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Case Name:

British Columbia (Minister of Forests) v. Okanagan Indian Band

Between
Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Forests, Plaintiff,
and
Chief Dan Wilson, in his personal capacity and as representative of the Okanagan Indian Band and all other persons engaged in the cutting, damaging or destroying of Crown Timber at timber sale licence A57614, Defendants

[2011] B.C.J. No. 1297

2011 BCSC 909

Docket: 23911

Registry: Vernon

British Columbia Supreme Court
Vancouver, British Columbia

J.S. Sigurdson J.

Heard: June 13-14, 2011.
Judgment: July 7, 2011.

(43 paras.)

Counsel:

Counsel for the Plaintiff: K.J. Tyler, K.E. Walman.

Counsel for the Defendants: M.L. Mandell, Q.C., C.Y. Sharvit.

Reasons for Judgment

J.S. SIGURDSON J.:--

Introduction

1 The plaintiff, Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Forests ("the Province"), has applied for directions in connection with the trial set for November 2011.

2 The central question on this application relates to whether the issues arising from a notice of constitutional question, recently filed on May 27, 2011, by the defendants ("Okanagan Indian Band"), should be heard at the time of the trial. The issue in the trial in November is whether the plaintiff is entitled to enforce its stop work order in light of the defendants' aboriginal right to harvest the timber in question, which has been admitted by the Province.

3 The plaintiff argues that the defendants are seeking to introduce an issue, that of aboriginal title, that has been severed to the second part of the trial.

4 The defendants disagree and say that the question of the Crown's burden of proof to establish that the timber was Crown timber has always been an issue in the case, and in the severed trial, and the recent notice of a constitutional question merely clarifies that position.

Background

5 In July 2007, upon a severance application by the plaintiff (2007 BCSC 1014), I ordered at para. 91 that:

> The trial will proceed ... on the issue of the enforceability of the stop work order in light of the petitioner's admission that the respondents at the time were exercising an aboriginal right to harvest timber ....

6 I noted in my reasons for judgment at that time that the plaintiff was seeking to sever the issue of the enforceability of the stop work order based on the admitted aboriginal right to harvest wood for domestic purposes from any larger issues based on the defence of aboriginal title.

7 The plaintiff at that time had initially suggested a number of issues with respect to the first stage of the proposed streamlined trial but in submissions acknowledged that the possible issue of whether the timber was Crown timber within the meaning of the *Forest Act*, R.S.B.C. 1996, c. 157, or *s.* 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, (given the Province's admission of the respondent's aboriginal right to harvest timber referred to in the stop work order of September 1999) could not be severed as the defendants asserted that it only arose in relation to the claim of aboriginal title. The defendants at the time took the position that the admitted right did not engage the constitutional questions relied on by them as the defences based on ss. 109 and 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, and could not be adjudicated in the absence of recognition of aboriginal title. The position of the defendants was that the subject trees were not Crown timber because of their aboriginal title.

8 In upholding the 2007 severance decision (2008 BCCA 107), Mackenzie J.A. stated at para. 21 that:

> The logging was for the purpose of building housing for members of the Okanagan Community and within the aboriginal right as admitted. The stop work order infringed that right. The only aboriginal rights issue remaining is whether the Province can justify the infringement in the exercise of a forest practices code jurisdiction.

9 He noted at para. 24:

> If the Province succeeds in justifying the stop work order then the broader issue of aboriginal title is engaged on the premise that proof of aboriginal title ousts provincial jurisdiction under the *Forest Practices Code* entirely.

10 In 2010 the defendants sought to vary the 2007 severance order which had severed the issue of the admitted aboriginal right to harvest timber from the aboriginal title defence. The defendants also applied for directions that their "streamlining proposal" be put in place so the trial could proceed on a number of different issues that they said related to "Aboriginal/Crown titles and jurisdictions". One was: "Was the harvested timber 'Crown timber' as asserted in the petitioner's statement of claim?"

11 I dismissed the application for reconsideration of the severance order (2010 BCSC 1088). I held that the respondents have not demonstrated a material change in circumstances from the time of the severance order in 2007 and I directed that the trial proceed in accordance with the existing severance order on the issue of justification of the admitted infringement of the defendants' aboriginal right.

12 Following those reasons in 2010, the parties have filed new pleadings and there remains only the question of which pleadings are operative for the first phase of the trial. The initial question on this application for directions is essentially whether the notice of constitutional question filed May 27, 2011, and the relief sought at paragraph 1(d) of the counterclaim is operative for the first phase of the trial. Paragraph 1(d) counterclaims for:

> (d) a declaration that the definition of "Crown timber" in s. 1 of the *Forest Act*, and ss. 18, 96, 119 and 123 of the *Forest Practices Code*, are constitutionally inapplicable to the lands and timber at issue in this case ...

13 That notice of constitutional question filed on May 27, 2011, reads as follows:

> (a) Are the Sections of the Code and the Decisions beyond the power of the Province and contrary to ss. 91(24) and 109 of the *Constitution Act, 1867*, the Terms of Union, 1871, as interpreted by the Courts as applied to the lands in issue in these proceedings, because the Province does not have the beneficial ownership interest or legislative authority asserted through its definition of "Crown timber" and "Crown lands", as applied through the Code, and the Decisions to the watersheds.
> (b) Is the Code inapplicable to Aboriginal Title lands in issue in these proceedings, by virtue of ss. 91(24) and 109 of the *Constitution Act, 1867*, the Terms of Union, 1871, as interpreted by the Courts?
> (c) In the alternative, are the sections of the Code and Decisions an unjustifiable infringement within the meaning of s. 35 of the *Constitution Act, 1982*?

14 The directions sought by the Province are that the notice of constitutional question filed on May 27, 2011, not be set down for hearing until after completion of the trial currently set to commence on November 7, 2011.

15 The defendants say that the notice of constitutional question and the relief sought at paragraph 1(d) of the amended counterclaim are not new and are responsive to the development and clarification of issues in this case and directly engage the question of whether the Crown has met its onus of proving that the timber at issue is Crown timber, an issue the defendants say has been engaged from the outset of this proceeding.

Discussion

16 The question that must be considered is whether the notice of constitutional question, in light of the severance order, should be deferred to the second phase of the trial.

Parties' Positions

The Province's position

17 The Province's position is that the notice raises questions relating to aboriginal title and that all issues relating to aboriginal title were deferred to the second phase of the trial. In particular the plaintiff argues that the severance order

unequivocally deferred all issues relating to aboriginal title, not merely the positive proof of aboriginal title, that the suggestion that aboriginal title might be an issue was repudiated by the defendants in 2007, and that it was not suggested until very recently that the identification of the timber harvested by the defendants as Crown timber would play any part in the trial relating to the justification of the infringement of the aboriginal right.

18 The plaintiff seeks directions that the challenge embodied in the notice of constitutional question on May 27, 2011, not be permitted to be argued during the first phase of the severed trial because it is said to be contrary to the severance order made by this court and affirmed by the Court of Appeal, would require the Crown to adduce considerable new evidence in relation to the defendants' assertion of aboriginal title, including substantial historical evidence, and would require the trial date to be adjourned.

19 Mr. Tyler argues that it is apparent from the defendants' correspondence that the defendants' constitutional challenge is based upon aboriginal title. Mr. Tyler points to a paragraph of the defendants' application response where they submit:

> The Okanagan will also rely on constitutional facts which, they will argue, engage a different and lower level of proof than establishing Aboriginal title. They will argue that the Province knew enough about the Okanagan Nation's legal rights prior to 1846 in the Watersheds to prevent the Province from dealing with the land exclusively as they did through the impugned sections of the *Code* and Decisions. In this regard, the Okanagan will rely on the legal determination that the existence of Aboriginal title in the Watersheds has *prima facie* merit, the admissions made in these proceedings, the documents and affidavits already before the court. The Okanagan do not intend to file new affidavits.

20 The Crown says its burden for the severed trial is to establish that the timber falls within the statutory definition of Crown timber. Mr. Tyler submits, as I understand his argument, that it has never been suggested in these proceedings that a finding of Crown timber is inconsistent with an assertion or finding of aboriginal title. The Province says that it is an abuse of process to set down a constitutional question for hearing during the first phase of the trial that is substantially identical to the question that has been the subject of a dismissed motion for it to be heard in that phase of the trial.

21 Mr. Tyler argues that while the defendants say that they only intend to rely on documents and affidavits already before the court, the plaintiff says that none of those materials, which have been presented on interlocutory applications, are actually evidence at trial and, in Mr. Tyler's submission, contain assertions not relevant to the issues to be decided at the trial. In the Crown's view these assertions, particularly the evidence from Chief Dan Wilson about earlier promises, would require a substantial volume of historical evidence concerning the history of reserve allotment in the Okanagan region and for the Okanagan Indian Band. The Province says it would also need to lead substantial evidence of the epidemiological history of small pox outbreaks in the Okanagan region to respond to the defendants' assertion that disease was deliberately introduced by settlers on blankets infested with small pox.

22 Mr. Tyler says that if the November trial will include the issues raised by the notice of constitutional question of May 27, 2011, preparation for an argument based on extensive historical evidence will require an adjournment of the trial.

Defendants' position

23 The defendants oppose the directions sought by the plaintiff.

24 They argue that the relief sought at paragraph 1(d) of the counterclaim is not new relief. The defendants say that the notice and paragraph 1(d) directly engage the question of whether the Crown has met its onus of proving that the timber at issue is Crown timber as defined by the statute. The defendants refer to this as the "onus of proof" issue.

25 The defendants say that the onus of proof issue has been an issue throughout the proceedings. They suggest that the Province's position on this directions application conflates two threads to the litigation concerning aboriginal title. The first strand, or thread, they say is the defence of aboriginal title which has been severed from the first phase of the trial in November, based on advance cost order considerations. They say that this strand or thread requires positive proof of aboriginal title and gives rise to issues such as the test to prove aboriginal title and the constitutional consequences should a declaration of aboriginal title be granted.

26 The defendants say that the plaintiff's application for directions incorrectly conflates the second strand with the issue of aboriginal title that has been severed. They put it this way:

> The second strand is the Province's onus of proof that the timber is Crown timber, which engages a constitutional challenge to Sections of the *Code* and Decisions identified in the Notice of Constitutional Question and the relief sought at para. 1(d) of the amended Counterclaim. This strand is engaged by the pleadings of the Province and the Okanagan -- old and new -- and is based on judicial determinations which are not dependent on proof of Aboriginal title. The Province has indicated that it intends to discharge its onus through legal argument alone. The Okanagan defence will rely on the common law of Aboriginal rights, a division of powers analysis, the legal determination that Aboriginal rights and title have not been extinguished in B.C., and that the onus to prove extinguishment lies with the Crown.
>
> The Okanagan will also rely on constitutional facts which, they will argue, engage a different and lower level of proof than establishing Aboriginal title.

27 After the Crown puts forward its case in support of its plea that the timber is Crown timber and that it possesses the legislative power it asserts through the impugned Sections of the *Code* and Decisions, the Okanagan submits that it will lead a *prima facie* case of aboriginal title and rights to establish that the Crown was and is on notice of pre-existing legal rights to land and governance that requires reconciliation. Ms. Mandell does not anticipate filing new affidavits.

28 Ms. Mandell says that the issue she wishes to raise is engaged by the Crown's assertion that the timber is Crown timber. She submits that that the Crown recognizes the burden is on it to prove the timber is Crown timber. Ms. Mandell said that the band would have to call a *prima facie* case of aboriginal title and rights sufficient to require the Crown to prove extinguishment. Her position is that when the Band satisfies its *prima facie* proof based on the various elements of proof she described, the onus shifts to the Crown and the Crown cannot assert absolute sovereignty without satisfying its burden to show extinguishment of aboriginal title. She says that the Province is and was on notice of pre-existing legal rights to land and governments that require reconciliation.

29 The defendants say that the primary reason for the severance decision was that proof of aboriginal title would be the most lengthy and expensive part of the trial and, when the streamlining proposal was put forward by the defendants in 2010, the Court did not separately consider whether the onus of proof issue would form part of the first phase of the trial as severed.

30 The Okanagan seek a remedy that gives effect to the challenge to the Province's forestry jurisdiction and without the amendment (to the counterclaim) they say they would be precluded from obtaining any remedy that would concretely affect their relations with the Province. The Band says that the effect of the Province's request for directions will be to remove from consideration at the first phase of the trial any requirement for the Province to prove one of its core assertions and for the Okanagan to be able to challenge it. The defendants say that it is not necessary to prove aboriginal title in order to raise the constitutionality of the *Forest Act* provisions relating to Crown timber. They say that this jurisdictional argument rests on an independent footing in the common law, and only requires them to establish a *prima facie* case as to aboriginal title.

31 The defendants say that allowing the disputed relief to be operable at the first phase of the trial will impose a minimal cost on the parties, while refusing it operates significantly to the prejudice of the Okanagan in resolving the important issues in this trial.

32 Ms. Mandell says that when the question of severance was decided what was severed was the defence of aboriginal title and the question of the onus or burden on the Crown was not discussed. She submits that I was influenced by the cost of the trial on aboriginal title and that the additional cost of the first phase of the trial will be minimal if argument on the new notice of constitutional question is allowed to proceed.

The Province's reply

33 Mr. Tyler says in reply that the defendants are mischaracterizing the Crown's position. He says that virtually every position attributed by Ms. Mandell to the Crown is inaccurate.

34 He says that the Crown is not arguing extinguishment, the Crown is not asserting absolute sovereignty, and the Crown is not asserting absolute title. He says that Ms. Mandell's suggestion that the plaintiff's admissions do not apply to all parts of their case is not correct. He does not dispute that the defendants have the right to bring forward the constitutional question, insofar as it has been based on aboriginal rights, in the first phase of the case. However, he submits that insofar as the constitutional question is based on aboriginal title it should be dealt with in the second phase of the trial.

35 Mr. Tyler says that the plaintiff does not argue that the act of vesting title to the lands in the Crown abrogates aboriginal title, a position he says is supported in the authorities. He submits that there is no inconsistency with aboriginal title and Crown title existing on the same land. He submits that the question of whether it was Crown timber is only relevant to whether the Crown has "statutory" authority for its actions. Insofar as the defendants' claim is for aboriginal title he says the burden is on the defendants to prove it at the appropriate time, not to simply raise a *prima facie* case.

Decision

36 The question on this application is the appropriate directions for the trial that is scheduled to commence in November.

37 The question of what issues would be operable at the first phase of the trial was the subject of my 2007 and 2010 decisions. The considerations that I set out in those decisions are still applicable to my decision in these reasons. The intention of those decisions was to sever the issues relating to the question of the aboriginal right that has been admitted by the Province from the issues of aboriginal title. The latter issues of aboriginal title will arise in the event that the defence based on the admitted right does not succeed and the trial proceeds on the basis of the defence of aboriginal title or if the Court determines, after further submissions, that the existing advance costs order applies, or should be extended to apply, to the counterclaim for a declaration of aboriginal title throughout the Watershed.

38 I think that the recently served notice of constitutional question seeks to interject into the first phase of the trial issues relating to aboriginal title that are to be part of the second phase of this trial if and when such a trial becomes necessary. It was and remains my decision that issues relating to aboriginal title were not part of the first phase of the trial.

39 Without deciding on the merit of the arguments advanced by Ms Mandell in the context of an aboriginal title defence or a claim for a declaration of aboriginal title, I am satisfied that her submissions do not give rise to issues that are necessary to be decided to determine the questions at the first stage of the trial.

40 Accordingly, the appropriate directions are that the notice of constitutional question served in May 2011, and paragraph 1(d) of the counterclaim will be deferred to the second phase of the trial.

41 Based on this decision and my earlier rulings, I anticipate that it will be clear to counsel which of the pleadings, the form of which are agreed to, will be operative for the first phase or severed part of the trial.

42 I direct the plaintiff to advise the defendants within three days of this ruling as to which paragraphs in the pleadings are operative for the first phase or, in other words, the parts of the pleadings that are not stayed. The defendants will reply with their position within three days. In the event that there are areas of disagreement the parties may provide their submissions in writing but in the event that the parties think an oral hearing will resolve the issue more expeditiously, then they should advise the Registry and I will make myself available to hear the parties.

Conclusion

43 Accordingly, my direction is that the notice of constitutional question filed on May 27, 2011, will not form part of the first trial. The parties will exchange submissions as to which pleadings should be stayed and I will subsequently resolve any matters of disagreement. If the timelines I have set are not practicable for the parties they may agree on a different schedule and I ask that they advise me of that through the Registry.

J.S. SIGURDSON J.

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