2011 CarswellBC 2027, 2011 BCSC 1031

Tzeachten First Nation v. Canada Lands Co.

Chief Joe Hall, Chief of the Tzeachten First Nation, on behalf of all members of the Tzeachten First Nation, all members of the Skowkale First Nation, and all members of the Yakweakwioose First Nation, Plaintiffs and Canada Lands Company Limited and Canada Lands Company CLC Limited, Defendants

British Columbia Supreme Court

Butler J.

Heard: February 25, 2011
Judgment: July 29, 2011
Docket: Vancouver L051395

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Counsel: Gregory J. McDade, Q.C., Maegen M. Giltrow, for Plaintiffs

Simon B. Margolis, Thomas J. Moran, for Defendants

Subject: Civil Practice and Procedure; Property; Public

Aboriginal law.

Civil practice and procedure.

Estoppel.

Real property.

***Butler J.*:**

Overview

1 This is an application by Canada Lands Company CLC Limited ("CLC") and Canada Lands Company Limited ("Canada Lands") (together, the "applicants") pursuant to Rule 9-7 to dismiss the representative action brought by Chief Joe Hall on behalf of the members of three First Nations communities: the Tzeachten First Nation, the Skowkale First Nation and the Yakweakwioose First Nation (the "plaintiffs") on the grounds that it is *res judicata* or that the plaintiffs are estopped from pursuing the claims. Alternatively, and pursuant to Rule 9-5, the applicants ask that the claim be struck because it discloses no reasonable claim or is an abuse of process.

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2 The claims in the action relate to two parcels of land in Chilliwack known as the Rifle Range and Promontory Heights (the "Lands"). The Lands were sold by the federal government to the defendant CLC in 2004. CLC is federally incorporated and is a wholly-owned subsidiary of the defendant Canada Lands, which is a Crown Corporation and agent of the Crown pursuant to the *Government Corporations Operation Act*, R.S.C., 1985, c. G-4.

3 In the representative action, the plaintiffs claim:

> . . .
>
> (b) a declaration that [ ] CLC and CLC Parent have had since CLC acquired title to the Remaining CFB Chilliwack Lands, a legal obligation to consult with the Plaintiffs and accommodate their interests in the Rifle Range and Promontory Heights, prior to transferring, selling, or otherwise disposing of or developing any portion of those lands;
>
> (c) an order enjoining CLC from transferring, selling or otherwise disposing of any further land in the Rifle Range or Promontory Heights without the agreement of the Plaintiffs or further order of this Court;
>
> (d) damages for the wrongful sale of any portion of the Subject Lands or alternatively, an accounting for the proceeds of any such disposition;
>
> . . .

4 For the reasons that follow, I am dismissing the applications. As will be apparent from these reasons, I am concerned about the current status of the pleadings and doubt that the issues raised in this proceeding can be determined without the addition of the federal Crown and the Province of British Columbia. However, I am not prepared to dismiss the claims on this application. I conclude that the appropriate remedy at this time is to arrange for the early assignment of a trial judge and have the case placed in case management. Issues regarding the addition of parties and amendment to the pleadings can be determined by the assigned judge. Accordingly, I will recommend to the Chief Justice that early assignment of a trial judge be made pursuant to Practice Direction, PD-4.

Background

5 The plaintiffs claim a legal interest in the Lands either as a result of aboriginal title to, or reserve ownership of the Lands. With regard to the latter, the plaintiffs allege that the Lands were part of reserves created for them in 1864. They allege that in 1868, British Columbia wrongfully removed the Lands from the reserves and in the 1880s transferred the Lands to Canada. The plaintiffs allege that CLC acquired the Lands subject to the plaintiffs' legal rights, and with full knowledge of the plaintiffs' claims of aboriginal title and reserve ownership.

6 CLC was established to purchase property at fair market value from the federal government with a view to improving, managing or selling it in order to achieve financial return and community value, both for local communities and for the Crown, its sole shareholder. It acts much like a private real estate development company. As an ordinary company, it is subject to provincial and municipal regulations and pays taxes at all levels of government.

7 The Lands (and other adjacent properties) have been the subject of discussion, negotiation and litigation between the plaintiffs and Canada for many years. In 1988, some of the communities that form part of the

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plaintiffs' First Nations submitted a specific claim with respect to the Lands (involving reserves IR 13 and 14) pursuant to Canada's Specific Claims Policy. The claim was not recommended for negotiation by the Crown. The First Nations appealed that decision to the Indian Claims Commission. In 2003 that claim was placed in abeyance where it remains.

8 The present action was commenced in June 2005. The Attorney General of Canada was named as a defendant in the writ of summons along with CLC and Canada Lands. The plaintiffs sought a declaration that the transfer of the Lands to CLC was of no force and effect and alleged that the Crown and the current defendants had not satisfied consultation and accommodation obligations owed to the plaintiffs. In *Chief Joe Hall v. Canada (Attorney General)*, 2007 BCCA 133, the court held that the Federal Court of Canada had exclusive jurisdiction to determine whether the Crown met its consultation obligations.

9 The plaintiffs brought an application for judicial review in Federal Court. The pleadings in that action were almost identical to the pleadings filed at the commencement of this action. In that proceeding, Tremblay-Lamer J. held that Canada fully discharged its obligation to consult with the plaintiffs: see , 2008 FC 928, upheld at 2009 FCA 337 [*Tzeachen Appeal*], leave dismissed at [2010] S.C.C.A. No. 8.

10 The history of consultation and negotiation is set out in *Tzeachen Appeal*. I need not repeat it in any detail. Representatives of the Crown and the plaintiffs met approximately 26 times between 1995 and 2000 and a number of proposals were discussed regarding the Lands. In June 2000, a disposal strategy was put in place which involved Canada retaining the Lands for two years to permit the Chief Federal Treaty Negotiator an opportunity to engage in treaty land selection negotiations with the plaintiffs. After two years, if the Lands were not selected for treaty purposes, then Canada could seek the approval of the Treasury Board for the transfer of the Lands to CLC. There were no further negotiations in the two-year period regarding the Lands and so they were transferred to CLC in 2004.

11 In *Tzeachen Appeal* at para. 20, the court summarized the principal conclusions of Tremblay-Lamer J. which included the following:

> (a) The Tzeachten have a moderately strong Aboriginal claim to the Rifle Range and Promontory Heights, and the Crown's transfer of that land represents an infringement of their potential Aboriginal title. However, the damage is compensable, monetarily or otherwise, in the course of treaty negotiations. In these circumstances, there was a duty to consult that was more than minimal, requiring good faith consultation and a process addressing the concerns of the Tzeachten.
>
> . . .
>
> (c) From 1995 to 2000, Canada engaged in significant consultation with the Tzeachten which at times rose to the level of deep consultation... These were good faith attempts by Canada to harmonize conflicting interests and move toward reconciliation...
>
> (d) The Tzeachten participated in the discussions in good faith, and their unwillingness to compromise what they perceived to be their strong legal claims was not unreasonable. They fulfilled their reciprocal duty...
>
> (e) In spite of the good faith efforts on both sides, no agreement was reached. However, that does not indicate that the Crown breached any duty to consult or failed to act honourably. The law does not require parties to agree.

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12 At para. 35 of *Tzeachen Appeal*, the court noted that Tremblay-Lamer J. found that the Federal Court did not have jurisdiction to make an order against CLC. She made no determination as to whether CLC was a Crown agent. The jurisdiction ruling was not contested on the appeal. Accordingly, while CLC and Canada Lands remained parties to the appeal, no order was made in relation to either party.

13 In dismissing the appeal, the court stated as follows at para. 32:

> ... [T]he Crown conceded in argument, correctly in my view, that the decision in this case does not dispose of any claim the Tzeachten may assert for compensation based on its claim to IR 13 and 14 or its claim to Aboriginal title. Therefore, the matter of compensation remains open to negotiation or litigation in relation to either of those claims.
>
> [Emphasis added.]

14 When the judicial review proceedings were brought, the plaintiffs discontinued the action against the Attorney General of Canada. An amended statement of claim was filed on January 13, 2009. Following *Tzeachen Appeal*, the plaintiffs indicated they would pursue this action against the applicants.

15 Much of the amended statement of claim is based on the allegation that the applicants and the federal Crown, through the Treasury Board and the Minister of Defence, owed a legal obligation to the plaintiffs to consult with them and accommodate their interests prior to transferring the Lands. At paragraph 6, the plaintiffs make the following allegation:

> 6. The Plaintiffs claim that the Subject Lands are subject to aboriginal title of the Plaintiffs, or alternatively are "lands reserved for Indians" within the meaning of s. 91(24) of the Constitution Act and the Terms of Union, 1871 between B.C. and Canada, and cannot lawfully be disposed without the consent of the Plaintiffs or lawful consultation and accommodation of their interests ...

16 That statement is followed by numerous sub-paragraphs setting out the basis for the claim that the Lands are subject to aboriginal title or reserve ownership. At paragraph 7, the plaintiffs allege the applicants had knowledge of the plaintiffs' claims at all material times:

> 7. At all material times, representatives of Her Majesty the Queen in Right of Canada (the "Federal Crown") and the Defendants Canada Lands Company Limited and Canada Lands Company CLC Limited (hereinafter "CLC Parent" and "CLC" respectively) have had knowledge of the facts and matters set out above, and specifically that CLC Parent and CLC have knowledge that the Plaintiffs hold both aboriginal title and a reserve interest in lands which include the Subject Lands, or alternatively that the Plaintiffs have a strong prima facie claim to aboriginal title to the Subject Lands, and knowledge that any decision to transfer, sell or otherwise dispose of those lands would have an adverse effect on that aboriginal title and reserve interest and would infringe the Plaintiffs' aboriginal title.

17 In addition, the following paragraphs of the amended statement of claim are relevant to this application:

> 21. In the premises, the Treasury Board, [ ] the Minister of Defence, CLC and CLC Parent breached their legal obligations to the Plaintiffs. The Plaintiffs plead that CLC and CLC Parent took title to the Subject Lands with knowledge of, and subject to the aboriginal and reserve interests of the Plaintiffs and subject to any lawful duties to consult and accommodate and to account for any proceeds of sale for lands wrongfully

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transferred. [ ]

. . .

25. CLC Parent and CLC are agents of the Crown and act for the Crown in disposition of Crown land, and are required to account to the Crown for the proceeds of sale therefrom. The Crown cannot lawfully deprive itself of the duty to consult and accommodate by the use of CLC Parent and CLC as intervening corporations.

. . .

36. The Plaintiffs plead that, in all the circumstances as pleaded herein, CLC Parent and CLC cannot legally transfer the Subject Lands at all, or alternatively, until the Plaintiffs have been reasonably accommodated, and that any transfer of the Subject Lands that have occurred to this date have caused damages to the Plaintiffs from the loss of the lands, and further that CLC Parent and CLC must account for any benefits or proceeds of sale of such lands.

37. The CLC and CLC Parent have denied the jurisdiction of the Federal Court over them in the matters relating to the Subject Lands. In the Federal Court in *Tzeachten First Nation et al v. Attorney General, Canada Lands Company Limited and Canada Lands Company CLC Limited* (Federal Court Registry T-754-07), the Federal Court upheld that contention and refused jurisdiction over CLC and CLC Parent.

Parties' Positions

Position of the Applicants

18 The applicants advance three principle arguments. First, they say that CLC is not an agent of the Crown. It has not been designated a Crown agent and the Crown does not exercise *de jure* control over it: see *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551. If CLC is not an agent of the Crown then it can owe no duty to consult. They argue that this issue can be decided on a Rule 9-7 application.

19 Second, they say that to the extent that there may be an issue regarding the duty to consult, that issue was determined finally in the Federal Court proceedings. The courts found that the Crown fully satisfied its duty to consult prior to transferring the Lands to CLC. Both applicants were parties to the Federal Court proceedings. As a result, even though the court determined it had no jurisdiction to grant relief against CLC, the parties were the same and so the test for a finding of *res judicata* is satisfied. Alternatively, if the strict requirements of issue estoppel are not met, then the applicants say that the consultation claims should be struck because they are abusive of the court's process. Here, the applicants argue it is clear that the current proceeding is an attempt to relitigate a claim that has already been determined.

20 Third, the applicants say that the amended statement of claim is manifestly deficient in an attempt to raise the issues of aboriginal title and reserve interest. The obvious deficiency is the absence of both the federal Crown and the Province of British Columbia as parties to these proceedings. To the extent that claims against the applicants are based on aboriginal title and a reserve interest, those claims cannot be pursued in this proceeding without those additional parties. The applicants argue that the proper remedy is to strike the claims and let the plaintiffs commence a new action with the proper parties.

Position of the Plaintiffs

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21 The plaintiffs say the applicants' arguments are based on a fundamental misapprehension of their claims. The amended statement of claim is focused on the Lands now owned by CLC and raises claims based on aboriginal title and reserve interest. Both the amended statement of claim and the defence put aboriginal title and reserve interest in issue, but, the action is not generally against the Crown nor does it seek a declaration of aboriginal title. The plaintiffs will seek to establish at trial that the Lands were exclusively used and occupied by them at the date of sovereignty in order to satisfy the test for aboriginal title. They also seek to establish at trial that the Lands were part of two reserves set aside for them which were unlawfully removed by British Columbia from the reserves.

22 Their claims to the Lands flow from their aboriginal interests which they argue continued after the Lands were transferred to CLC. In that regard, they assert that CLC is not a good faith purchaser without notice. Rather, it took title knowing of the plaintiffs' aboriginal title to and reserve interest in the Lands. Accordingly, the plaintiffs say that the applicants owe ongoing obligations to consult, accommodate and account.

23 The plaintiffs acknowledge that the claims are somewhat novel, but say that the applicants cannot meet the "plain and obvious" test for striking pleadings. Further, they say that *res judicata* does not apply to this action. No order was made against the applicants in the Federal Court and the court specifically found it did not have jurisdiction over CLC. In addition, the Federal Court proceeding dealt with the Crown's consultation and administrative law obligations on an interim basis prior to proof of aboriginal title or a reserve interest. The plaintiffs say that such interim obligations are distinct from the rights and obligations that arise upon final determination of their substantive rights to the Lands.

24 Finally, the plaintiffs say that if the applicants are of the view that the federal Crown and the Province of British Columbia should be parties to this proceeding, they are free to apply to add them. The plaintiffs note that both of those parties are aware of these proceedings and have not sought to be added as parties. In any event, they say that the possibility that other parties may be necessary to adjudicate the issues raised does not mean that this action should be dismissed.

Issues

25 I will consider the following issues:

1. Can CLC's status as a Crown agent be determined on this Rule 9-7 application?

2. Should the consultation and accommodation claims against the applicants be dismissed because they are *res judicata* or an abuse of process?

3. Should the claims be dismissed because of deficiencies in the pleadings and the absence of necessary parties?

Issue 1. Can CLC's status as a Crown agent be determined on this Rule 9-7 application?

26 It will be apparent from my brief outline of the background and the positions of the parties that this case raises novel and complex issues regarding aboriginal title and the remedies that might be available to First Nations claimants in circumstances where land has been transferred to third parties with full knowledge of the claimants' alleged interest in the land. The question as to whether CLC is a Crown agent is but one small issue raised by the pleadings in this case.

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27 There is a real danger in deciding issues on a summary trial application in isolation where those issues are related to and form part of a larger legal and factual matrix. In *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138, at paras. 6 and 7, Southin J.A. warned that where the summary trial rule is used to hive off individual issues for decision, the efficient and just adjudication of disputes can be impaired:

> This is a useful rule intended to shorten litigation, thereby lessening its cost to the parties and to the public treasury and reducing delays in the process, it being an axiom, at least since Bacon's time, that justice delayed is justice denied.
>
> When, however, as in this case, the rule is invoked to try "an issue" rather than the whole case — what I have often characterized as "litigating in slices" — it may become a hindrance to the "just, speedy and inexpensive determination" of the dispute "on its merits".

28 Here, I have no hesitation in concluding that if I was to determine CLC's status I would be dealing with one slice of a much larger pie. The problems that can arise from that are magnified here where it is possible there will be amendments to the pleadings and the addition of parties. Accordingly, it would be unwise to attempt to determine the question as to whether CLC is a Crown agent at this time. It would not shorten the litigation nor would it serve to focus the issues remaining.

29 The summary trial application regarding determination of the status of CLC is dismissed without prejudice to the applicants' right to re-set the application in accordance with the directions of the trial management judge.

Issue 2. Should the consultation and accommodation claims against the applicants be dismissed because they are res judicata or an abuse of process?

30 In order to invoke the doctrine of *res judicata* the issues must be the same as a prior decision; the previous judicial decision must be final, and the parties to the previous decision must be the same as the parties in the present proceeding: *Angle v. Canada (Minister of National Revenue)*, [1975] 2 S.C.R. 248 at 254.

31 It is clear from the decision in the *Tzeachten Appeal* that no order was made with regard to the applicants. While no order was made, CLC was a proper party to the federal court proceeding as a party directly affected by an order sought in the application: Rule 303 of the *Federal Court Rules*. Accordingly, as the applicants have argued, they may be able to meet the requirement, for application of *res judicata*, that the parties to the prior proceeding are the same as, or privies of, the parties to this proceeding. However, I need not decide that issue on this application.

32 The consultation and accommodation claims cannot be dismissed on this application because the issues raised in this action are different from the claims in the Federal Court proceedings. The Federal Court proceedings raised the issue of Canada's obligation to consult in relation to the plaintiffs' asserted but not yet established aboriginal rights to the Lands. In other words, it was concerned with the Crown's interim consultation obligations in accordance with the principles set out in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73. It was an application for judicial review of a decision of the Treasury Board and not a proceeding to determine substantive rights or a claim for compensation.

33 In contrast, the plaintiffs are now seeking remedies based on the existence of substantive aboriginal

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rights — title or reserve interest in the Lands — which they will attempt to prove in this action. The claim that the applicants breached alleged duties to consult is one allegation that forms part of a larger claim which is premised on alleged breaches of existing substantive rights. Of course, the allegation that there was a breach of those substantive rights was not part of the Federal Court proceedings. In *Tzeachten Appeal*, the court indicated in the clearest possible language that the claims for breach of aboriginal and treaty rights were not determined by the Federal Court. The questions as to the existence of those rights and the compensation for any breach of those rights were left to later determination.

34 Whether or not the allegation of breaches of consultation obligations by CLC adds anything to the substantive breaches is something that is properly left to that later determination. As the plaintiffs explained in their written argument, the application for judicial review in the Federal Court did not raise, or require determination of, the following issues:

> a) The residual substantive rights of the Plaintiffs' — ie aboriginal rights, title or reserve interest — in the ... Lands;
>
> b) The legal obligations arising from CLC's participation in interim consultation with the Plaintiffs that survive the transfer of the ... Lands to CLC, not related to the statutory obligations of Canada; or
>
> c) The legal obligations of CLC as the holder of the ... Lands, or as an agent or assign of Canada, or as a trustee *de son tort* or just as a purchaser with notice, once there has been a legal determination of the Plaintiffs' aboriginal rights, title or reserve interest in the ... Lands. (para. 39)

35 As the plaintiffs have noted, the question of the extent of obligations owed by the Crown and by third parties following proof of aboriginal title is novel. There have been few instances where title has been proven in court. The novelty of the claim is not, however, a reason to strike the claim. The principles that must guide this Court on an application to strike a claim have not changed with the new rules. A claim should only be struck where it is plain and obvious that the pleadings disclose no reasonable cause of action. If the pleadings could be amended in a way that would put forward an arguable case, or where there are serious questions of law or questions of general importance raised, a claim should not be struck: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

36 This case raises serious questions of law and general importance. It would be inappropriate to decide this issue on a R. 9-5 application based on *res judicata*. The better course is to permit further amendment to the pleadings and the possible addition of parties, following which the case management judge should consider the best way to secure the determination of the issues raised on their merits in accordance with the object of the Rules.

37 The applicants also claim it would be an abuse of process to allow the claims to continue. They say even if *res judicata* does not apply, the claims are a collateral attack on the ruling in *Tzeachten Appeal* and should be struck. As I have already indicated, the claims as pleaded raise different issues and so I cannot conclude it would be an abuse of process to permit the claims to proceed.

Issue 3. Should the claims be dismissed because of deficiencies in the pleadings and the absence of necessary parties?

38 Finally, the applicants say the pleadings are manifestly deficient because the plaintiffs have not joined

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the federal and provincial Crown as defendants. They take the position that the proper remedy for the deficiency in the pleadings is to strike the claim and require the plaintiffs to commence a further action should they wish to do so. They rely on the comments of McKay J. in *Western Forest Products Ltd. v. Skidegate Indian Band*, [1985] B.C.J. No. 2994 (S.C.), at paras. 18-19:

> ... The Haidas assert aboriginal title to the Queen Charlotte Islands and say that their title has never been lawfully extinguished. ...
>
> The answer to that proposition is that the determination of aboriginal title is not before the Court in the two cases at bar. The Queen in the Right of the Province of British Columbia is not a party to these proceedings and, of course, must be if title to Crown land is in dispute. ...

39 It is not clear to me that the decision in *Western Forest Products* stands for the proposition that the provincial Crown must be a party in every case where title to Crown land is in dispute; each case will depend on the facts alleged and the claims advanced. However, in the circumstances of this case, I agree with the applicants' submission that the pleadings as they stand are deficient because of the absence of those parties. It appears to me that both the federal and provincial Crown will be necessary parties. The plaintiffs say they will attempt to prove two claims: a treaty right and aboriginal title to the Lands. I fail to see how they can do either in the absence of the parties against whom those allegations are directed.

40 The plaintiffs do not seriously dispute the contention that the federal and provincial Crown are proper parties. Rather, they say the applicants can add the federal and provincial Crown as parties if they wish to do so; it is not up to the plaintiffs to take that step. The applicants disagree. They say they should not be required to add parties with whom they have no dispute. However, as neither party has taken the initiative to add those parties, the pleadings are left in the current, deficient state.

41 I am of the view that there is no reason to strike the claims because of the failure of the plaintiffs to add the federal and provincial Crown as parties. I have concluded that either the plaintiffs should be given an opportunity to amend the pleadings to include other parties or the case management judge can put in place a procedure to determine which of the parties should apply to add the federal and provincial Crown. Of course, those parties may have different views about their addition to the action and those views can be considered in due course.

Conclusion

42 The applications are dismissed. I am recommending to the Chief Justice that he direct the early assignment of a trial judge in accordance with Practice Direction, PD-4.

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