onus on the first principle from *Alcan Smelters.*

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[1] Canada actually says in its outline that there is only one term and condition at issue.

2. Does the proposed question of law assume the allegations of the opposite party are true?

[24] There was a dispute between the parties as to whether Canada's defence on this point is a true "demurrer" to RRDC's claims in this regard. Whether it is or it isn't may be somewhat beside the point, since Veale, J., in *Imperial Oil Ltd.* (Re), 2002 YKSC 14, held, at para. 20, that the second principle from *Alcan Smelters* is not limited to the classic demurrer situation where the defendant assumes the allegations of the plaintiff are true, but contends that they do not raise a claim in law. Rather, either party can rely on Rule 34, if the opposite party has assumed the truth of the applicant party's allegations, but says that they are of no legal consequence.

[25] In this case, the essential allegations underlining RRDC's proposed question of law are those set out in paras. 16 through 21 of its Amended Statement of Claim and these allegations are not denied by Canada. Rather, it is the conclusions of law which flow from those allegations which Canada disputes. Therefore, I am satisfied that the second principle in *Alcan Smelters* has been met by RRDC.

3. Are the facts relating to the point of law in dispute and are they capable of being resolved without evidence?

[26] This is the central issue on this application. Here, RRDC says that not only has Canada not denied the allegations in paras. 16 through 21 of the Amended Statement of Claim (which I described above), but that it has also admitted:

> a) The Yukon Territory was, prior to 1870, part of the North-western Territory referred to in s. 146 of the *Constitution Act*, *1867*; and

> b) The lands that now constitute the Yukon Territory were part of the North-western Territory admitted into the Dominion of Canada by the *1870 Order*

and that these unchallenged allegations and facts, altogether, are sufficient to decide the point of law.

[27] While not prejudging the matter, I agree that even if the terms and conditions at issue from the 1867 Address, are "part of the Constitution of Canada" by virtue of their connection to the 1870 Order, it does not necessarily follow that the subject provision has constitutional force and is capable of being enforced. Rather, it seems to me, in order to make that determination, one must consider the intention of Parliament. Further, although I accept that interpretation of a constitutional or statutory instrument begins by examining the language of the provision at issue, if the language or meaning is unclear, then courts must look to extrinsic material. In this case, that would likely include reference to the legislative history leading up to the 1867 Address and the *1870 Order*.

[28] In *R* v. *Blais*, 2003 SCC 44, the Supreme Court of Canada was deciding whether "Indian" in para. 13 of the Manitoba *Natural Resources Transfer Agreement*, included the Métis, and stated at para. 16:

> "… The starting point in this endeavour is that a statute – and this includes statutes of constitutional force – must be interpreted in accordance with the meaning of its words, ***considered in context*** and with a view to the purpose they were intended to serve: see E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. As P.-A. Côté stated in the third edition of his treatise, "Any interpretation that divorces legal expression from ***the context of its enactment*** may produce absurd results (*The Interpretation of Legislation in Canada* (3rd. ed. 2000), at p. 290)." (my emphasis)

[29] I understood RRDC's counsel to concede that, based upon the case of *British Columbia Teachers' Federation* v. *British Columbia (Attorney General)*, [1986] B.C.J. No. 1046, aids to interpretation, such as legislative history, may be proper in deciding a constitutional question of law under Rule 34. However, counsel went on to argue that this is not a consideration on the first stage of a Rule 34 application, as to whether leave should be granted, although it may arise on the second stage if leave is granted. I do not understand this submission. If it seems probable that evidence of legislative history will be necessary in order to decide the question of law at the second stage of the hearing, i.e. if a trial of the issue is likely, then that would seem to be a reason for denying leave, since the case does not meet the third principle in *Alcan Smelters.*

[30] In *British Columbia (Attorney-General)* v. *Canada (Attorney-General); Vancouver Island Railway* (1994) 114 D.L.R. (4th) 193 (the "*B.C. Railway*" case), the Supreme Court of Canada had to determine the status of an agreement, known as the Dunsmuir agreement, between British Columbia and Canada. The Dunsmuir agreement was appended as a schedule to the *Dominion Act*, which in turn was designed to sort out the rights and obligations of British Columbia and Canada respecting railroads. Speaking for the majority, Iacobucci J. held that the Dunsmuir agreement was not incorporated into the *Dominion Act* and therefore did not have the force of legislation. In coming to that conclusion, at para. 118, he relied on the Manitoba Court of Appeal's decision in *Winnipeg* v *Winnipeg Electrical Railway Co.*, [1921] 2 W.W.R. 282, where Fullerton J.A. wrote:

> "…in order to make an agreement scheduled to an Act a part of the Act itself, it is not sufficient to find words in the statute merely confirming and validating the agreement; you must find

> words from which the ***intention*** can be inferred." (my emphasis).

Iacobucci J. added:

> "Like the Court of Appeal, I do not regard this statement as meaning that a scheduled agreement will have statutory force only if that intention is made express in a particular provision, e.g. "the agreement is hereby confirmed, ratified, and endowed with statutory force", although an intention nearly so obvious is sometimes apparent; see, e.g, s. 1 of the Constitution Act, 1930, already discussed, which gave the "force of law" to scheduled agreements. Rather, ***all of the tools of statutory interpretation can be called in aid*** to determine whether incorporation is intended: see e.g, *Cree Regional Authority* v. *Canada (Federal Administrator)*, [1991] 3 F.C. 533 (C.A.)…" (my emphasis)

[31] In arguing his position, RRDC's counsel placed considerable reliance on Iacobucci J.'s judgment, at paras. 54 and 55, where he recognized the constitutional status of one of the relevant British Columbia Terms of Union:

> "The required constitutional analysis begins with a recognition of the constitutional status of Term 11 of the British Columbia Terms of Union. Pursuant to s. 146 of the Constitution Act, 1867 it was lawful for British Columbia to enter Canada upon terms which "shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland". Section 52(2) of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ***places the constitutional status of Term 11 beyond doubt***. That section provides that the acts and orders listed in the Schedule to the Constitution Act, 1982 ***are part of Canada's Constitution***. The British Columbia Terms of Union, dated May 16, 1871, are listed as Item 4 in that Schedule.
>
> ***The railway obligations placed upon Canada by Term 11 which are thus endowed with constitutional force*** are located principally in the first paragraph of the term…" (my emphasis).

In coming to that conclusion, Iacobucci J. noted (at para. 72) that Term 11 was "clear on its face" and (at para. 68) that there was no need to rely on the rules of statutory

construction, extrinsic evidence, or legislative history when the language under consideration is clear. Rather, regard must first be had to the language of the provision to be interpreted (para. 70).

[32] It is, however, important to keep in mind that there was a considerable amount of historical evidence before the Court in the *B.C. Railway* case. The judgments below came out of two petitions before the British Columbia Supreme Court and, as far as I can tell from the case report, there was never a trial of any issue at that level. Nevertheless, the evidence adduced in the course of those petitions apparently included the history of events between 1871 and 1883 (para. 57) and, in particular, eight historical factors were identified as being significant to the decision of the British Columbia Court of Appeal (at para. 43). Therefore, the decision of the majority of the Supreme Court of Canada was not made in a factual vacuum.

[33] RRDC also relied upon *The Queen in Right of Canada* v. *The Queen in Right of Prince Edward Island,* (1977) 83 D.L.R. (3d) 492 (Fed. C.A.). In that case the trial was, in the first instance, limited to the question of liability. It was agreed that there was an interruption of ferry service between P.E.I. and the mainland over a period of 10 days in 1973. The Canadian National Railway was employed by Canada to conduct that ferry service on its behalf and the interruption was consequent upon a national strike of C.N.R. employees. At the end of the first stage of the trial, the trial judge dealt with three questions:

> 1. What was the nature of duty imposed upon Canada under Prince Edward Island's Terms of Union with Canada, in particular, the term which dealt with ferry service.

2. Whether there was a breach of that duty by Canada?
3. If there was a breach, did that give rise to damages?

The Federal Court of Appeal held that the Prince Edward Island Terms of Union created a legal duty in favour of that province in respect of the ferry service to be provided by the Government of Canada, and that the Government was in breach of that statutory duty. However, that case differs from the one before me in that the parties agreed on the essential facts and there was less of a need to call evidence. Further, the principal issue in the case was whether the failure to provide the ferry service gave rise to a claim in damages.

[34] Another authority relied on by RRDC was *Dixon* v. *Attorney General of British Columbia* (1986) 31 D.L.R. (4th) 546 (B.C.S.C.), a decision of McEachern CJSC, as he then was. *Dixon* involved a petition which questioned the allocation of seats in the British Columbia legislature on the basis of uneven electoral representation. In particular, the petitioner sought a declaration that provisions the *Constitution Act* of British Columbia were inconsistent with the *Canadian Charter of Rights and Freedoms*. The court was only asked to determine whether the petition raised justiciable issues, and McEachern CJSC framed the preliminary question of law as follows:

> "Do the provisions of the Charter apply to s. 19 in Schedule 1 of the Constitution Act, RSBC, 1979, c. 62, as amended?"

[35] The Attorney General of British Columbia took the position that the *Constitution Act* of British Columbia was part of the constitution of Canada, which is the supreme law of Canada, and that therefore the provisions of the *Charter* did not govern other provisions of that supreme law. MacEachern CJSC focussed his analysis on s. 52(2) of

the *Constitution Act*, *1982*, and determined that it must be read “narrowly and exhaustively”. He held that, although s. 52(2) uses the word “includes”, it seemed only realistic to regard the definition as exhaustive. MacEachern CJSC also referred to an Order made on May 16, 1871, by which Her Majesty the Queen received certain Addresses of the legislature of British Columbia, in April 1871, requesting that British Columbia be admitted to the Dominion of Canada. He had “no doubt” in concluding that the 1871 Addresses formed “a part of the Order of May 16, 1871”. Nevertheless, he concluded that there was nothing in the Addresses to support the contention that either the May 16, 1871 Order or the Addresses made the British Columbia *Constitution Act*, as amended, part of the Canadian constitution.[2]

[36] I gather that the importance of this case for RRDC is that it was decided without the need for any particular factual evidence, beyond the history of the legislation. Indeed, as the matter was brought on by petition there was no trial of any issue. Nevertheless, the question posed in *Dixon* was one of pure statutory interpretation and was much narrower than the one at bar, which I have already suggested will require evidence in order to answer.

[37] The case of *Imperial Oil Ltd* (Re), cited above, was also tendered by RRDC in support of this application, but that case is distinguishable because the facts necessary to decide the question of law there were not in dispute.

[38] I acknowledge that constitutional issues are not necessarily precluded from the scope of Rule 34: *Canada (Attorney General)* v. *British Columbia*, [1999] B.C.J. No. 246, at para. 19. Even so, the British Columbia Court of Appeal in *British Columbia*

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[2] In *New Brunswick Broadcasting Co.* v. *Nova Scotia*, [1993] 1 S.C.R. 319, a majority of the Supreme Court of Canada also held that the definition in s. 52(2) of the *Constitution Act* is not exhaustive.

Teachers' Federation, cited above, cautioned against "splitting off issues in constitutional cases" (para. 4). Further, while the Court ultimately allowed the Attorney General of British Columbia to proceed with its question of law determination before trial, pursuant to Rule 34, on what was admittedly a constitutional issue, it also noted that the Statement of Claim in that case, which numbered some 62 paragraphs over approximately 40 pages, set out "in great detail the matters upon which the plaintiffs propose to lead evidence" (para. 28). Therefore, the Court of Appeal was satisfied that the question of law would not be decided "in a vacuum" and without the facts.

[39] In *Manitoba (Attorney General)* v. *Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, Beetz, J. speaking for the Supreme Court of Canada, acknowledged, at para. 49 that "there may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge." However, at para. 50, Beetz J. also fully agreed with Professor R.J. Sharpe, and cited p. 177 of his book *Injunctions and Specific Performance*:

> "…with respect to constitutional cases that "the courts have sensibly paid heed to the fact that at the interlocutory stage they cannot fully explore the merits of the plaintiff's case." At this stage, even in cases where the plaintiff has a serious question to be tried or even a prima facia case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits."

[40] In *R* v. *Jack*, [1980] 1 S.C.R. 294, the appellants were "Indians" within the coverage of the *Indian Act*. They were convicted of fishing for salmon during a prohibited period in violation of the *Fisheries Act*. They defended the charges by arguing that Canada did not have the constitutional capacity to embrace them and others of their band in its fisheries legislation, insofar as that meant denying them the

right to continue to fish for food. They contended that there had been a policy to that effect in British Columbia prior its admission, in 1871, as a province of Canada, and further, that article 13 of the Terms of Union sanctified that policy so as to create a limitation on federal legislative power in relation to sea coast and inland fisheries under s. 91(12) of the *British North America Act*. The majority of the Supreme Court of Canada held that nothing in article 13 could possibly operate as an inhibition on federal legislative power in relation to fisheries. In coming to that conclusion, Laskin C.J. stated that the Terms of Union were approved by an Imperial Order in Council in conformity with s. 146 of the *British North America Act* and, accordingly, "it had constitutional status". Dickson J., as he then was, concurred in the result, similarly holding that the Terms of Union, having been approved by the Imperial Order in Council, were thereby given "constitutional effect" as if enacted by the Imperial Parliament.

[41] RRDC's counsel relies on these comments in support of his proposition that the proposed point of law can be decided without evidence. However, it is once again important to recognize that there was significant amount of historical and expert evidence presented at the trial in that case, unlike on the motion at bar.

[42] RRDC's counsel also filed the case from this Court of *Dawson First Nation* v. *Arkona Resources Inc.*, [1993] Y.J. No. 231. There, the plaintiff First Nation brought an application under Rule 34 to determine three points of law, which are similar to the point proposed before me. At para. 1, Hudson J. set out the points as follows:

> "1. Are the terms and conditions upon which the disputed lands were transferred to Canada contained in the Address set out in Schedule A of the Rupert's land and North-Western Territory Order of 1870?
>
> 2. If so, are those terms and conditions a part of the Constitution of Canada and do they create or entail

> constitutional obligations enforceable at the instance of the Indians therein referred to?
>
> 3. If so, do those constitutional obligations require the Canadian Government to settle the claims of the Indians therein referred to prior to making alienations of interests in land as pleaded in paragraph 19 of the Statement of Claim?"

[43] Counsel for RRDC, who was also plaintiff's counsel in *Arkona*, candidly conceded that, in retrospect, Hudson J. probably dismissed the application because of the third question. Counsel acknowledged that questions one and two in *Arkona* are somewhat similar to the point of law before me, but submitted that question number three in particular gave rise to the need for evidence to determine the nature of the "constitutional obligations" referred to therein. Counsel explained that the case involved a handful of placer mining claims at the mouth of the Klondike River near Dawson City. The purpose of that action was to attack the constitutionality of the historical land alienations giving rise to the placer claims. However, in the case at bar, RRDC's counsel says that he is only attacking the validity of *future* alienations. Finally, he says that the point of law in the case at bar is much narrower of that in *Arkona*, as the problematic third question of law is not reproduced. For these reasons counsel submits the case should be distinguishable. On the other hand, RRDC's counsel conceded at the hearing of this motion, again with admirable candour, that if I am not satisfied that *Arkona* can be distinguished on the basis of the third question, then he would expect to lose the current application.

[44] Perhaps I misheard RRDC's counsel on this point, but in my view it is incorrect to say that the case at bar is limited to attacking the validity of *future* alienations of land in which the RRDC claims an interest. An order has been made that the '05 Action (05-

A0043) and the ‘06 Action be tried together, that evidence in one action, both at trial and in all pre-trial procedures, shall be evidence in the other action, and that any orders made in respect of any pre-trial applications shall be binding on the parties in respect of both actions. In the ‘05 Action, RRDC seeks a declaration that its claims for compensation for lands which have historically been alienated by Canada be settled before any further such dispositions are made *and* that it receive an accounting and restitution for all revenues received by Canada in respect of those lands. Thus, RRDC appears to ultimately seek compensation for the *past* alienations of land, on the basis that those dispositions were unconstitutional and in breach of other duties owed by Canada to the plaintiff. In that regard, I can see little that distinguishes the case at bar from *Arkona*.

[45] At para. 13 of *Arkona*, Hudson J. set out his several reasons for dismissing the Rule 34 application in that case. I will attempt to paraphrase those reasons in the same order they were stated:

> a) There was a likelihood that the parties would “seek to call evidence on the ***points***” and particularly with regard to the phrases “considered and settled”, “equitable principles” and “uniformly governed”, as contained in Schedule A of the *1870 Order*. (my emphasis)
> b) It was not made clear that historical evidence would not be required by the parties or by the Court “to properly decide the ***issues posed***” (my emphasis)
> c) There was a concern that “the ***issues***” were of great complexity might give rise to conflicting expert opinions, and therefore “the trial process should be applied.” (my emphasis)
> d) The Court was concerned that it ought to heed the “caution” in *British Columbia Teachers’ Federation*, cited above, against “splitting off

issues in constitutional cases" on Rule 34 applications.

e) The Court was not persuaded that there was more than a "mere possibility" of a substantial saving of time and money should the points of law be determined first. (I accept the point of RRDC's counsel here that Hudson J. failed to expressly consider the prospect of the plaintiff ***losing*** on the points of law, which presumably would have brought an immediate end to the action)

f) The Court was of the view that the Rule 34 procedure should only be adopted in "clear and obvious cases", which that case was not.

[46] The last point made by Hudson J. likely comes from *Fink* v. *British Columbia (Public Guardian and Trustee)*, cited above, where Dillon J. said, at para. 10:

> "… Rule 34 is akin to Rule 19(24) in the sense that an order to set a question for hearing should only be given under Rule 34 ***in the clearest of cases*** when there are not mixed questions of fact and law (Legion Credit Union (Co-Liquidators) v. British Columbia (Minister of Finance and Corporate Relations) (1994), 25 Admin. L.R. (2d) 47 at paras. 65 and 70 (B.C.S.C.). (my emphasis)

[47] As I noted above, RRDC's counsel stressed that, had the third point of law not been included in the Rule 34 application in *Arkona*, the case may have been decided differently. However, the repeated references by Hudson J. to the "points" and "issues", in the plural, seems to suggest that he had the above concerns with respect to all three points and not simply the third one. Further, while I am not compelled to follow the case, I do find it to be of significant assistance generally, and in particular with respect to the third principle in *Alcan Smelters*. In any event, based on my reasoning on this and the remaining two principles from *Alcan Smelters*, which are discussed below, I remain unpersuaded that there are sufficient reasons for distinguishing *Arkona* from the case at bar.

[48] In the result, I am not satisfied that the point of law is capable of being resolved without hearing evidence.

4. Will a determination on the point of law be decisive of the litigation, or a substantial issue raised in it?

[49] In his written submissions, RRDC's counsel stated that, if the point of law is decided in Canada's favour, that decision would "bring to an end" both the '05 and '06 Actions, because both of those actions are premised on the assumption that the relevant terms and conditions of the *1870 Order* are legally enforceable. However, he retreated from that proposition at the hearing with respect to the '06 Action, but not with respect to the '05 Action.

[50] Even if I were to find that there were no constitutional duties owed by Canada to RRDC in each action, RRDC has pled that there are both constitutional *and* fiduciary duties owed to it by Canada. In the '05 Action, RRDC claims that Canada breached those fiduciary duties by failing to protect its aboriginal title, rights and interests in the subject lands and, generally, by allowing the alienation of those lands prior to settling RRDC's claims in respect of them. In its prayer for relief in that action, RRDC seeks a declaration that Canada is in breach of its fiduciary duties to RRDC, as well as compensation or damages, including punitive and exemplary damages, for breach of those duties.

[51] In the '06 Action, RRDC, once again has pled that there is a fiduciary relationship between it and Canada, which arose out of the historic relationship between them, as well as three other historical events, of which the *1870 Order* is only one. The prayer for relief in that action seeks a declaration that Canada has a fiduciary duty to negotiate

with due diligence and in good faith towards a settlement of RRDC's claim and that it has breached that duty. Finally, the '06 Action seeks compensation or damages, including punitive exemplary damages, for that breach of duty. It is also arguable, regardless of how the proposed point of law is determined, that the plaintiff's "loans" claim, that the loans made to it by Canada for the purpose of the land claim negotiations are void, could also continue. Indeed, RRDC's counsel eventually conceded that, despite a negative result for RRDC on the proposed point of law, it could continue to pursue the remedy sought regarding the loans, based on grounds of bad faith and the failure of Canada to uphold the honour and integrity of the Crown.

[52] I am satisfied that a determination of whether the terms and conditions at issue in the *1870 Order* and 1867 Address are constitutionally enforceable will be dispositive of a substantial issue raised in each of the actions, which are to be tried together. Nevertheless, such a determination would not be decisive of the litigation. On balance, my conclusion here works against RRDC on the application.

5. Will a determination of a proposed question of law shorten the trial or save time and costs?

[53] It is important to remember here that this principle in *Alcan Smelters* was expressed in terms of whether the effect would be to "*immeasurably* shorten the trial, or result in a *substantial* saving of costs" (my emphasis). I have just concluded that, regardless of how the point of law were to be decided, significant issues would remain to be tried. While there might well be a saving of time and costs, I am not persuaded that the saving would be to the significant extent contemplated in *Alcan Smelters*. Therefore, RRDC has not made a sufficiently compelling case on this principle either.

CONCLUSION

[54] Having considered all of the five principles in *Alcan Smelters* in conjunction, and particularly with regard to the third principle, I am not satisfied that the point of law is capable of being properly resolved in the context of a Rule 34 application. Accordingly, the application is dismissed.

[55] Costs may be spoken to if necessary, although I note that none were sought in the Amended Notice of Motion.

Gower J.