# THE CREE REGIONAL AUTHORITY AND BILL NAMAGOOSE (Applicants) v. RAYMOND ROBINSON (Respondent) and PROCUREUR GENERAL DU QUEBEC AND HYDRO-QUEBEC (Intervenors)

[Indexed as. **Cree Regional Authority v. Robinson]**

Federal Court, Trial Division, Rouleau J., March 13, 1991

J. O'Reilly and P. Hutchins, for the applicants
F. Aubry and R. LeBlanc, for the respondent
R. Monette, for the intervenor, Procureur General du Quebec
O. Emery and S. Lussier, for the intervenor, Hydro Quebec

The applicant, having become aware that the Quebec government and the James Bay Corporation and Hydro-Quebec intended to proceed with Phase II of the Great Whale River Hydroelectric Project, sought an order of mandamus against the respondent federal administrator ordering him to comply with ss.22 and 23 of the James Hay and Northern Quebec Agreement and the *James Bay and Northern Quebec Native Claims Settlement Act,* S.C. 1976-77, c.32 with respect to the Project, and specifically to conduct environmental and social impact assessment and review procedures contemplated by ss.22 and 23, or alternatively to obtain an injunction or other relief ordering the administrator to comply with ss.22 and 23 to pursue said procedures.

The applicant contended that the Agreement which was ratified by Parliament is a law of Canada and that the federal administrator, appointed pursuant to the enabling Act of Parliament, had a statutory obligation to appoint review panels which he failed to do; that pursuant to s.3(5) of the ratifying Act, the federal administrator was a “federal board, commission, or other tribunal” pursuant to s.2(g) of the *Federal Court Act,* R.S.C. *1985,* c.F-7 and that the Court had jurisdiction to entertain the motion and grant the relief requested.

The federal administrator and the intervenors contended that Parliament did not incorporate the Agreement into its confirming legislation; that the appointment of the federal administrator was therefore not pursuant to federal legislation and that his powers were derived from a joint provincial and federal authority; that the Agreement was not an Act of Parliament and consequently the Court did not have jurisdiction to grant the relief sought.

**Held: The Federal Court, Trial Division, had jurisdiction to entertain the motion for relief. The application for mandamus and injunctive relief was adjourned for argument on the merits to a later date.**

1. When the terms of a statute clearly confirm what Parliament intended and it expressly requires that the terms of the contract be carried into execution, then it becomes part of the law. Section 13 of the *Interpretation Act,* R.S.C. 1985*,* c.I-21 provides that the preamble of a statute shall be read as part of the enactment and is intended to assist in explaining its purport and object.

2. Parliament confirmed the Agreement by statute *(James Bay and Northern Quebec Native Claims Settlement Act,* S.C. 1976-77, c.32). The preamble of the statute clearly confirmed that Parliament contemplated that the Agreement would form part of the statute and the law of Canada. The preamble explained that the government of Canada assumed certain obligations under the Agreement respecting the Crees and the Inuit, that in accordance with the established regime certain lands for hunting, fishing and trapping were set aside for the native peoples, that it sought their active participation in the administration of the territory, that it would safeguard and protect their future and ensure their involvement in the development of the territory. The preamble also referred to the establishment of laws, regulations and procedures to protect the environment and to remedial and other measures respecting hydroelectric development. The preamble also stated that in consideration of the surrender of native claims to the territory, the government of Canada recognized and affirmed a special responsibility to protect the rights, privileges and benefits given to the native peoples under the Agreement.

3. The appointment of the administrator did not arise from a joint/federal authority but exclusively from a federal enactment. Since the James Bay and Northern Quebec Agreement forms part of the federal statute, the federal administrator is thus a person exercising powers conferred by or under an Act of Parliament, and is a "federal board" as specified in s.2(g) of the *Federal Court Act.* Consequently, the Court had jurisdiction under s.18 of the *Federal Court Act* to entertain the motion for the relief claimed.

4. In the event that the above analysis was incorrect, then alternatively the court would have

jurisdiction under either s.44 of the *Federal Court Act* or in exercising its powers for "the better administration of the laws of Canada" pursuant to s.101 of the *Constitution Act, 1867.* Federal appointees must be either specifically governed by applicable regulation or subject to some other review mechanism. In this instance there was no apparent authority having the power to review the acts or omissions of the federal administrator. In the absence of such a review mechanism, and given that Indian affairs and the environment are under federal jurisdiction, it would be just and convenient for the court to grant an order for mandamus or an injunction under s.44 of the *Federal Court Act.*

5. There are three requirements used to determine whether the court has jurisdiction: 1) there must be a statutory grant of jurisdiction by the federal Parliament; 2) there must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; 3) the law on which the case is based must be "a law of Canada" as the phrase is used in s.101 of the *Constitution Act, 1867.* Conditions 2 and 3 were met in this case. The court being satisfied that there was a gap with respect to the granting of any supervisory role over the federal administrator, and unable to envisage any other body capable of exercising that function, the court concluded that it had jurisdiction to review the actions of the federal administrator. Any contrary determination would provoke with the native groups a sense of victimization by white society and its institutions.

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**ROULEAU J.:** Motion on behalf of Applicants to obtain an order of mandamus against Respondent Raymond Robinson ordering him as federal administrator to comply with ss.22 and 23 of the James Bay and Northern Quebec Agreement and the *James Bay and Northern Quebec Native Claims Settlement Act,* S.C. 1976-77, c.32 in regard to the proposed Great Whale River Hydroelectric Project and specifically to pursue the federal impact assessment and review procedures contemplated by ss.22 and 23 of the James Bay and Northern Quebec Agreement and the *James Bay and Northern Quebec Native Claims Settlement Act* in regard to the proposed Great Whale River Hydroelectric Project or alternatively to obtain an order of injunction or other relief ordering him to so comply with said ss.22 and 23 to pursue said procedures.

Reasons for Order

This motion was heard at Montreal on March 11th, 1991. The issue before the Court arises out of a dispute with respect to an Agreement executed in 1979 concerning the James Bay and Northern Quebec Agreement. The signatories are the Governments of Canada, the Province of Quebec, the James Bay Development Corporation, Hydro-Quebec, the Grand Council of the Crees of Quebec and the Northern Quebec Inuit Association. As a result of this Agreement, the Cree and Inuit of Northern Quebec conceded and relinquished certain rights they had over the territory in exchange for certain guarantees and undertakings given by both the federal and provincial governments. The purpose was to plan and control future development of the Northern Quebec Region.

In recent months, the government of Quebec along with the James Bay Corporation and Hydro-Quebec have made public their intention to proceed with Phase II of the development called the Great Whale River Hydroelectric Project. It was recently disclosed that the corporation responsible for the development of the project called for tenders for the clearing for an access road as well as its construction. The Grand Council of the Cree became aware of this initiative and were pressing federal authorities to initiate environmental review procedures in the area before construction was to begin. Conscious of the imminent commencement of site preparation for the road, the Grand Council of the Cree instructed their lawyers to bring proceedings before this Court seeking *mandamus* or an injunction against the appointed federal administrator, Mr. Raymond Robinson. Ultimately the relief requests that he conduct environmental and social impact assessment and review procedures pursuant to ss.22 and 23 of the Agreement.

In a letter dated October 3rd, 1989 and directed to the Minister of the Environment of the Province of Quebec, the federal minister, Lucien Bouchard, indicated that since the federal authorities had become aware of the development of the Great Whale Hydro Quebec Project, it was its view that an environmental assessment should be undertaken since the project involved matters of federal jurisdiction. He contended that ss.22 and 23 of the Agreement applied and he suggested a cooperative approach between both levels of government. The letter went on to indicate that federal officials would look forward to hearing from Hydro-Quebec and hoped to receive from them an outline of the proposed project. He further suggested that taking into account the considerable magnitude of this project, it was extremely important that the environmental assessment be conducted as objectively and independently as possible.

On November 28th, 1989, the federal minister of the environment once again wrote to the newly appointed Minister of the Environment of the province of Quebec bringing to his attention the urgency of the environmental review and enclosed a copy of the letter previously forwarded to his predecessor. By a letter dated the 23rd of November 1989, Mr. Raymond Robinson, the federal administrator, corresponded with the vice-president of environment of Hydro-Quebec and reiterated that this project was subject of a federal environmental review procedure pursuant to ss.22 and 23 of the Agreement. He further requested a summary or outline of the project and confirmed that pursuant to his mandate, he had appointed a tribunal to initiate a study. He also confirmed that he considered that the federal government had an obligation to undertake these studies in light of recent decisions of the Federal Court of Canada and, more particularly, in light of the E.A.R.P. Guidelines which came into effect in June of 1984. He also suggests a cooperative study.

An extensive period of silence then prevails. On the 19th of November 1990, Mr. Robinson wrote to Michel Chevalier of Environment Canada, president of the evaluation committee responsible for the James Bay and Northern Quebec Development. He outlines the federal responsibility with respect to the Great Whale Project and the impact it may have in areas of federal jurisdiction, such as fisheries, migratory birds and the ecology of Hudson's Bay. He advises that the federal appointees are prepared to work in collaboration with their provincial counterparts and he is anxious that a joint agreement be ratified. Should Quebec fail to act, the federal government would be obliged to act unilaterally, he wrote. On November 23rd, 1989, Mr. Robinson again advises the vice-president of the environment for Hydro-Quebec that this project is subject to federal evaluation pursuant to ss.22 and 23 of the Agreement and he seeks a cooperative effort.

At a meeting in November of 1990, Mr. Robinson changes his position and informs the Cree that he has no mandate to apply federal impact assessment review procedure under the Agreement. As a result of this turn of events, this motion was launched against Mr. Robinson, the federal administrator responsible for environmental evaluation pursuant to ss.22 and 23 of the Agreement. Shortly thereafter, having been made aware of the motion, Hydro-Quebec, the federal Department of Justice, and the Attorney General of Quebec sought leave to be added as intervenors. This was granted by the Court without objection by the applicant. The respondent as well as the intervenors challenge the jurisdiction of this Court to grant the relief sought.

It is the applicant's position that the Agreement, which was ratified by the Parliament of Canada, is the law of Canada, that Mr. Robinson, appointed pursuant to the enabling Act of Parliament, has a statutory obligation to appoint review panels which he has failed to do; that, pursuant to s.3(5) of the ratifying Act, Mr. Robinson, appointed by Order in Council, was a "federal hoard, commission, or other tribunal" pursuant to s.2(g) of the *Federal Court Act,* R.S.C. 1985, c.F-7 and that this Court has jurisdiction to entertain the motion and grant the relief claimed.

The respondent, as well as all intervenors, submit that the Parliament of Canada, has not incorporated the Agreement per se into its confirming legislation. They summit that as a result, the appointment of Mr. Robinson was not pursuant to federal legislation and that his powers are derived from a joint provincial and federal authority; and finally, that this Agreement was not an Act of Parliament and therefore this Court does not have jurisdiction.

As mentioned earlier, this rather extensive and complex Agreement involved not only federal and provincial authorities, but included as signatories Hydro-Quebec, the James Bay Development Corporation and, more importantly, the Grand Council of the Cree and Inuit of Northern Quebec. In the document, the aboriginal peoples relinquished their traditional rights over some 3/5 of the territory of the province of Quebec in return for certain assurances and guarantees included in the Agreement. It specifically recognizes the Crees' rights to trapping, fishing, and hunting grounds; considers the social and economic impact that any future development may have, and enshrines, in ss.22 and 23, a procedure to be followed with respect to environmental impact studies which are to be conducted in the event of further projects.

Section 22 refers to the Environment and Future Development Below the 55th Parallel, and s.23 refers to the Environment and Future Development North of the 55th Parallel. There is not doubt that some of the initial infrastructure development may be undertaken south of the 55th parallel, but nevertheless the major hydroelectric development will occur north of the 55th parallel.

Pursuant to the terms of this Agreement, all parties are to derive certain benefits, and there is no doubt that the Cree and Inuit of the territory were given some guarantees for having surrendered certain rights. The ultimate aim was to provide future safeguards for the occupying aboriginal peoples.

According to ss.22 and 23 of the Agreement, a federal administrator is to be appointed for the

purposes of supervising the environmental impact of any future development and to see to the protection of areas of federal jurisdiction which includes, of course, the Indian people of the region. The Agreement specifically indicates that the Administrator is to set up evaluating committees to determine if the development is to have any significant impact on the native people or the wildlife resources of the territory. He is under no obligation to proceed with an assessment in the event that the development contemplates no significant impact. I doubt that anyone can suggest that Phase II of the James Bay Hydroelectric Development Project will not affect both the social and economic future of the native peoples and will certainly interfere with wildlife and its habitat, resulting in drastic changes to the traditional way of life.

As a Schedule to the Agreement, it was indicated that future amendments were to be approved by all parties and ratified by the Quebec National Assembly as well as the Parliament of Canada when changes concerned their respective jurisdictions. This would appear to me to indicate that all parties presumed legislative authority or ratification.

The initial submission put forth by the respondents, as well as the intervenors, was to the effect that the statute passed by the Parliament of Canada ratifying the Agreement did not of itself incorporate all terms of the Agreement; was not an enactment and therefore created no federal jurisdiction; it was not a statute, therefore, the appointment of Mr. Robinson, by Order in Council, was not by enactment, and could not clothe this Court with jurisdiction to grant the relief sought. Most counsel relied and referred me to a quote from *Halsbury's Law of England,* at paragraph 938 in volume 44 and argued that from a reading of what was contained therein, a simple ratification of a contract by Parliament did not have the force and effect of a statute. The following is the quote from Halsbury:

> 938. Statutory confirmation of contracts. Where a contract is confirmed by statute, no objection can be taken as to its validity. It cannot, for example be challenged for uncertainty or remoteness; nor is it material that it creates a right which could not be created by ordinary contract. It does not follow that, because it is confirmed by statute, a contract has the force and effect of a statute, but the terms in which it is confirmed may show that Parliament intended it to operate as a substantive enactment as if the contract had become part of the statute, and it will certainly have such an operation if the statute in question, in addition to confirming it, expressly requires it to be carried into execution. A contract having substantive effect in this way may accordingly affect persons who are not parties to it.

Most other authorities and jurisprudence relied upon by the respondent as well as the intervenors were irrelevant. The authorities referred to may be summarized as incidents where a specific grant of jurisdiction had been conferred on other bodies or cases where it was clearly determined that the jurisdiction belonged in provincial superior courts.

It appears evident and clear to me that counsel has misconstrued the passage. A careful reading would seem to indicate the contrary. In fact it suggests that when the terms of the statute clearly confirm what Parliament intended, and it expressly requires that the terms of the contract be carried into execution, it becomes part of the law. The federal Parliament confirmed the Agreement by statute on the 14th of July 1977, S.C. 1976-77, c.32. The opening paragraph of the preamble is as follows:

> An Act to approve, give effect to and declare valid certain agreements between the Grand Council of the Crees (of Quebec), the Northern Quebec Inuit Association, the Government of Quebec, la Societe' d'energie de la Baie James, la Societe de development de la Baie James, la Commission hydro-electrique de Quebec and the Government of Canada and certain other related agreements to which the Government of Canada is a party.

The preamble goes on to explain that the government of Canada has assumed certain obligations under the Agreement respecting the Crees and the Inuit. It relates that it is setting aside, for the native peoples, certain lands for hunting, fishing and trapping in accordance with the established regime; it seeks their active participation in the administration of the territory; it attempts to safeguard and protect their future and to ensure their involvement in the development of their territory. It refers to the establishment of laws, regulations and procedures to protect the environment and more particularly, refers to remedial and other measures respecting hydroelectric development.

The preamble goes on to state, that in consideration of the surrender of the native claims to this portion of the territory of Quebec, the government of Canada recognizes and affirms a special responsibility to protect the rights, privileges and benefits given to the native peoples under the Agreement (see e.g. s.(3)). The Agreement was tabled by the Minister of Indian Affairs and Northern Development and approved and declared valid by Parliament.

Section 13 of the *Interpretation Act,* R.S.C. 1985*,* c.I-21 provides that the preamble of a statute shall be read as part of the enactment and is intended to assist in explaining it purport and object.

How then can it be argued that Parliament did not contemplate that the Agreement form part of the statute and the law of Canada? There is no doubt in my mind that Parliament intended the Agreement to operate as a substantive enactment, as if the Agreement had become part of the statute. Parliament appears unequivocal as to its intention and purpose.

I am therefore satisfied that the appointment of the administrator, pursuant to s-s.3(5) of the statute allowing the Governor in Council to make regulations which are necessary for the purpose of carrying out the agreement or for giving effect to any of the provisions therefor, does not arise from a joint provincial/federal authority but exclusively from a federal enactment.

The Order in Council specifies that Mr. Robinson is to be the administrator in matters involving federal jurisdiction for the purpose of ss.22 and 23 of the James Bay and Northern Quebec Agreement.

Having concluded that the James Bay and Northern Quebec Agreement forms part of the federal statute, Mr. Robinson is thus a person exercising powers conferred by or under an Act of Parliament, and is a "federal board" as specified in s.2(g) of the *Federal Court Act.* I find that I have jurisdiction under s.18 of the *Federal Court Act* to entertain the motion for the relief claimed.

Should the above analysis prove to be incorrect, I would suggest that this court has jurisdiction either under s.44 of the *Federal Court Act* or in exercising its powers for "the better administration of the laws of Canada" (s.101 *Constitution Act).* We have at bar a federal administrator with no apparent authority having the power to review his acts or omissions. It is well established that federal appointees must be either specifically governed by applicable regulation or subject to some other review mechanism.

In the absence of such a review mechanism, and given that Indian Affairs and the Environment fall under federal jurisdiction, it may well be "just and convenient" for this Court to consider the granting of *mandamus* or an injunction under s.44 of the *Federal Court Act.*

In the case of *ITO-Int. Terminal Operators Ltd. v. Muda Electronics Inc.,* [1986] 2 S.C.R *752* it was established that there are 3 essential requirements to determine whether or not this Court has jurisdiction, as follows:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in S. 101 of the *Constitution Act, 1867.*

There is no doubt that this matter complies with conditions 2 and 3. The question to be answered is "Must there be a statutory grant of jurisdiction by the federal Parliament?" Being satisfied that there is a lacuna with respect to the granting of any supervisory role over Mr. Robinson, and unable to envisage any other body capable of exercising the function, I must conclude that jurisdiction to review actions of Mr. Robinson rests with this Court.

In reaching this conclusion, I cannot help but be directed by the words of Dickson C.J. of the Supreme Court of Canada in the *Sparrow* case, in which courts are directed that "the sovereign's intention must be clear and plain if it is to extinguish an aboriginal right" [*R.* v. *Sparrow,* [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160 at 175, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 56 C.C.C. (3d) 263, 46 B.C.L.R. (2d) 1, 111 N.R. 241].

I feel a profound sense of duty to respond favourably. Any contrary determination would once again provoke, within the native groups, a sense of victimization by white society and its institutions. This agreement was signed in good faith for the protection of the Cree and Inuit peoples, not to deprive them of their rights and territories without due consideration. Should I decline jurisdiction, I see no other court of competent jurisdiction able to resolve this issue.

**ORDER**

1. That the following parties be added as intervenors:
    1. Procureur-general du Quebec
    2. Hydro-Quebec

2. That the application for mandamus and injunctive relief be adjourned for argument on the merits to April 2,91 commencing at 13:30 p.m.

3. That the respondent and intervenors shall be allowed to March 27th 1991 to complete cross-examination of the affiants whose depositions were filed in support of this application.

4. On the challenge to jurisdiction, I hereby determine that this court does have jurisdiction to entertain the motion for relief.

Costs to the applicant in any event of the cause.