April 30th, 2009

Rule of Law, Deference and Contempt: Another Chapter in the Black Bear Crossing Dispute

By Jennifer Koshan

Cases Considered:

Tsuu T'ina Nation v. Frasier, 2009 ABCA 140

The dispute between the three remaining residents of Black Bear Crossing (BBC) and the Tsuu T'ina Nation was back before the courts on April 6, 2009. On that date, the Alberta Court of Appeal (Justices Peter Martin, Frans Slatter and Sal LoVecchio) heard an appeal by the Tsuu T'ina Nation of the finding of contempt made against it on November 7, 2008 by Justice Jo'Ann Strekaf. The contempt order related to the failure of the Tsuu T'ina Nation to comply with earlier orders requiring it to maintain utilities and water service at BBC while the three residents - Fred Frasier, Florence Peshee and Regina Noel - remained there pending the resolution of their claims for band membership (see my earlier post "Litigation by installments": Further Developments in the Black Bear Crossing Dispute). While the Court of Appeal dismissed the appeal in eight short paragraphs, its judgment is replete with lofty legal concepts such as the rule of law and deference that call out to be unpacked.

The Tsuu T'ina Nation's appeal was actually in relation to four orders: the contempt order and the three orders that were found to have been breached during the contempt hearing. The appeal of the latter three orders was dismissed as being moot, since the three underlying orders had been vacated by a subsequent order of Justice Strekaf on December 19, 2008 that terminated the Tsuu T'ina Nation's duty to maintain utilities. The precise reasons for this last order are not provided by the Court of Appeal, and the decision of Justice Strekaf is unreported. However, there is some suggestion in the Court of Appeal's most recent ruling that the December 19, 2008 order was based on evidence that "maintaining or restoring the utilities would have created a safety hazard" (at para. 4). The appeal of the three underlying orders being moot, the focus of the appeal was on the contempt order.

The Tsuu T'ina Nation presented several arguments in support of its claim that the contempt order should be overturned. First, it argued that the finding of contempt could not stand because the original three orders regarding utilities "should never have been granted" (at para. 4). Those orders should not have been granted, said the Nation, because they amounted to mandatory injunctions and the test for mandatory injunctions had not been met. Further, the Tsuu T'ina Nation argued that a safety hazard would have been created if it had restored or maintained the

utilities, giving it "an adequate excuse for not respecting the orders" (at para. 6). It also argued that the three original orders were "too vague to support a contempt finding" (at para. 6).

The Court of Appeal rejected this first set of arguments. According to the Court:

> Orders of the court must be obeyed and respected, even if they were arguably granted in error. The fact that an order is subsequently rescinded or reversed does not justify breaches of the order that occurred in the meantime: *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at pp. 942-3; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at p. 935; *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.) (at para. 5).

Further,

> The chambers judge was aware of all the issues relating to the safety of the premises and the utilities. Whether or not there is an adequate excuse is a mixed question of fact and law, and the decision of the chambers judge is entitled to deference: *Liu v. Tangirala*, 2005 ABCA 391, 380 A.R. 101 at para. 6. We see no palpable and overriding error here that would justify interference on appeal (at para. 6).

The Court of Appeal did not explicitly deal with the argument related to mandatory injunctions, presumably because even if the three orders were mandatory injunctions and even if the test for mandatory injunctions had not been met, the Tsuu T'ina was still obliged to comply with the order on the basis of the authorities the Court cited.

Neither does the Court deal with the argument that the three orders were too vague to serve as the basis for a finding of contempt. It is more difficult to see this argument as having been addressed by the "orders must be obeyed and respected" point. The requirement that laws must not be too vague is based in part on the underlying principle that people must know with some degree of certainty what conduct on their part will attract legal consequences (see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606). This principle is in turn based upon the rule of law and the ideas that (1) citizens must be given fair notice of what the law requires, and (2) law enforcement officials' powers to enforce the law must be constrained by intelligible legal standards. Given that the vagueness argument was seen as the most compelling ground of appeal by Justice Patricia Rowbotham in her decision granting leave to appeal (see *Tsuu T'ina Nation v. Frasier*, 2009 ABCA 23), it would have been helpful to see the Court of Appeal address this argument head on.

The Court of Appeal does deal with the rule of law in a different context. The Tsuu T'ina Nation's second main argument was that because it is an Aboriginal First Nation, it is entitled to deference in respect of its decisions and its duty to respect court orders. This argument was dismissed by the Court of Appeal with the statement that "the rule of law applies to all Canadians, and the obligation to respect court orders is universal" (at para. 7). Further, the Court

held that this was “essentially a landlord and tenant dispute”, requiring a “balance [of] the rights of the landlord and tenants, having regard to their respective legal rights and obligations, without providing deference to either party” (at para. 7).

The upshot of this holding is that deference applies to the courts, but not to decisions of a First Nation, and that the rule of law requires obedience of court orders, but not necessarily clarity with respect to the obligations those court orders impose.

While this aspect of the Court’s ruling is not surprising, it must be noted that the rule of law and its application to Aboriginal peoples has been the subject of academic comment. In “Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences” (1989), 6 Canadian Human Rights Yearbook 3, Mary Ellen Turpel critiques the preamble of the Constitution Act, 1982, which provides that “…Canada is founded upon principles that recognize the supremacy of God and the rule of law.” Turpel argues that the preamble is insensitive to cultural differences between the Canadian settler society and Aboriginal peoples. Canadian legal norms such as the rule of law are “highly legalistic, adversarial, and abstract” and “developed according to the needs of the predominantly Anglo-Canadian colonialists” (at 6). She also argues that the preamble “is inaccurate as an historical matter” (at 7), perpetuating the myth that Canada was created by two founding nations according to law. As noted by Andrew Orkin, “Aboriginal peoples have never freely consented to their collective dispossession through the wholesale taking of their traditional lands and resources across this land…” (Andrew Orkin, “When the Law Breaks Down: Aboriginal Peoples in Canada and Governmental Defiance of the Rule of Law” (2003) 41 Osgoode Hall L.J. 445 at 445).

Turpel’s critique also implicates the individual, property rights focus of the *Charter* and calls into question whether the kind of dispute that arose between the Tsuu T’ina Nation and Frasier, Peshee and Noel can be properly adjudicated by Canadian courts given their inability to truly understand cultural differences (even, or perhaps especially when those differences arise in internal disputes within First Nations). The Court of Appeal’s characterization of this case as a landlord and tenant matter arguably proves Turpel’s point in this respect.

In his contribution Orkin raises a number of instances where Canadian governments have insisted that Aboriginal peoples are bound by the rule of law, normally in situations where Aboriginal peoples are trying to resist government attempts to break their treaty promises or are otherwise standing up for their own interests. He contrasts these examples of Aboriginal peoples’ resistance, dissent and civil disobedience with state violations of legal norms - i.e. defiance of the rule of law - by stealing land and resources, breaching treaties, insisting upon agreement to the extinguishment of Aboriginal and treaty rights contrary to international law, and so on.

The rule of law is thus a contested concept in its application to Aboriginal peoples in Canada. To the extent it does apply, we should insist on its equal application to the Canadian state in its dealings with Aboriginal peoples. This would include the obligation to address a legal argument that a court order is so vague that it is contrary to the rule of law itself.