Federal Court of Appeal  Cour d'appel fédérale

Date: 20140627

Docket: A-418-12

Citation: 2014 FCA 170

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

BURNS BOG CONSERVATION SOCIETY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on May 5, 2014.

Judgment delivered at Ottawa, Ontario, on June 27, 2014.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Burns Bog Conservation Society appeals from the judgment of Russell J. of the Federal Court (the Judge) granting the respondent's motion for summary judgment pursuant to section 215 of the *Federal Courts Rules*, SOR/98-106 (the Rules), and dismissing its action against the respondent.

I. BACKGROUND

[2] The Judge describes in detail the facts in his reasons at paragraphs 2 to 20, reported at 2012 FC 1024. For the purpose of this appeal, it will suffice to highlight the following facts.

[3] Burns Bog, located in British Columbia, is one of the largest raised peat bogs in the world. The appellant is a registered non-profit society dedicated to preserving Burns Bog and raising awareness of its significance (Reasons at paragraph 2).

[4] In 2004, the corporation of Delta, the Greater Vancouver Regional District and the Province of British Columbia (together, the Bog owners) purchased six parcels of Burns Bog for conservation purposes from its private owners. The Federal Government contributed $28 million to the purchase, but did not take title to any part of Burns Bog. The Contribution Agreement requires the Bog owners to ensure that at least five thousand acres of Burns Bog will be managed as protected conservation land (Reasons at paragraph 4).

[5] In March 2004, the Bog owners granted the Federal Government a conservation covenant (the Covenant) over Burns Bog under section 219 of the British Columbia Land Title Act, R.S.B.C. 1996, c. 250. The Covenant restricts the activities that the Bog owners may undertake on Burns Bog. Specifically, the Bog owners' use of the land is subject to the terms and conditions set out in the Covenant. The Covenant is registered as a charge on Burns Bog (Reasons at paragraph 31).

[6] The Covenant provides at section 9.1 that the obligations it creates are solely contractual:

> The parties agree that this Agreement creates only contractual obligations and obligations arising out of the nature of this Agreement as a Covenant under seal. Without limiting the generality of the foregoing, the parties agree that no tort or fiduciary obligations or liabilities of any kind are created or exist between the parties in respect of this Agreement and nothing in this Agreement creates any duty of care or other duty on any of the parties to anyone else.

[7] The Covenant also includes an "entire agreement" clause:

> 16. None of the parties hereto have made any representation, Covenants, warranties, guarantees, promises or agreements (oral or otherwise) with any other party than those contained in this Agreement or in any other agreement that is reduced to writing and executed by all parties to it. This agreement may only be changed by a written instrument signed by all the parties.

[8] On March 23, 2004, the Bog owners and the Federal Government entered into the Burns Bog Management Agreement (the Management Agreement). The Management Agreement lays out the process by which the parties would develop a long-term management plan, as per the Contribution Agreement. On May 25, 2007, the Bog owners finalized the Burns Bog Ecological Conservancy Area Management Plan (the Management Plan), setting out policy directions and recommended actions to maintain Burns Bog's ecology.

[9] The British Columbia Gateway Program is a project run by the Provincial Government of British Columbia to improve bridge and road infrastructure throughout the greater Vancouver area. It includes a segment of road that runs adjacent to Burns Bog, the South Fraser Perimeter Road (SFPR). On September 3, 2008, the Federal and Provincial Governments entered into an arrangement to fund the SFPR. However, notwithstanding its financial contribution, the Federal Government did not assume any responsibility for the construction or operation of the SFPR.

[10] The construction of the SFPR required an environmental assessment under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. This assessment was carried out jointly with the Province's own environmental study in accordance with the Canada – British Columbia Agreement for Environmental Assessment Cooperation (2004). The assessment's conclusion was that the SFPR was not likely to cause significant adverse environmental effects if certain mitigation measures were followed, such as the creation of hydrology and air quality work plans. The assessment report, dated June 27, 2008, contains a specific section dealing with Burns Bog (A.B., Vol. II, pages 377-385). It is clear that Environment Canada and the Scientific Advisory Panel were involved in making several recommendations during the assessment, the whole in accordance with section 8.2 of the Management Plan (A.B., Vol. I, page 276).

[11] In 2010, the appellant filed a statement of claim seeking to compel the respondent to protect Burns Bog, claiming that the Federal Government owes the Canadian public a trust, fiduciary, or other legal duty to protect Burns Bog, or that it is bound to protect Burns Bog under a number of federal statutes. The appellant asks the Court for an injunction halting construction of the SFPR until the Federal Government has intervened to ensure that the construction will not impact the ecological integrity of Burns Bog. Apart from damages, general and punitive, the appellant also seeks a declaration that Burns Bog is subject to a public trust and/or equitable relationship with the Federal Government who is required to protect it.

[12] After filing its statement of defence, the respondent brought a motion for summary judgment pursuant to section 215 of the Rules alleging that there was no legal basis for the appellant's claim.

A. *Federal Court Decision*

[13] In a comprehensive and well-reasoned decision, the Judge addresses the following issues: (i) whether the statement of claim discloses a genuine issue for trial; and (ii) whether summary judgment is appropriate.

[14] The Judge concludes that the matter is appropriate for summary judgment as there are no contested facts which need to be resolved in order to determine whether the appellant's claim has any chance of success (Reasons at paragraph 65).

[15] The Judge also concludes that after reviewing the record, the relevant agreements, and the principles and authorities put forward by the parties, he is convinced that the respondent has made its case for summary judgment (Reasons at paragraph 76). The Judge summarizes his reasoning as follows at paragraph 77:

> 77 Canada does not owe any duty to the Plaintiff, the Bog or the general public respecting the protection of the Bog's ecological integrity. This is because:
>
> a. The Covenant, Management Agreement and Management Plan do not impose upon Canada any positive obligations respecting the protection of the Bog;
>
> b. Canada does not owe any trust obligations respecting the Bog because Canada does not own the Bog. Moreover, there is no basis in law or equity for the imposition of a "public trust" duty in this case;
>
> c. Canada has not undertaken any fiduciary obligations with respect to the Bog; and,
>
> d. None of the statutes cited by the Plaintiff impose upon Canada any obligations with respect to the protection of the Bog.

[16] Regarding the Covenant, the Judge observes that it does not impose upon the Federal Government any obligation regarding Burns Bog (Reasons at paragraph 78). Moreover, the Covenant applies only to Burns Bog and as such, does not limit the use of land outside of Burns Bog (Reasons at paragraph 80). As such, it cannot be used to give rise to an obligation to ensure that the SFPR is constructed by the Provincial Government in a manner that would help preserve Burns Bog.

[17] In the Judge's opinion, the Covenant does not create a trust relationship between the Federal Government and Burns Bog, as it does not provide the Federal Government with title to Burns Bog or give it the ability to control Burns Bog, and explicitly stipulates that it does not create any "tort or fiduciary obligations or liabilities of any kind" (Reasons at paragraphs 100-105).

[18] With respect to the Management Agreement, the Judge observes that it is clear that this document was intended to act as a bridge and to provide for the management of Burns Bog while the parties worked toward the development of the long-term Management Plan. This agreement does not contain any provisions that would require the Federal Government to take any steps to protect Burns Bog, with the Government's only commitment in this agreement being to participate in the collaborative planning team to prepare the Management Plan (Reasons at paragraphs 87-88).

[19] As for the Management Plan, the Judge notes that this document is not a contract, but a policy document that identifies various priorities and recommended actions regarding Burns

Bog. This Plan does not oblige the Federal Government in any way to protect Burns Bog (Reasons at paragraphs 90-91, 93).

[20] After noting that the appellant has done little to suggest how a trust or fiduciary obligation with respect to Burns Bog could have arisen on the facts of this case, the Judge notes that an analysis of the basic principles applicable to the creation of such obligations demonstrates that there is nothing to support such obligations in this particular case (Reasons at paragraph 94).

[21] After reviewing the authorities referred to by the parties, including particularly the decision of the Supreme Court of Canada in *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74 [*Canfor*], the Judge concludes that no Canadian court has recognized a public trust duty that requires the Federal Government to take positive steps to protect the environment generally or a specific property owned by other parties. In that respect, the Judge notes that the factual situation in the present matter is strikingly different from that before the Supreme Court of Canada in *Canfor* (Reasons at paragraph 112). In his view, the public trust duty aspect of the claim is bound to fail.

[22] The Judge also rejects the argument that there is a fiduciary obligation owed to the Canadian public at large or to Burns Bog itself. The Judge notes in respect of the latter that fiduciary obligations can only be owed to persons or classes of persons, not geographical locations, and therefore it is not possible to owe an obligation toward the land itself. With respect to a duty to the general public including particularly to the appellant, the Judge observes that to succeed, the appellant would have to demonstrate an *ad hoc* fiduciary relationship and that,

applying the principles set out by the Supreme Court of Canada in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261**,** this claim is also bound to fail (Reasons at paragraphs 113-125).

[23] Before concluding, the Judge reviews the appellant's allegation that there is a statutory duty to protect Burns Bog, finding that such allegation is also bound to fail because there is no basis for finding any such obligation (Reasons at paragraphs 126-128).

[24] The Judge concludes by stating that while he appreciates the appellant's concerns over the future of Burns Bog, there is nothing before him that substantiates those concerns or that suggests that the Federal Government has a legal obligation, let alone a legal right, to step in and insist that the SFPR project be reviewed again and/or modified (Reasons at paragraphs 69-73, 129-130). He thus allowed the respondent's motion for summary judgment.

II. ISSUES

[25] First, the appellant submits that the Judge erred in law by requiring it to put forward evidence of harm to Burns Bog.

[26] Second, the appellant argues that the Judge erred in law by failing to conclude that the various agreements referred to above provide a legal basis for its action. At the hearing, the appellant made it clear that the Judge referred to the appropriate legal test to determine if there was a genuine issue for trial. What the appellant disputes is how the Judge applied this test.

[27] Whereas in its memorandum the appellant appeared to concentrate on the Judge's treatment of the principles regarding trust and fiduciary obligations, during the hearing the appellant acknowledged that the Judge did not misstate the applicable general principles of law. Rather, the appellant submitted that its action raises novel issues (such as the effect of the Covenant) that require a novel remedy to ensure its performance.

[28] At the hearing, the appellant insisted that the Judge erred by failing to consider that the various agreements referred to above created a *sui generis* legal obligation on the Federal Government to protect Burns Bog. This novel duty would be somewhat akin to the duty alluded to in *Canfor* when the Government owns land. It is in that sense that the Judge would have erred in concluding as he did at paragraphs 101-105 of his Reasons. The appellant also argued that such a duty would be analogous to the concept of the "honour of the Crown" developed in aboriginal law.

[29] In the appellant's view, these novel arguments warrant further investigation. The appellant should thus be allowed to get through the discovery process so that it can better substantiate the concerns raised by Eliza Olson in her affidavit as well as add details with respect to how the agreements at issue came about. It is clear that at this stage, and this was confirmed at the hearing, that what the appellant seeks is a further assessment on the environmental impacts of the SFPR on Burns Bog.

[30] The appellant no longer argues that the respondent has a statutory duty to protect Burns Bog that goes beyond the assessment already performed.

III. ANALYSIS

[31] Absent an extricable error of law, the decision of the Judge can only be overturned if he made a palpable and overriding error. An error of law is reviewable on the standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[32] As noted earlier, the Judge mentions that the appellant has not put before the Court any evidence to support the concerns expressed by Eliza Olson in her affidavit. He also adds that the appellant did not present evidence of relevance to the issue of whether the respondent owes some contractual, trust, fiduciary or statutory obligation to maintain the ecological integrity of Burns Bog (Reasons at paragraphs 70 and 72).

[33] The appellant argues that "the [J]udge erred in holding that there was no evidence addressing the [r]espondent's factual and legal arguments" (Appellant's Memorandum at paragraph 31). The appellant also argues that the Judge erred in holding that there was no evidence of harm to Burns Bog given that the concerns set out at paragraph 3 of Eliza Olson's affidavit should be sufficient to support its action at this stage (Appellant's Memorandum at paragraph 40).

[34] According to the appellant, the Judge's statements in that respect constitute an error of law because, as it was set out in *MacNeil Estate v. Canada (Department of Indian & Northern Affairs)*, 2004 FCA 50 [*MacNeil*], parties responding to a summary judgment motion do not have

to prove all of the facts of the case and merely need to show that there is a genuine issue for trial (Appellant's Memorandum at paragraph 35).

[35] Although I agree with the legal principle stated in *MacNeil*, I do not believe that the Judge required that the appellant "prove all of the facts of the case". Moreover, the Judge did not base his decision to grant summary judgment on such "lack of evidence". Rather, the Judge concluded that there was no genuine issue for trial because there was no legal basis in this case to find that the respondent owes a legal duty to protect Burns Bog.

[36] The Judge had to consider the evidence of Eliza Olson as this was the only evidence put forth in response to the motion before him. His statement that her evidence is limited to her personal beliefs and that there is no real evidence to support such beliefs is an accurate description of this evidence. I agree with the Judge that such beliefs do not assist him in understanding what the respondent's legal responsibility for Burns Bog is (Reasons at paragraph 72).

[37] Moreover, at paragraph 75 of the Reasons, the Judge notes:

> There is an obvious reason for this lack of evidence. The issue of Canada's obligations is almost entirely legal. We have before us all of the relevant agreements and principles required to answer the question of whether there is a genuine case for trial on this matter.

[38] In its memorandum at paragraph 32, the appellant acknowledges that the Judge correctly described the only issue before the Court in paragraph 66 of his Reasons when he states:

> The issue is whether there is a genuine issue for trial over whether the Defendants owe to the Plaintiff any duty with respect to Burns Bog that compels any of the

> Defendants to intervene and ensure that the construction of the SFPR does not impact the ecological integrity of Burns Bog.

[39] Having reviewed the agreements and the principles referred to, the Judge concludes that the respondent does not owe any duty to the appellant, Burns Bog or the general public regarding the protection of Burns Bog's ecological integrity (see paragraph 77 of the Reasons reproduced above at paragraph 15).

[40] This brings me to the second part of the appellant's submissions, namely that the Judge erred by failing to conclude that the various agreements referred to above provide a legal basis for its action.

[41] The appellant is correct when it says that its action should not be struck merely because it relies on novel arguments. That said, novelty alone is not a sufficient answer in and of itself to allow an action to proceed and to refuse to grant summary judgment. Novelty does not address the need to weed out hopeless claims.

[42] As noted by the Supreme Court recently in *Hryniak v. Mauldin*, 2014 SCC 7 at paragraph 34, the summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper and faster alternative to a full trial. Swift judicial resolution of a legal dispute allows individuals to get on with their lives. Proportionality is a recognized principle that can act as a benchmark for access to civil justice. Judges are tasked with recognizing when summary judgment is appropriate in order to avoid wasting resources on a full trial.

[43] I agree with the Judge that this is a clear case where the appellant's claim must be weeded out because it is bound to fail. I agree with the Judge substantially for the reasons he gave that the appellant has failed to establish the essential elements of a trust or fiduciary relationship.

[44] It is clear that in reaching his conclusion, the Judge carefully considered *Canfor*. He found that at best *Canfor* opens the door to the application of the public trust doctrine developed in the United States in respect of land owned by the Crown (see *Canfor* at paragraphs 74-81). Here, as mentioned, the respondent does not own Burns Bog.

[45] The appellant acknowledged at the hearing before us that the particular public trust or fiduciary duty it is relying on has not yet been recognized anywhere, including the United States. The appellant's position requires extending not only Canadian law but the American doctrine upon which the appellant relies on to a completely different situation.

[46] In the absence of a precedent dealing with the alleged *sui generis* public trust duty, the Judge turned to the basic principles of fiduciary and trust law. Indeed, the Supreme Court of Canada has already set out general principles that should guide the Courts when reviewing cases alleging an *ad hoc* fiduciary duty imposed on governments. It has also set out the general principles applicable to cases where a trust relationship is alleged.

[47] The Judge identified those principles and applied them to the matter before him. I am satisfied that he was not limiting himself to factual situations already encountered in the case law

and kept an open mind as to what new circumstances these principles could apply to. I find no error in his articulation of the law or in his application of these legal principles to the facts of this case.

[48] There is no indication that the appellant raised the concept of the "honour of the Crown" before the Judge. It is not referred to in the proceedings. I do not believe that we should entertain that argument. In any event, this analogy is inappropriate.

[49] As to the appellant's argument that for every wrong there must be a legal remedy, I have not been persuaded that it has any application here. The appellant has not challenged in any way, through judicial review or otherwise, the joint environmental study performed to assess the potential impact of the SFPR on Burns Bog.

[50] In my view, there is simply no error that would justify this Court's intervention. In these circumstances, I propose that the appeal be dismissed with costs.

" Johanne Gauthier"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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