Federal Court Cour fédérale

Date: 20180226

Docket: T-138-01

Citation: 2018 FC 218

Ottawa, Ontario, February 26, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE KASKA DENA COUNCIL

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] The Kaska Dena Council [KDC] moves for summary judgment pursuant to Rule 213(1) of the *Federal Court Rules,* SOR/98-106. Specifically, KDC seeks summary judgment against Canada in respect of the following aspects of the relief claimed in this action:

> (a) a declaration that the Government of Canada has the authority, under s. 91(24) of the *Constitution Act, 1867,* to negotiate and conclude treaties or land claims agreements within the meaning of s.35 of the *Constitution Act, 1982,* with those aboriginal peoples of Canada, including those aboriginal people represented by the plaintiff, who have established to the

> Government of Canada's satisfaction that their aboriginal rights, titles and interests in and to lands located in British Columbia have never been dealt with through a treaty or otherwise superseded by law;
>
> (b) a declaration that the Government of Canada has formally recognized and affirmed that the aboriginal title and related interests of the Kaska Dena in and to lands in northern British Columbia have never been dealt with through a treaty, and in particular Treaty No. 8, and have never been otherwise superseded by law;
>
> (c) a declaration that the defendant Crown is in a fiduciary relationship with the plaintiff and its members and that acceptance of the plaintiff's comprehensive land claim by the defendant gave rise to certain fiduciary duties owed by the defendant and its servants and agents to the plaintiff and its members including:
>
> > (i) the duty to protect the aboriginal title and related interests asserted in the plaintiff's comprehensive land claim which was accepted by the Government of Canada in 1983; and
> >
> > (ii) the duty to act in good faith towards the plaintiff in respect of the negotiation and settlement of the plaintiff's recognized comprehensive land claim in and to lands in northern British Columbia;
>
> (d) a declaration that the defendant Crown and its servants and agents have acted in bad faith and have breached and continue to breach the duty owed to the plaintiff and its members to act in good faith towards the negotiation [and] settlement of the plaintiff's recognized comprehensive land claim in and to lands in northern British Columbia;
>
> (e) a declaration that the defendant Crown and its servants and agents have breached and continue to breach the fiduciary duty owed to the plaintiff and its members to protect the aboriginal title and related interests which were recognized and affirmed by the Government of Canada in 1983.

[2] After reading the records filed, including the written memoranda of the parties and hearing their oral submissions over a day and one-half in Whitehorse, Yukon, I have concluded

that this motion cannot succeed. KDC's position on this motion, in my view, is that the declarations sought are principles of law on which there can be no dispute, or else require a minimal factual underpinning and those facts are not in dispute. Canada, for its part disputes some, if not all of the statements of law that the KDC urges upon the Court, and submits that some of the factual underpinning or inferences to be drawn from the facts are not as stated by the KDC.

[3] Given my disposition of this motion, and the requirement that this litigation proceed to a trial, I will restrict my comments as much as possible, so as not to influence the parties as to the view a trial judge may take of the issues after a full trial.

BACKGROUND

[4] It is not surprising, given that this action commenced in 2001, that there is a lengthy history leading to this motion. The following provides only a glimpse to the background facts that are necessary to position this motion.

[5] The KDC was established in 1981 to represent the interests of the members of the Kaska Dena First Nation, and specifically to negotiate treaty and land claim agreements concerning their claimed rights to traditional territory in Northern British Columbia and the Yukon.

[6] In a letter dated October 22, 1981, the then Minister of Indian and Northern Affairs, John Munro, advised the KDC as to how it could submit a comprehensive land claim for the territory in British Columbia. Following that advice, on February 18, 1982, KDC met with the Minister

of Indian Affairs to deliver a document entitled "Submission of the Kaska Dena Council for Recognition of Their Comprehensive Claim to Lands in Northern British Columbia" [the Comprehensive Land Claim]. Most of the territory claimed in British Columbia is provincial Crown land. As part of the Comprehensive Land Claim, the KDC asserted that Treaty No. 8, which covers a significant portion of Northern British Columbia, did not extinguish the Kaska Dena's Aboriginal title to lands in Northern British Columbia.

[7] By letter dated December 23, 1983, the Minister of Indian and Northern Affairs confirmed Canada's decision to accept for negotiation the Comprehensive Land Claim. The relevant provisions of the 1983 acceptance letter are as follows:

> Further to our meeting in Vancouver on October 24, 1983, I would like to confirm my decision, on behalf of the Government of Canada, of accepting for negotiation the comprehensive land claim which was submitted by the Kaska Dena Council in February 1982.
>
> The federal government's resolve to negotiate your claim is contingent upon the Province of British Columbia agreeing to participate in tripartite negotiations. While your claim meets the federal policy criteria for acceptance for negotiation purposes, I must advise you that this should not be construed as an admission of legal obligation or liability on the part of the federal government. During negotiations the statements and positions of all parties are to be on a "without prejudice" basis relating to any present or future legal proceedings. Furthermore, the acceptance of your claim ought not to be regarded as an official recognition of the boundaries on the map you submitted as being the extent of the land traditionally used and occupied by the Kaska Dena people. [emphasis added]

[8] During the 1980's the province of British Columbia appeared to have little interest negotiating land claims, and no progress was made.

[9] In 1993, the British Columbia Treaty Commission was established to facilitate treaty negotiations between First Nations in British Columbia and the Governments of Canada and British Columbia. On November 8, 1993, the KDC filed a Statement of Intent to negotiate land claims through the British Columbia Treaty Process. In June 1995, the KDC began tri-partite negotiations with Canada and British Columbia and in January 1996, a Framework Agreement to Negotiate a Treaty among the parties was signed.

[10] In March 1999, during a negotiation meeting, counsel for Canada informed the KDC that its legal view was that Treaty No. 8 extinguished the Kaska Dena's right to title in the land under that treaty that it claimed as its traditional territory in British Columbia.

[11] A letter dated November 30, 1999, was sent to the KDC from the then Minister of Indian Affairs, the Honourable Robert Nault, stating, "…while Canada has accepted the Kaska Dena Council's claim to negotiate a Treaty, this is not an admission by Canada of any legal obligation or liability, nor of the existence of Aboriginal rights or title."

[12] On September 30, 1999, an adhesion and settlement agreement was signed between Canada, British Columbia, and the McLeod Lake Indian Band adhering the McLeod Lake Band to Treaty No. 8. Article 4 of the recitals states, "Canada asserts that the aboriginal title and rights to land of Indians inhabiting the Treaty No. 8 area were extinguished when Treaty No. 8 was approved by the Governor in Council on February 20, 1900." The KDC commenced this action against Canada on January 23, 2001, seeking, among other things, the five declarations set out in paragraph 2, which includes a declaration that "the Government of Canada has formally

recognized and affirmed that the aboriginal title and related interests of the Kaska Dena in and to lands in northern British Columbia have never been dealt with through a treaty, and in particular Treaty No. 8, and have never been superseded by law."

[13] The parties agreed in April 2001, to place this litigation in abeyance pending the negotiations. In November 2001, the KDC served Canada with notice of intention to reactivate the litigation. Canada filed a Statement of Defence in August 2002, and by letter dated March 20, 2003, Minister Nault suspended negotiations, citing the on-going litigation as the reason for this step.

[14] From 2003 until 2006 the parties attempted, unsuccessfully, to negotiate a new abeyance agreement. However, in November 2006, this Court ordered that the action be placed in abeyance. Ultimately, the parties reached an abeyance agreement in 2008, and resumed their negotiations.

[15] David Miranda, Treaty Negotiator for Indigenous Affairs and Northern Development Canada deposed, by way of affidavit, that since 2008 the KDC and Canada have been negotiating towards an Agreement in Principle which he says is 90% completed. Outstanding issues include wildlife, land selection and quantum, and development of appropriate language. He asserts that the negotiation of land selection is being led by the Government of British Columbia, as it has jurisdiction over the land claimed. KDC and the Governments of British Columbia and Canada have concluded an Incremental Treaty Agreement for the transfer of ownership of certain specified land in British Columbia, pending the final treaty.

[16] On February 19, 2016, KDC sent a letter to the Honourable Jody Wilson-Reybould advising the government that it was taking the within action out of "hibernation" over concerns that its title was "…not being properly respected…" On March 29, 2017, Canada filed an Amended Statement of Defence, in which it changed its position on the implications of Treaty No. 8. Canada now takes the position that Treaty 8 did not extinguish the Kaska Dena's claim to aboriginal rights, title, and interests within the treaty boundaries.

[17] On December 8, 2017, the KDC filed this motion for summary judgment.

TEST FOR SUMMARY JUDGMENT

[18] The KDC provided no submissions on the law regarding summary judgment, nor on the burdens of the respective parties. Nonetheless, it did not challenge the outline Canada provided in that regard. The Court accepts Canada's summary as accurate and complete.

[19] Rule 215(1) of the *Federal Courts Rules* provides that on a motion for summary judgment, if "the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly."

[20] This Court and the Federal Court of Appeal have clarified what is meant by "no genuine issue for trial" in the context of a summary judgment motion.

[21] In *Apotex Inc v Pfizer Canada Inc*, 2016 FC 136 at paragraph 29, aff'd 2017 FCA 201, this Court summarized the relevant onus and the meaning of "no genuine issue for trial" as follows:

> In a motion for summary judgment, the onus is on the moving party – here, the Plaintiff – to establish that there is no genuine issue for trial (*Morin v Canada*, 2013 FC 670 at paras 25-26) and that the respondent's case "is so doubtful that it does not deserve consideration by the trier of fact" (*Source Enterprise Ltd v Canada (Public Safety and Emergency Preparedness*), 2012 FC 966 at para 20).

[22] The onus on the moving party includes an evidentiary burden, as this Court noted in *Kirkbi AG v Ritvik Holdings Inc*, [1998] FCJ No 912 at paragraph 56:

> It is trite to say that the onus is on an applicant for summary judgment. This legal onus carries with it an evidentiary burden where, as on this application, there is substantial dispute as to the facts or the inferences to be drawn from the facts. While a respondent on an application for summary judgment is undoubtedly under an obligation to put his, her or its best foot forward or to "lead trump or risk losing", the same can equally be said of an applicant who bears the legal onus and therefore the initial evidentiary burden.

[23] Because each party is required on a summary judgment motion to put their best foot forward in terms of evidence, the Court is entitled to assume no new evidence would be presented if the issue were to proceed to trial: *Rude Native Inc v Tyrone T Resto Lounge,* 2010 FC 1278 at para 16. Therefore, it is on the basis of the evidence before the Court on a summary judgment motion and the inferences that may be drawn from that evidence that a judge must determine whether or not there is a genuine issue for trial, that is to say whether the responding party's case is so doubtful that it does not deserve consideration by the trier of fact.

[24] I am mindful of the direction of the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7, which stated at paragraph 49 that there is no genuine issue for trial when:

> …the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

I am also mindful of the care and caution that must be exercised when considering a summary judgment motion. I concur with the observation of Justice Mactavish in *Source Enterprise Ltd v Canada (Public Safety and Emergency Preparedness*), 2012 FC 966 at para 21:

> In making this determination, a motions judge must proceed with care, as the effect of the granting of summary judgment will be to preclude a party from presenting any evidence at trial with respect to the issue in dispute. In other words, the unsuccessful responding party will lose its "day in court:" see *Apotex Inc. v. Merck & Co.*, 2004 FC 314, 248 F.T.R. 82, at para.12 aff'd 2004 FCA 298.

ANALYSIS

[25] The five declarations that the KDC seeks by way of summary judgment will be examined separately, although there is some overlap among them.

> *A. A declaration that the Government of Canada has the authority, under s. 91(24) of the Constitution Act, 1867, to negotiate and conclude treaties or land claims agreements within the meaning of s.35 of the Constitution Act, 1982, with those aboriginal peoples of Canada, including those aboriginal people represented by the plaintiff, who have established to the Government of Canada's satisfaction that their aboriginal rights, titles and interests in and to lands located in British Columbia have never been dealt with through a treaty or otherwise superseded by law.*

[26] The KDC submits that Canada has exclusive jurisdictional authority pursuant to subsection 91(24) of the *Constitution Act, 1867* to "conclude treaties or land claims agreements" with it and, contrary to the position taken by Canada, the agreement of British Columbia is not required. In support of that submission, it cites *St. Catherine's Milling and Lumber Company v the Queen (Ontario)* (1888), 14 AC 46 (JCPC), *Ontario Mining Co v Sheybold*, [1903] AC 73 (JCPC), *Star Chrome Case (Re)*, [1920] AC 401 (JCPC), *R v Whiskeyjack*, 1984 ABCA 336, and *Delgamuukw v British Columbia*, [1997] SCR 313.

[27] Canada submits that subsection 91(24) of the *Constitution Act, 1867* "does not confer on Canada exclusive authority to conclude treaties containing subject matters within provincial jurisdiction." It further says that "this is a complex legal issue that requires analysis of Canada's constitutional provisions and jurisprudence, as well as some review of the historical treaty making context in BC."

[28] It is my view that the declaration the KDC seeks cannot be granted because Canada's position is not so doubtful on the evidence submitted that it does not deserve consideration by a trial judge.

[29] To the extent that a treaty or land claims agreement with a First Nation involves the transfer to or setting aside for its Aboriginal people, land in a Province, it requires the co-operation and agreement of the provincial government. This is evident from the unanimous decision of the Supreme Court of Canada in *Wewaykum Indian Band v Canada*, 2002 SCC 79, at paragraph 15:

> Federal-provincial cooperation was required in the reserve-creation process because, while the federal government had jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*, Crown lands in British Columbia, on which any reserve would have to be established, were retained as provincial property. Any unilateral attempt by the federal government to establish a reserve on the public lands of the province would be invalid: *Ontario Mining Co. v. Seybold*, [1903] A.C. 73 (P.C.). Equally, the province had no jurisdiction to establish an Indian reserve within the meaning of the *Indian Act*, as to do so would invade exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians". [emphasis added]

[30] There is no evidence before me that in negotiating a treaty or land claims agreement the KDC is not seeking to have transferred to it lands in British Columbia, either by way of the creation of a reserve or otherwise. Absent such evidence, it cannot be said that it is without doubt that Canada acting alone can do what the KDC seeks in this declaration.

[31] Moreover, I note that there is evidence in the record that Canada, British Columbia, and the KDC entered into an Incremental Treaty Agreement dated April 10, 2013, under which the fee simple in certain land was to be transferred from the province to the KDC. This proves, to my mind, that land in British Columbia is the goal of the KDC. The agreement is also evidence that all parties, including the KDC, were of the view that the agreement of the Government of British Columbia was required.

[32] Accordingly, the first declaration sought cannot be granted on summary judgment. This requires a full record and trial.

B. A declaration that the Government of Canada has formally recognized and affirmed that the Aboriginal title and related interests of the Kaska Dena in and to lands

> *in northern British Columbia have never been dealt with through a treaty, and in particular Treaty No. 8, and have never been otherwise superseded by law.*

[33] The KDC submits that under Canada's 1973 Comprehensive Claims Policy, it first had to establish that Aboriginal title and rights had not been superseded by treaty or law before the claim was accepted for negotiation. Based on this assertion, it claims that Canada is now estopped from arguing that the KDC has not established a claim to title.

[34] However, and to the contrary, the evidence is that when the KDC claim was accepted for negotiation in 1983, Canada stated:

> While your claim meets the federal policy criteria of acceptance for negotiation purposes, I must advise you that this should not be construed as an admission of legal obligation or liability on the part of the federal government. … Furthermore, the acceptance of your claim ought not to be regarded as an official recognition of the boundaries on the map you submitted as being the extent of the land traditionally used and occupied by the Kaska Dena people. [emphasis added]

[35] In the face of this, a trial is required to establish whether and when Canada accepted that the Kaska Dena have Aboriginal title to lands in British Columbia, and exactly what land that encompasses. The requested declaration cannot issue on a summary judgment motion, based on the record before the Court. Canada's position is not so devoid of merit that a trial is not required.

> *C. A declaration that the defendant Crown is in a fiduciary relationship with the plaintiff and its members and that acceptance of the plaintiff's comprehensive land claim by the defendant gave rise to certain fiduciary duties owed by the defendant and its servants and agents to the plaintiff and its members.*

[36] The KDC submits that by virtue of the historic relationship between the Crown and First Nation peoples, as well as the terms of the 1973 Comprehensive Claims Policy, a fiduciary relationship exists between it and the Crown.

[37] I agree with Canada that the KDC has not provided sufficient, if any evidence, from which this Court can assert that a fiduciary duty exists, or the nature of that duty, from the mere fact that Canada agreed to accept a claim for negotiation.

[38] The Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paragraph 18, observed that an assertion of Aboriginal rights and title, even where there is a strong claim, is not sufficient to create a fiduciary duty:

> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:
>
> > ... "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.
>
> Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title. [emphasis added]

[39] The evidence presented by the KDC on this motion does not permit the Court to determine that its claim to right and title of land in British Columbia has been defined or proved, except for that land that has already been transferred to it pursuant to the Incremental Treaty Agreement. Absent such evidence, the declaration sought cannot be ordered.

> *D. A declaration that the defendant Crown and its servants and agents have acted in bad faith and have breached and continue to breach the duty owed to the plaintiff and its members to act in good faith towards the negotiation [and] settlement of the plaintiff's recognized comprehensive land claim in and to lands in northern British Columbia.*

[40] The KDC submits that in March 1999, during a negotiation meeting, counsel for Canada informed the KDC that its legal view was that Treaty No. 8 extinguished the Kaska Dena's right to title in the land under that treaty that it claimed as its traditional territory in British Columbia. It says that acceptance of its right to title in land in British Columbia was the basis on which the claim had been accepted and that this change of position after 16 years was an act of bad faith.

[41] KDC further submits that Canada acted in bad faith in refusing at various times to come to the bargaining table to negotiate its claim.

[42] Canada submits that its change of position during without prejudice negotiations had no effect on the negotiations and that the Minister confirmed this in writing. Moreover, it submits that a change in a party's legal analysis cannot amount to bad faith.

[43] If Canada changed its position for some reason other than as stated by Canada, for example in order to delay or end the negotiations, then it might show bad faith. However, there

is insufficient evidence before the Court to make any determination as to the motivation and reasoning behind the decision. This requires evidence and cross-examination. This requires a trial.

> *E. A declaration that the defendant Crown and its servants and agents have breached and continue to breach the fiduciary duty owed to the plaintiff and its members to protect the aboriginal title and related interests which were recognized and affirmed by the Government of Canada in 1983.*

[44] Having failed to establish on the record before the Court that the Crown owed a fiduciary duty to the KDC or that it had "recognized and affirmed" the title of the Kaska Dena, this declaration cannot issue.

[45] For these reasons, the motion is dismissed. Canada does not seek its costs, and none will be awarded.

ORDER in T-138-01

THIS COURT ORDERS that the motion is dismissed, without costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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