IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cowichan Tribes v. Canada (Attorney General),* 2017 BCSC 1575

Date: 20170906
Docket: 14-1027
Registry: Victoria

Between:

Cowichan Tribes, Squtxulenuhw, also known as William C. Seymour Sr., Stz'uminus First Nation, Thὀlmen, also known as John Elliott, Penelakut Tribe, Suliisuluq, also known as Earl Jack, Halalt First Nation and Sulsimutstun, also known as James Thomas, on their own behalf, and on behalf of all other descendants of the Cowichan Nation

Plaintiffs

And:

The Attorney General of Canada, Her Majesty the Queen in right of the Province of British Columbia, and The City of Richmond

Defendants

Before: The Honourable Madam Justice J. A. Power

Reasons for Judgment

Counsel for the Plaintiffs:	D. M. Rosenberg Q.C. and D. M. Robbins
Counsel for the Defendant Attorney General of Canada:	K. Ring and N. Wright
Counsel for the Defendant Her Majesty the Queen in right of the Province of British Columbia:	G. R. Thompson and M. C. Akey
Counsel for the City of Richmond:	B. B. Olthuis and T. Bant
Place and Date of the Hearing:	Victoria, B.C. May 11-12, 2017
Place and Date of Judgment:	Victoria, B.C. September 6, 2017

Introduction

[1] These reasons follow the hearing of an application, brought by the defendant Attorney General of Canada ("Canada"), concerning whether or not this Court should order formal notice to the private registered owners of fee simple lands within the area referred to, in the Second Further Amended Notice of Civil Claim, as the Lands of Tl'uqtinus (the "Claim Area"), whose interests may be adversely affected by the relief sought by the plaintiffs in this action.

[2] Canada seeks an order that the plaintiffs deliver formal notice within 45 days of the date of this decision, or alternatively that the defendant, Her Majesty the Queen in Right of British Columbia ("British Columbia"), deliver such formal notice to affected private landowners.

[3] As noted in previous decisions, the plaintiff Cowichan Tribes and others bring a representative action for declarations relating to aboriginal title of lands in what is now the City of Richmond, including at Tl'uqtinus and the south shore of Lulu Island, and relating to aboriginal fishing rights in the south arm of the lower Fraser River.

[4] As of May 2017, the defendants included Canada, British Columbia, the City of Richmond, the Vancouver Fraser Port Authority, the Musqueam Indian Band, and the Tsawwassen First Nation. Canada's application is supported by British Columbia except with respect to the alternative relief sought by Canada which would instead require British Columbia to deliver formal notice to private landowners. The City of Richmond also supports Canada's application. None of the other defendants has appeared on this application.

[5] This is a matter that I have been managing as the case management judge (see 2016 BCSC 420 and 2016 BCSC 1660). As this issue was discussed at case planning conferences without resolution, I expressed the view that judicial efficiency and economy required that this issue be resolved before a trial date is set.

[6] Between December 2014 and April 2017, Canada and British Columbia sought and received particulars with respect to whether the Claim Area includes land

held by private landowners. During that time, it was also proposed that the plaintiffs either amend their pleadings to excise any claim to lands held by private landowners or, alternatively, that the plaintiffs serve private landowners with formal notice of the action. The plaintiffs persisted in their contention that, while nothing precluded Canada or British Columbia from providing notice to private landowners, neither plaintiff nor court-ordered notice was warranted.

[7] Canada notes that a similar application will be heard this fall before Fisher J. in the *Haida Nation* action. In that regard, I am of the view that a decision such as this is discretionary in nature, must be made with due regard to the unique circumstances of each case, and should be of no consequence to upcoming decisions.

Position of the Parties

[8] Canada estimates that there are over 200 privately held fee simple titles that are derived from the colonial and provincial Crown grants that the plaintiffs seek to invalidate.

[9] Canada argues that notice of this litigation should be provided to private landowners because the declarations sought -- of aboriginal title over the Claim Area, that Crown grants of fee simple are invalid, and that Canada and British Columbia negotiate in good faith the reconciliation of Crown grants of fee simple with aboriginal title -- may adversely affect private landowners' interests.

[10] British Columbia also notes that the plaintiffs seek a declaration that Crown grants of fee simple interest to private landowners in the Claim Area infringe Cowichan Nation aboriginal title to those lands. It is argued that this, if granted, constitutes a remedy not only against the original Crown grants, but also against the private landowners and therefore may adversely implicate their interests.

[11] Further, as argued by both Canada and British Columbia, an aboriginal title declaration is in the nature of a judgment *in rem* and that the conventional view is that a judgment *in rem* will be conclusive against non-parties in the absence of fraud,

collusion, or proof that an interested non-party was denied the opportunity to be heard.

[12] Canada also contends that court-ordered formal notice to private landowners will promote judicial economy, and avoid the mischief of multiple proceedings, unnecessary costs and expense, and the potential for inconsistent results. Canada further submits that should private landowners seek joinder following receipt of notice of this action, their participation could be effectively managed by way of a representative proceeding, or a defendant class proceeding.

[13] The plaintiffs vigorously oppose the application, arguing that Canada's application is misconceived. They argue that no court has ever ordered notice of aboriginal title litigation be given to private landowners holding a fee simple interest. They say that the only instances of court-ordered notice in aboriginal title litigation related to other First Nation groups -- every court asked to order formal notice to tenure holders has so far declined to do so.

[14] Further, the plaintiffs submit that they are not seeking a declaration of invalidity or defectiveness with respect to the fee simple interests in the private Tl'uqtinus Lands, nor do they claim they are entitled to possession of such land as against any private landowner.

[15] The plaintiffs also argue that while Canada's application appears on its face to be procedural, and is not a joinder application, the requested order, if granted, could have far reaching and significant consequences. The plaintiffs argue that they have taken an approach in this litigation that fosters reconciliation by involving only the proper parties. They argue that this approach leaves for another day, and only if necessary, the consequences of a declaration of aboriginal title on private landowners.

[16] Having considered the arguments and for the reasons that follow I have determined that I should not accede to Canada's application and I do not order

formal notice to private landowners. As noted in the authorities which I will discuss, it is open to the defendants to provide notice if they wish to do so.

Discussion

[17] In *William v. Riverside Forest Products Ltd.*, 2002 BCSC 1199, the defendant British Columbia (and the Regional Manager of the Cariboo Forest District) sought directions concerning whether the plaintiff should be required to give notice of the claims made in the action to land or resource-use tenure holders or applicants for tenure whose interests may be affected.

[18] In his reasons for dismissing British Columbia's motion, Vickers J. observes that, in the circumstances of that case, it would not be in the interests of the administration of justice to order formal notice to land or resource-use tenure holders. In this regard, the court states the following:

> [8] In *Calder v. British Columbia (Attorney General)* (1969), 8 D.L.R. (3d) 59, 71 W.W.R. 81 (B.C. S.C.) Gould J. said at p. 62:
>
> > The second preliminary objection was that all the parties having any interest in or over any of the said lands should be before the Court. This would involve many hundreds of defendants, such as to preclude, for practical reasons, any litigation going forward in any Court. The law does not take kindly to any such frustratory proposition, nor, as the momentary voice of the law in this instance, do I.
>
> …
>
> [12] In summary, British Columbia says that the plaintiff has framed claims for relief that may potentially affect the interest of non-parties. Counsel on behalf of British Columbia says that if the plaintiff intends this proceeding to produce a declaration of aboriginal title, which may be relied upon conclusively in future infringement proceedings against others, then, at the least, notice ought to be given.
>
> [13] I have no doubt the relief sought by the plaintiff is intended to produce such a judgment. However, I conclude no notice is required.
>
> [14] There is implicit in any notice, a notion that the court is inviting participation in the action to the person or firm receiving such notice. If, by R.15, tenure holders applied to be added to the action then the court could consider, in the context of such an application, whether it is just and convenient to do so. There is nothing to preclude British Columbia, if it is so advised, from advertising the fact of these proceedings. However if all parties having an interest in the subject lands were to seek to be added as parties in

> the action, it would, for practical purposes, put a halt to these proceedings. Such a process is not in the interests of the administration of justice.
>
> [15] The nature of aboriginal title and rights, as understood today, does not alter the force or the effect of what Gould J. said in *Calder*, *supra*. The presence of several hundred defendants would preclude this litigation going forward. The action will not be frustrated at any time by such a prospect.
>
> [16] Any tenure holder's interest derives from the interest of British Columbia. If the plaintiff's aboriginal rights and title affect the title and interest of British Columbia, then the interests of tenure holders are also affected. If they have something less than what they bargained for, their remedy does not lie in joining this action to attack the interests of the plaintiff. All parties defending specific claims will make arguments against the interests of the plaintiff. Those arguments do not improve with repetition by others against whom no claim is advanced.

[19] In *Ahousaht Indian Band v. Canada (Attorney General)*, 2006 BCSC 646, the court concluded that, in the circumstances, it would not serve the interests of justice to provide notice to aboriginal groups with overlapping claims. In her reasons, at paras. 23 to 25, Madam Justice Garson cites with approval from *Williams*, adding further support to the argument that there is nothing to preclude either Canada or British Columbia from providing their own notice to third parties of the pending litigation.

[20] A decision similar to that in *William* was reached in *Willson v. British Columbia (Attorney General)*, 2007 BCSC 1324. In that action, the plaintiffs sought a declaration concerning the western boundary of the land encompassed by Treaty 8. On application, the court was asked to consider whether it should allow amendments that add First Nations as parties and delete the claim that each chief represented all the beneficiaries of Treaty 8.

[21] In his reasons, Johnston J. concluded that it was sufficient to require that all signatories and adherents to Treaty 8 receive notice of the action (para. 57). As a final matter, the court considered the issue of notice to anyone other than signatories or adherents to Treaty 8 and made the following remarks:

> [43] I conclude that the declaration [concerning the location of the western boundary] sought in this case, if granted, would result in a decision *in rem*, good against all persons, whether or not parties to the action. This makes it important, as a matter of fairness, that those signatories and adherents to

> Treaty 8, whose interests will be affected by a declaration sought, be given an opportunity to be heard.
>
> …
>
> [61] The last matter is whether notice should be given to anyone other than signatories or adherents to Treaty 8. The result of this action may affect signatories or adherents to Treaty 11 …
>
> [62] The signatories and adherents to Treaty 11 are not privies of the parties to this action because none would have standing to bring this action seeking a declaration as to the western boundary of Treaty 8.
>
> …
>
> [64] Notwithstanding that this action might expose the Treaty 11 signatories and adherents to the risk of disruption in their understanding of the scope of the area covered by the treaty, it is neither necessary nor advisable that they be given notice of this action. … I cannot see how Treaty 11 signatories and adherents could advance this litigation by their participation in any way other than as witnesses, and they do not need to be parties in order to give evidence.
>
> [65] While the possibility of adding up to 33 more signatories or adherents to Treaty 8 would not, in my view, make this litigation non-justiciable, the possibility of adding any of the 21 Treaty 11 signatories and adherents to this action would make it non-justiciable. Notice to Treaty 11 signatories and adherents is not required.
>
> [66] For the reasons given by Vickers J. in *Xeni Gwet'in* [*William*], *supra*, notice need not be given to any who hold or claim to hold other interests in the area between the disputed western boundaries.

[22] I note that British Columbia relies, in part, on the appeal decision in *Kakeway v. Canada*, 64 O.R. (2d) 52, [1988] O.J. No. 297 (Q.L.) (H.C.J.). This was an action for a declaration that the plaintiffs, who were not the registered owners of the land, did in fact own the land, and that the original patent by the Ontario Crown was invalid. In the decision below, which was upheld on appeal, the court was critical of the fact that the registered owner of the land was not a party to the action. Beginning at para. 33, the court states the following:

> [33] It is noted that no claim whatsoever is made against him in the statement of claim, nor is his name ever mentioned.
>
> [34] This defies all rules of law and equity, that a person's rights may be adversely affected without notice, or without having the specific allegations on which the claim is based, brought to his attention to enable him to defend the claim, and would result in a complete denial of natural justice.

> [35] The remedy sought is an equitable remedy and the manner in which the plaintiffs have proceeded amounts to a complete denial of justice in so far as Mr. Kron is concerned.

[23] Unlike *Kakeway*, however, the plaintiffs in the case at bar do not seek to invalidate or render defective the fee simple interests of private landowners. Rather, as stated above, they seek a declaration of aboriginal title to land held by private landowners -- title which is *sui generis* in nature, and the consequences of which, in relation to private interests, remain unclear (see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700; and *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44).

[24] In this regard, one of Canada's central arguments is that the uncertainty in the case law in and of itself should cause the court to order notice. I have determined that the counter argument is more persuasive -- uncertainty in the case law weighs against court ordered notice. As the plaintiffs do not seek, at this stage, to invalidate fee simple interests held by private landowners, I conclude that the defendant Canada's application should be dismissed. Private landowners will have an opportunity to make all arguments, including that they were not given formal notice, in any subsequent proceedings against them if any such proceedings are brought.

Conclusion

[25] While I am not persuaded by the plaintiffs that the authorities definitively decide the issue before me, I have concluded that in the context of these circumstances I should exercise my discretion by dismissing Canada's application.

[26] As a result, I further decline to comment on the issue, raised by Canada, concerning whether it is more appropriate for the plaintiffs, as initiators of this litigation, or British Columbia, from whom private landowners derive their fee simple titles from, to be the party to provide formal notice.

[27] In these particular circumstances, I decline to exercise the court's discretion to require the plaintiffs to serve formal notice on private landowners. However, as I

have already outlined above, my decision does not prevent any of the defendants from providing informal notice to private landowners if they wish to do so.

[28] In the result, Canada's application is dismissed.

"J. A. Power, J."
The Honourable Madam Justice J. A. Power