2011 CarswellBC 2002, 2011 BCSC 1001

Gitxsan Nation v. Gitxsan Treaty Society

Spookw also known as Geri McDougall on behalf of Herself and Other Gitxsan Chiefs and Members, Basky-alaxha also known as William Blackwater Sr, Suu Dii also known as Yvonne Lattie, Luutkudziiwuus also known as Charlie Wright, Xsimwits,Iin also known as Lester Moore, Moolxhan also known as Noola, and as Norman Moore, Gitanmaax Indian Band, Glen Vowell Indian Band, Gitwangak Indian Band, Kispiox Indian Band, and Gitksan Local Services Society, Plaintiffs and Gitxsan Treaty Society, British Columbia Treaty Commission, Her Majesty The Queen In Right of the Province Of British Columbia and The Attorney General Of Canada, Defendants

British Columbia Supreme Court [In Chambers]

Kelleher J.

Heard: May 4-5, 2011
Judgment: July 26, 2011
Docket: Smithers 15150



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K. Phillips, for Her Majesty the Queen in Right of the Province of British Columbia

A. Singh, N. Wright, for Attorney General of Canada

Subject: Civil Practice and Procedure; Constitutional; Public

Aboriginal law.

Civil practice and procedure.

***Kelleher J.*:**

1 This is an application pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, to stay or dismiss the plaintiffs' action against the British Columbia Treaty Commission (the "Commission") on the

basis that it discloses no reasonable claim within the meaning of Rule 9-5(1)(a) of the *Rules*. Alternatively, the Commission seeks summary judgment pursuant to Rule 9-6(4) of the *Rules*. The basis of this alternative application is that there is no genuine issue for trial with respect to the claim.

**The Parties: The Plaintiffs**

2 The Gitxsan Nation is made up of traditional houses known as wilps, which constitute the basic Gitxsan social unit. The Gitxsan live in communities at Gitwangak, Gitanyow, Gitsegukla, Gitanmaax, Kispiox, and Glen Vowell.

3 The first six listed plaintiffs are Gitxsan hereditary chiefs: Spookw, also known as Geri McDougall, both on her own behalf and on behalf of other Gitxsan chiefs and members; Baskyalaxha, also known as William Blackwater Sr.; Suu Dii, also known as Yvonne Lattie and now known as Gwininitxw; Xsimwits,Iin, also known as Lester Moore; Moolxhan, also known as Noola and as Norman Moore; and Luutkudziiwuus, also known as Charlie Wright. Each of these hereditary chiefs is also responsible for his or her wilp.

4 The plaintiffs include four bands, which plaintiffs' counsel refers to as the Gitxsan First Nations: Gitanmaax Indian Band, Glen Vowell Indian Band, Gitwangak Indian Band and Kispiox Indian Band.

5 The plaintiff Gitksan Local Services Society is a non-profit society, which delivers programs and services to members of five bands: Gitanmaax, Glen Vowell, Kispiox, Gitwangak and Gitanyow. The board of directors is comprised of the chief counsellor of each of those bands.

**The Parties: The Defendants**

6 The defendant Gitxsan Treaty Society ("GTS") is negotiating a treaty with the Government of Canada and the Government of British Columbia.

7 The defendant the Queen in Right of Canada as represented by the Attorney General of Canada ("Canada") holds land for the use and benefit of the plaintiff Indian bands and band members, funds band government and funds and participates in treaty negotiations with the GTS.

8 The defendant the Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia ("British Columbia") funds and participates in treaty negotiations.

9 The defendant Commission came about as a result of recommendations made in the report of the British Columbia Claims Task Force, and was created by an agreement, the British Columbia Treaty Commission Agreement, dated September 21, 1992. The parties to the agreement were the governments of Canada and British Columbia and the First Nations Summit. This agreement was then made the subject of federal and provincial legislation, the *British Columbia Treaty Commission Act*, S.C. 1995, c. 45, and the *Treaty Commission Act*, R.S.B.C. 1996, c. 461, and confirmed by a resolution of the First Nations Summit.

**The Actions**

10 The plaintiffs' claim against the GTS is based on oppression. Their claim against Canada and British Columbia is for breach of fiduciary duty and of duty of honour. The plaintiffs' claim against the Commission, which is the subject of this application, is founded in negligence.

**The Treaty Process**

11 The Gitxsan Nation is one of sixty First Nations in the treaty process.

12 The Commission monitors and facilitates treaty negotiations. It is comprised of a chief commissioner and four commissioners. There are some ten staff members.

13 The Commission's functions include:

(1) receiving statements of intent to negotiate from the First Nations;

(2) allocating treaty negotiation funds to First Nations, at the request of First Nations. The actual funds are advanced by Canada and British Columbia;

(3) assessing the readiness of parties to commence negotiations of a "framework agreement" in accordance with certain published criteria; and

(4) as the parties progress through a six-stage process of negotiations, assisting the negotiating parties to reach agreement.

14 Additionally, a central role of the Commission is with respect to the advancing of funds provided by British Columbia and Canada. These funds enable First Nations to prepare for and carry out treaty negotiations with Canada and British Columbia.

15 A First Nation must apply to the Commission each year that it seeks funding.

16 There are published criteria that the Commission must follow for the allocation of negotiation funds. Pursuant to s. C(8) of those criteria, it is required to consider the following factors in determining funding allocations:

- population
- number of communities represented by a First Nation
- size of traditional territory
- geographic location/travel requirements
- extent and number of overlapping traditional territories
- anticipated nature and complexity of the issues

17 Section C(8) of these published criteria states: "A request for funds by a First Nations requires the approval of its constituents."

18 The Gitxsan Nation entered the treaty process by filing a statement of intent. The statement of intent indicates that the Gitxsan Nation receives its mandate by "consensus".

19 The GTS, acting on behalf of the Gitxsan Nation, has applied for and received funding for each fiscal year since it entered into the treaty process in 1994. Its most recent financial statements, for the fiscal year end-

ing March 31, 2010, indicate $19,188,071 has been advanced by Indian and Northern Affairs Canada.

20 The plaintiffs' complaint is that over the years the GTS has unduly restricted the involvement of the plaintiff hereditary chiefs and Indian bands in treaty negotiations. They complain that, amongst other things, GTS has declined to take direction or input from the Gitxsan chiefs, restricted debate on matters of concern to all Gitxsan, and conducted its affairs in a secretive and "oppressive" manner that was unfairly prejudicial to the plaintiffs.

21 From 2004 to 2009, hereditary chiefs and Indian bands have notified the defendants that they do not feel that the GTS represents them.

22 The plaintiffs take particular issue with a proposal tabled by the GTS called the Gitxsan Alternative Governance Model. The plaintiffs view this proposal as one which, if adopted, would severely impact aboriginal and other rights and obligations of Gitxsan hereditary chiefs and house members, registered Gitxsan band members, band council and land holders on Indian reserve land. The plaintiffs attempted in 2008 to have negotiations brought to a halt until concerns about this alternative governance model were addressed in the community.

23 The plaintiffs complain that notwithstanding these protestations, funds continue to be advanced to the defendant GTS.

**The Allegation of Negligence Against the Commission**

24 The plaintiffs argue that the Commission owes a duty of care to the plaintiffs to oversee the negotiation process, to ensure the readiness of the Gitxsan people to negotiate in the Commission process and to ensure on an ongoing basis that the negotiators have a mandate and to allocate funds in accordance with the published criteria described above.

25 The plaintiffs' case is that the Commission breached its duty of care by failing to meet the standard of care required by a reasonable and prudent facilitator of the treaty process, including failing to ensure that the GTS has a valid mandate and is representative and accountable to the Gitxsan people, and in not exercising due care and diligence in lending funds to the GTS.

26 The plaintiffs say they have suffered injury and loss as the loan amount has been increased because, ultimately, they are among those who will be responsible for repaying the advances.

27 There is no dispute that for a negligence claim to succeed, a plaintiff must establish that the defendant owes the plaintiff a duty of care; that the defendant has failed to meet that duty by not meeting the standard of care required; and that damages resulted from the breach.

28 It is the submission of the Commission that the plaintiffs are unable to establish that they are owed a duty of care by the Commission. Alternatively, the Commission says that even if there were a duty of care and a failure to meet that duty, there have been no damages suffered.

29 The plaintiffs' claim does not fall within any category of cases in which a duty of care has been previously recognized.

30 The Commission, in its written argument, correctly described the approach in an application such as this:

(a) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care?; and

(b) If so, are there any residual policy considerations which ought to negate or limit that duty of care?

See: *Cooper v. Hobart*, 2001 SCC 79at para. 30; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80at paras. 9-10.

31 The proximity analysis at the first stage of the test focuses on factors arising from the relationship between the plaintiff and the defendant. At the second stage, the issue is whether there are residual policy considerations outside the relationship between the parties that would make the imposition of a duty of care unwise, despite sufficient foreseeability and proximity.

32 The first stage of the inquiry, then, is whether there is foreseeability and proximity that establishes a *prima facie* duty of care. The Commission argues there is no reasonable likelihood that individual members or bands within a first nation could suffer harm if it acted negligently in assessing that first nation's mandate to negotiate. The argument is that the only harm particularized relates to debt obligations incurred by the GTS. The Commission says that if the GTS has not been validly authorized by the Gitxsan Nation, it will be unable to look to the plaintiffs to contribute towards repayment. Further, if it has acted in accordance with the direction of the Gitxsan Nation, the plaintiffs' claim fails.

33 The GTS is in the process of negotiating a treaty that will profoundly affect the Gitxsan Nation. I am not persuaded that harm to members of the Gitxsan Nation, in particular the plaintiffs, is not foreseeable if the Commission acts negligently in determining the GTS's mandate and advancing funds.

34 In my view, the real question is whether there is proximity between the plaintiffs and the Commission.

35 The principle of proximity was discussed by the Supreme Court of Canada in *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5. In that case, there was a protracted labour dispute at the Giant Mine near Yellowknife, N.W.T.. A murder took place in the mine in the course of the labour dispute. Survivors of the miners sued, *inter alia*, government mining inspectors and Pinkerton's of Canada Ltd., which provided security, for failing to prevent the intruder responsible for the murders.

36 Mr. Justice Cromwell, giving the judgment of the Court, described "proximity" at para. 26:

> The inquiry is concerned with whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close and direct to give rise to a legal duty of care, considering such factors as expectations, representations, reliance and the property or other interests involved ...

37 The Court held that there was a duty of care owed by the mining inspectors to those working in the mine. The Court distinguished earlier decisions, such as *Edwards* and *Cooper v. Hobart*, on the basis that those working in the mine were a clearly defined group: at para. 43. As well, the mining inspectors had direct and personal dealings with the deceased miners, visits by mine inspectors during the strike were "almost daily" occurrences, and statutory duties of the mining inspectors related directly to the conduct of the miners themselves: at para. 44.

38 The plaintiffs argue that there is a similar degree of proximity in this case. At various times over the years, various Gitxsan people have told the Commission that the defendant GTS does not represent them:

(1) The Gitanmaax Indian band conducted a referendum of its members to ascertain their members' views of treaty negotiations. The Commission was advised of the results.

(2) In 2004, 2005, 2006, 2008 and 2009, some hereditary chiefs and bands notified the defendants that the Society does not represent them.

(3) The Society has been provided with resolutions of band councils notifying them that the Society does not represent them and calling on them and on the defendants, Canada and British Columbia, to cease negotiations.

(4) The Commission has attended meetings when the plaintiffs have been present.

(5) Miles Richardson, the Chief Commissioner, attended a meeting in March 2004 with Gitxsan hereditary chiefs. According to Spookw, Mr. Richardson acknowledged that his office had been swamped with questions of Gitxsan mandate.

(6) In 2008, some of the plaintiffs contacted the Commission again. The Commission was provided with resolutions of the Gitanmaax band council opposing the way in which negotiations were being conducted. The Committee responded advising the plaintiffs to take their concerns up with the defendant Society and with the Gitxsan hereditary chiefs.

39 The contact here between the Commission and the plaintiffs is far different from the contact between the government mine inspectors and mine workers in *Fullowka*. Here, the plaintiffs initiated the contact; the Commission did not contact the plaintiffs. If anything, they have been rebuffed by the Commission.

40 The plaintiffs have sought the assistance of the Commission. They have sought the very relationship that, if accepted by the Commission, could ground a duty of care. However, the Commission has consistently demurred. It has instead suggested that the plaintiffs deal with others and, in particular, with the GTS.

41 The effect of the plaintiffs' argument is to turn the role of the Commission somewhat on its head. The Commission is required to respect the self-governance of the First Nation at the treaty table. I am not persuaded that the Commission has a duty is to involve itself in the governance of a First Nation by acting to protect the interests of a minority group within the Nation. In my view, the Commission's duty is to the collectivity, not the individuals represented.

42 A similar issue arose in *Tsimshian Tribal Council v. British Columbia Treaty Commission*, 2005 BCSC 860, which was an application for an interlocutory injunction. There was a dispute as to which body had the mandate and authority to receive funding and negotiate. Mr. Justice Cullen found that the Commission could not involve itself in internal structures or processes. He described the conflicting interests at stake as follows:

... the fundamental proposition of the plaintiff is that if funding is provided to the Treaty Society and to the Kitkatla and Lax Kw'alaams Bands to conduct treaty negotiations other than under the umbrella of the TTC, it will undermine the primacy of the TTC and the views it represents and wishes to fulfill through negotiation. In my opinion, in advancing that proposition the plaintiff is conflating a perceived harm to its interests and views with perceived harm to the collective interests and views of the Tsimshian Nation.

The question of for what and how the Tsimshian community should be negotiating is an internal question to be decided collectively by its membership. It cannot be decided by the BCTC or by the court. The require-

> ment of securing and advancing a mandate is an open one conducive to debate, persuasion, and resolution through ongoing processes. It is through that essentially political process that the interests and views of those aggregating around the TTC can be furthered.
>
> (at paras. 58-59)

43 The Commission's role is the same here. It is intended to be an impartial and arms-length body that cannot be involved in the internal structure and processes of the Gitxsan Nation.

44 A duty of care, if it were imposed here, would appear to conflict with the fundamental principle of self-governance for First Nations.

45 Moreover, apart from the question of proximity, there are related policy concerns that negate the recognition of a duty of care upon the Commission. There are sixty First Nations encompassing 110 Indian bands involved in the treaty process. This process covers some 200,000 First Nations individuals. If each First Nations person were owed a duty, it would amount to indeterminate liability: *Cooper* at para. 54. See also: *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 at paras. 79 and 82-83.

46 The plaintiffs argue that in any event, in an aboriginal law case, one should be cautious because of the need to accommodate evolving law. The plaintiffs rely on *Shubenacadia Indian Band v. Canada (Minister of Fisheries and Oceans)*, [2001] F.C.J. 347at para. 5, leave to appeal ref'd [2002] F.C.J. No. 882:

> ... the Statement of Claim is to be read generously and with an open mind and it is only in the very clearest of cases that the Court should strike out the Statement of Claim. This, in my view, is especially the case in this field, that is the field of aboriginal law, which in recent years in Canada has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted.

47 With respect, this is not a matter of aboriginal law. The issue before me is not the extent of aboriginal title or an issue of aboriginal rights. Rather, it is whether a statutory tribunal owes a duty of care to individual members of organizations who may be affected by its actions.

**Conclusion**

48 In conclusion, the plaintiffs' action against the Commission does not disclose a reasonable cause of action and is dismissed pursuant to Rule 9-5(1)(a). This application succeeds.

49 The Commission is entitled to its costs at Scale B.

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