

“Litigation by installments”: Further Developments in the Black Bear Crossing Dispute by Jennifer Koshan

Tsuu T’ina Nation v. Frasier, 2009 ABCA 23,

<http://www2.albertacourts.ab.ca/jdb%5C2003%5Cca%5Ccivil%5C2009%5C2009abca0023.pdf>

As noted in a previous post (http://ablawg.ca/wp-content/uploads/2008/04/jk_blackbear_april-15.pdf), a February 2008 decision of the Alberta Court of Appeal effectively prevented the Tsuu T’ina Nation from enforcing an eviction notice against residents of Black Bear Crossing whose band membership was disputed until such time as the membership of the residents was resolved (see 2008 ABCA 74). The Tsuu T’ina’s application for leave to appeal to the Supreme Court of Canada was denied on October 30, 2008 (see 2008 CanLII 55966). Meanwhile, the parties were before the Alberta courts again when the Tsuu T’ina Nation cut off the water and utilities for the three remaining residents of Black Bear Crossing (BBC). The Tsuu T’ina Nation was held in civil contempt by Justice Jo’Anne Strekaf of the Court of Queen’s Bench for refusing to supply the residents with these services after being ordered to do so. Those orders had been made as conditions of an adjournment granted to the Tsuu T’ina in respect of its underlying action pursuing eviction of all remaining residents of BBC on October 20, 2008. The Court of Appeal had left such an action open to the Tsuu T’ina if it did not discriminate between member and non-member residents. On January 15, 2009, Justice Patricia Rowbotham of the Alberta Court of Appeal granted the Tsuu T’ina leave to appeal Justice Strekaf’s October 20, 2008 order (2009 ABCA 23). In a strange twist, however, the previous day Justice Strekaf granted the Tsuu T’ina an eviction order in respect of the one remaining resident of BBC, the other two having moved out after accepting the Nation’s offer of a year’s accommodation off-reserve (see <http://www.calgaryherald.com/Technology/Judge+backs+Black+Bear+eviction/1179409/story.html>).

To provide more detail on the key legal events, the order of October 20, 2008 granted the Tsuu T’ina Nation an adjournment of its eviction action *sine die* (without a fixed date), on the condition that the status quo was maintained until the case returned to court. The status quo required that the Nation continue providing water, gas and electricity to the remaining three residents of BBC. The order was entered on November 17, 2008, but is not available on the Alberta Courts website.

Electrical service to two of the residents’ homes was shut off on October 28, 2008. On October 29, 2008, Justice Scott Brooker of the Alberta Court of Queen’s Bench ordered the Tsuu T’ina Nation to ensure the residents’ utilities were not shut off and to reverse any actions they had taken against the residents subsequent to October 20, 2008. However, that same day the residents’ water was shut off. The parties appeared before Brooker J. again on October 31, 2008, and he ordered the Tsuu T’ina Nation to restore water to the residents’ homes immediately. On November 7, 2008, Justice Strekaf granted the residents’ application to hold the Tsuu T’ina Nation in contempt of her October 20 order and the two orders of Justice Brooker. Two months later, Justice Strekaf imposed the penalty for the contempt, ordering the Tsuu T’ina Nation to pay “reasonable costs and expenses” of the three residents, as well as their legal costs (although only at the legal aid rate). She did not impose a fine, holding that the Tsuu T’ina Nation had taken “meaningful steps and invested significant resources to remedy the situation” (see

<http://www.calgaryherald.com/Technology/Tsuu+penalized+court+over+Black+Bear+evictions/1154037/story.html>). This judgment is not yet posted on the Alberta Courts website.

The Tsuu T'ina Nation filed four separate notices of appeal in relation to the four orders of Justices Strekaf and Brooker. Justice Rowbotham's decision concerns only the October 20, 2008 order of Justice Strekaf.

The first question for Justice Rowbotham was whether leave to appeal was required by the Tsuu T'ina, or an appeal could be pursued without leave of the Court. That question in turn depended upon whether Justice Strekaf's October 20 order was simply an adjournment order. If so, leave to appeal would be required. If not, and more specifically, if the order could be characterized as an injunction (as argued by the Tsuu T'ina Nation), then leave would not be required. On this issue, Justice Rowbotham ruled that "the proper characterization of the order is that of an adjournment", as "[t]he condition of the adjournment has no context otherwise" (at para. 10). The kind of condition ordered by Justice Strekaf – to maintain the status quo – was said to be common in adjournment applications. Leave to appeal was therefore required.

The next question was whether leave to appeal should be granted, and Justice Rowbotham set out the test as follows:

an applicant must show that: 1) there is an important question of law or precedent of importance to the practice; 2) there is a reasonable chance of success on appeal and; 3) the delay will not unduly hinder the progress of the action or cause undue prejudice to the parties (at para. 11, citing *Jeerh v. Yorkton Securities Inc.*, 2005 ABCA 64 at para. 27).

Further, she noted that this is a "high threshold" that should "rarely be granted", and that "litigation by installments" was to be discouraged (at para. 12, citing *Liu v. Tangirala*, 2005 ABCA 299 at para. 5 and *Jeerh* at para. 24).

The Tsuu T'ina alleged five errors in the October 20 order of Justice Strekaf. First, by granting what amounted to an injunction, she erred in law. Second, the Tsuu T'ina Nation was not permitted to present evidence on its adjournment application. Third, Justice Strekaf failed to consider the implications of the conditions ordered, including "the risk of injury and possible loss of life". Fourth, the order encroached on the jurisdiction of the Tsuu T'ina's Chief and Counsel. Fifth, the order was said to be "ambiguous and vague", and to have been inaccurately reduced to writing when this was finally done on November 17 (at para. 13).

In response, the residents argued that even if the order of October 20 was wrongly granted, it was "serious contempt to knowingly disobey an order of a Superior Court" (at para. 16).

The position of the Tsuu T'ina prevailed in the end. Justice Rowbotham focused on the fifth ground of appeal, finding that it "presents a reasonable prospect of success and has some importance to the practice" (at para. 15). Her decision is brief and further reasons for this conclusion are not given. Leave to appeal was not restricted to the fifth ground.

However, it seems unlikely that the Tsuu T'ina Nation will need to pursue its appeal in light of Justice Strekaf's ruling on January 14, 2009 that the Nation can evict the one remaining resident of BBC. This latest decision is not yet posted on-line, and further analysis will be provided on ABlawg when it becomes available. According to the Calgary Herald, Regina Noel was given until January 31 to leave her home. The Tsuu T'ina Nation then plans to demolish Black Bear Crossing.

While the residents' efforts to maintain their housing in BBC failed, it must be recalled that their action for band membership is ongoing. It is only when that action is concluded that their right to permanent housing on the reserve will be decided. In the meantime, when asked whether she would move out of her residence at BBC after Justice Strekaf's most recent ruling, Noel is reported to have said "I have to wait and see about that" (<http://www.calgaryherald.com/Technology/Judge+backs+Black+Bear+eviction/1179409/story.html>). It may be that this matter is before the courts again even before the membership action is heard.