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The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 1

INDIGENOUS LAW

Issues 2016

Indigenous Legal and Justice Issues - Lessons Learned from Inside and Outside the Courtroom

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November 14, 2016

cpd Continuing Professional Development

Indigenous Legal and Justice Issues – Lessons Learned from Inside and Outside the Courtroom
-Law Society of Upper Canada – Indigenous Law Issues – November 14, 2016
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Justice Delayed is Justice Denied
-Justice denied is an injustice.
-An injustice anywhere is a threat to justice everywhere.
-Martin Luther King (Letter from a Birmingham Jail)

Justice Trumps Law
-Law is a subset of justice.
-Law must give way to justice.

Can the Law be the Doctor (if) it is the Disease?
"Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered."
-Chief Justice McLachlin, Haida Nation, 2004
-The dispossession of Indigenous lands and resources came about by instruments and actions of the law. Some might argue that this "legal" process continues to this day.

A Culture of Delay – Criminal Proceedings
-Timely justice is one of the hallmarks of a free and democratic society.
-The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself.
-… a culture of complacency towards delay has emerged in the criminal justice system.
-But the quality of justice does not always increase proportionately to the length and complexity of a trial.
-Timely trials are possible.
-R v Jordan, 2016 SCC 27

The Court Content – Civil Proceedings:
RULE 48.14 DISMISSAL OF ACTION FOR DELAY
(1) Unless the court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances, subject to subrules (4) to (8):
1. The action has not been set down for trial or terminated by any means by the later of the fifth anniversary of the commencement of the action and January 1, 2017.
2. The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the later of the second anniversary of being struck off and January 1, 2017. O. Reg. 170/14, s. 10.

(7) At a status hearing, the plaintiff shall show cause why the action should not be dismissed for delay, and the court may,
(a) dismiss the action for delay; or

(b) if the court is satisfied that the action should proceed,

i. set deadlines for the completion of the remaining steps necessary to have the action set down for trial or restored to a trial list, as the case may be, and order that it be set down for trial or restored to a trial list within a specified time,
ii. adjourn the status hearing on such terms as are just,
iii. if Rule 77 may apply to the action, assign the action for case management under that Rule, subject to the direction of the regional senior judge, or
iv. make such other order as is just. O. Reg. 170/14, s. 10.

RULE 24 DISMISSAL OF ACTION FOR DELAY
WHERE AVAILABLE

24.01 (1) A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed,

a) to serve the statement of claim on all the defendants within the prescribed time;
b) to have noted in default any defendant who has failed to deliver a statement of defence, within thirty days after the default;
c) to set the action down for trial within six months after the close of pleadings; or
d) Revoked: R.R.O. 1990. Reg. 194, r. 24.01 (2).
e) to move for leave to restore to a trial list an action that has been struck off the trial list, within thirty days after the action was struck off. R.R.O. 1990, Reg. 194, r. 24.01; R.R.O. 1990, Reg. 194, r. 24.01 (2); O. Reg. 770/92, s. 7; O. Reg. 533/95, s. 4 (1).

(2) The court shall, subject to subrule 24.02 (2), dismiss an action for delay if either of the circumstances described in paragraphs 1 and 2 of subrule 48.14 (1) applies to the action, unless the plaintiff demonstrates that dismissal of the action would be unjust. O. Reg. 259/14, s. 6.

The Insidious Cancer of Excessive Delay in Resolving Indigenous Legal and Justice Issues
Tsilqot'in Nation v British Columbia, 2007 BCSC 1700
-Action instituted in 1990.
-Separate action commenced in 1998.
-Trial date set for September 10, 2001.
-Trial began on November 18, 2002.
-339 trial days.
-Trial decision – November 20, 2007.

***Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700**
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1373. I confess that early in this trial, perhaps in a moment of self pity, I looked out at the legions of counsel and asked if someone would soon be standing up to admit that Tsilhqot'in people had been in the Claim Area for over 200 years, leaving the real question to be answered. My view at this early stage of the trial was that the real question concerned the consequences that would follow such an admission. I was assured that it was necessary to continue the course we were set upon. My view has not been altered since I first raised the issue almost five years ago.

1374. At the end of the trial, a concession concerning an Aboriginal hunting and trapping right in the Claim Area was made by both defendants. As I have already noted, that concession brings with it an admission of the presence of Tsilhqot'in people in the Claim Area for over 200 years. This leaves the central question unanswered: what are the consequences of this centuries old occupation in the short term and in the long term, for Tsilhqot'in and Xeni Gwet'in people?

1377. A tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people. The recognition of the long-standing presence of Tsilhqot'in people in the Claim Area is a simple, straightforward acknowledgement of an historical fact.

Wikwemikong Declaration

-image

Wikwemikong Islands Claim

-1862 – 1975 – Various petitions, letters, meetings, and protests.
-1975 – Modern-day Declaration.
-March 1984 – Wikwemikong's Claim to 41 islands submitted to Canada.
-July 13, 1995 – Specific Claims Branch preliminary legal review completed.
-October 18, 1996 and November 27, 1996 – Additional arguments in support of Wikwemikong's Specific Claim to the 41 islands.
-May 22, 1997 – Canada's rejection of Specific Claim.
-December 1997 – Superior Court Claim filed by Wikwemikong against Canada and Ontario.
-March 1998 – Order of the Superior Court preventing further sales or leases of "Crown" islands in Georgian Bay, without the consent of the parties, or a further court order.
-Feb 2004 – Canada accepts claim for negotiation and negotiations commence with Canada and Ontario.
-2013 – Canada withdraws from negotiations.
-2016 – Negotiations between Wikwemikong and Ontario continue, including legal drafting to finalize an Agreement in Principle.

In the intervening years there are funerals:
Clayton Shawana;
Chief Ronald Wakegijig;
Chief Henry Peltier;
Sara Peltier.

And visits to rest homes and assisted-living quarters.

"Face it Dad. It's not going to be settled in your lifetime" – Brian O'Neill

1975 – Commencement of negotiations involving Algonquins of Ontario, Canada and Ontario
-October 2016: Agreement in Principle reached.
-41 years - nearly half a century – and still no final agreement or treaty.

Inside the Courtroom:
-The "D" word (discretion)
-Within the justice system, there is a spectrum and a continuum within which reasonable opinions and conclusions can be expressed.
-No one has a monopoly on the truth.

***Reference re: Supreme Court Act, ss. 5 and 6*, 2014 SCC 21**
-Legal opinions in support of the legality of appointing Justice Nadon to the Supreme Court of Canada:
-The Honourable Ian Binnie
-The Honourable Louise Charron
-Professor Peter Hogg

Supreme Court of Canada Decision:
-Majority 6 judges;
Minority 1 judge;
-The proposed appointment was rejected.

The Supreme Court is not last because it is right,
but right because it is last

The Fundamental Objective
"The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."
-*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388

Reconciliation – Definitions

-Oxford

-Restore friendly relations between.
-Settle (a quarrel)
-Make or show to be compatible.
-Make someone accept (a disagreeable or unwelcome thing)
-Make (one account) consistent with another, especially by allowing for transactions begun but not yet completed.

-Merriam-Webster

-To restore to friendship or harmony settle, resolve
-To make consistent or congruous
-To cause to submit to or accept something unpleasant
-To check (a financial account) against another for accuracy
-To account for
-To become reconciled

-Cambridge

-To find a way in which two situations or beliefs that are opposed to each other can agree and exist together
-Reconciliation in Practice
-Continued communication, consultation and accommodation
-Compromise and consensus-seeking
-ADR processes
-Civil and criminal pre-trials
-Mediation and facilitation processes

Reconciliation in Practice:

-Continued communication, consultation and accommodation
-Compromise and consensus-seeking
-ADR processes
-Civil and criminal pre-trials
-Mediation and facilitation processes

Can reconciliation occur in a court of law, following a lengthy trial process and hearing?

“I just love going to court and throwing on the gown – it’s so exciting.”
“There’s no way we can lose this case.”
“I’ll see you in court, if that’s your last offer.”
“Just wait until the judge hears that. Then we’ll see.”
“I’m not going to waste any more time trying to settle this case. It’s time to roll the dice.”
“That’s what your experts say. Wait until you hear from mine.”
“You’re full of @&*%...Go and tell your story to the judge.”
“I like arguing a case, win or lose.”

"Could be interesting and thrilling. Who knows what the outcome will be? Win or lose, everyone moves on."

-Or do they?

Reckon, Silly Nation?
-This is all in the past. Why should we have to pay for it now?
-Treaty rights are so vague as to be meaningless. Why should Aboriginal peoples have such rights anyway?
-Wasn't this all settled in the Indian wars, and as a result of the Seven Years' War?
-Why should there be two sets of laws? One for us and one for them?
-What's so special about the Royal Proclamation of 1763 and the Treaty of Niagara, 1764? Why honour the treaties anyway?
-Why can't they just learn to adapt and assimilate, as all newcomers to Canada must do?
-Maybe some of them should just think of moving away (Bingibaayong).
-Statements heard on the streets outside court

Reconciliation
-Have we visited First Nation communities, other than for court purposes?
-Can we count as among our friends, some Indigenous peoples?
-Have we tried to understand their laws, their beliefs and their deep connection to their traditional lands and waters?
-Have we educated ourselves about their treaty history, and the solemnity of their relationship with the Crown?
-Do we respect them?
-Do we trust them?
-Can we do more?

Transformational Change and a Shift in Paradigm
-Settlement and resolution of Indigenous claims from date of formal commencement ought not to exceed one generation or 20 years.
-Inherent jurisdiction of the Superior Court
-Courts must fully engage in the process through court management and court supervision processes, including processes captured by Rule 37.15.
-This results in fairness (elements of justice) but not perfect justice.
-If justice cannot be denied, then justice cannot be delayed.

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