Federal Court  Cour fédérale

Date: 20170831

Docket: T-1685-96

Citation: 2017 FC 791

Ottawa, Ontario, August 31, 2017

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

CLIFF CALLIOU ACTING ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE KELLY LAKE CREE NATION WHO ARE OF THE BEAVER, CREE AND IROQUOIS PEOPLES AND KELLY LAKE CREE NATION

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Defendant

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Cliff Calliou, acting on his own behalf and on behalf of the Kelly Lake Cree Nation, brings a motion before this Court, pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106, for an appeal of an Order of Madam Prothonotary Mandy Aylen, dated February 7, 2017, whereby the Plaintiffs' action was stayed pursuant to subsection 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 [the Act]. The action was stayed on the following grounds: the Plaintiffs are seeking land-related remedies involving provincial lands located in Alberta and British Columbia and this Court has no jurisdiction to make declarations or apply remedies that impact the rights of a province; and, it would be in the interest of justice that the land-related claims be determined by the provincial superior courts, rather than proceeding concurrently before this Court.

[2] For the reasons set out below, the Plaintiffs' motion will be dismissed.

II. Facts

[3] The Plaintiffs commenced this action in 1996. They are seeking a declaration from the Court stating that they have existing aboriginal title, Indian title, and aboriginal rights over lands located in the provinces of Alberta and British Columbia. The lands are described as being bounded on the north by the Peace River, on the west by a portion of the Rocky Mountains in British Columbia, on the south by the boundary between Treaty No. 6 of 1876 and Treaty No. 8, and on the east in Alberta by the sixth meridian [Traditional Lands]. The action in this Court was held in abeyance on consent of the parties from 2010 until 2016.

[4] In addition, the Plaintiffs sought a declaration that the Traditional Lands are lands reserved for Indians and under the exclusive legislative jurisdiction and administrative authority of the Crown; a declaration that neither script nor treaty extinguished their rights to the Traditional Lands; a declaration that the Crown has breached its obligations and duties owed to the Plaintiffs; and finally, a declaration that they have suffered damages in the amount of $5 billion, due to the conduct of the Crown in relation to the Traditional Lands and the Plaintiffs' rights in those lands.

[5] In the meantime, in March of 1996, a similar action was commenced by the Plaintiffs in the Court of Queen's Bench of Alberta [Alberta Action]. The Plaintiffs sought therein a declaration that they have existing aboriginal rights and Indian title, as well as personal and usufructuary rights over the lands and resources of the Traditional Lands. The Alberta Action was subsequently discontinued by the Plaintiffs on July 25, 1996.

[6] In July of 2010, the Plaintiffs, along with others [BC Plaintiffs], commenced an action in the Supreme Court of British Columbia [BC Action] in which they seek, in addition to other relief, a declaration that they have always held and continue to hold aboriginal title to the Traditional Lands as well as aboriginal rights to carry on various traditional activities within those lands, and damages in the amount of $50 million for infringement of the aboriginal title and rights of the BC Plaintiffs within their Traditional Lands. The BC Action remains before the Supreme Court of British Columbia and is ongoing, though it has not progressed past the pleadings stage.

[7] All aforementioned proceedings relate, in whole or in part, to the Traditional Lands.

III. Impugned Decision

[8] In an Order dated February 7, 2017, Madam Prothonotary Aylen stayed the action of the plaintiffs (as they then were) before this Court pursuant to subsection 50(1) of the Act.

[9] Upon consideration of the parties' arguments, Prothonotary Aylen concluded that this Court does not have jurisdiction to hear the plaintiffs' claim, stating that the "case law is clear that the Federal Court has no jurisdiction to make declarations or apply remedies that involve the rights of a province" (Order, at para 11; *Joe v Canada*, [1986] 2 SCR 145, 1986 CanLII 28 (SCC); *Huron-Wendat Nation of Wendake v Canada*, 2014 FC 1154 at para 65).

[10] This conclusion was also based on this Court's recent decision in *Côté v Canada*, 2016 FC 296. Prothonotary Aylen found entirely baseless the plaintiffs' argument that Côté is distinguishable from this case on the basis that different constitutional provisions apply to lands located in Alberta and British Columbia than to the lands at issue in Côté, located in Newfoundland, Labrador and Québec.

[11] Since the claim is, in essence, a land-related claim, impacting the rights of the provinces of Alberta and British Columbia, Prothonotary Aylen concluded that these provinces are essential parties to the claim and thus, this Court cannot issue orders or grant relief against them.

[12] Prothonotary Aylen expanded on whether this Court may have jurisdiction over portions of the claim once the elements of the land-related claims are determined first by the superior courts. To this point, she believes that the Federal Court may have jurisdiction over some elements of the claim, but finds that these flow from the land-related claims. Therefore, it is in the interest of justice that the land-related claims be decided by the provincial superior courts first.

[13] She added that a stay is warranted on the basis that there is a concurrent action currently before the Supreme Court of British Columbia. There is a factual overlap between this action and the BC Action, and both seek a determination of the plaintiffs' legal interests in the same land. As a result, it is not in the interest of justice to permit the present claim to proceed in this Court, while a parallel recourse is before the Supreme Court of British Columbia.

[14] Moreover, she found that despite the discontinued Alberta Action, this Court is not prevented from issuing a stay, as it may order the stay of a proceeding even when no other proceeding is pending before another court (see *Fédération Franco-Ténoise v R*, 2001 FCA 220 at para 81). The plaintiffs have not submitted that they are foreclosed or prevented in any way from commencing a new proceeding before the Court of Queen's Bench of Alberta concerning the Alberta portion of the Traditional Lands.

IV. Issues and Standard of Review

[15] This motion for appeal raises the following single issue:

Did the Prothonotary make an error of law or a palpable and overriding error of fact or mixed fact and law by concluding that this Court does not have jurisdiction to grant land-related remedies involving provincial land?

[16] The Plaintiffs submit that *de novo* review is the appropriate standard of review to be applied (*Apotex Inc v Bristol-Myers Squibb Company*, 2011 FCA 34 at para 6); whereas the Defendant argues that decisions of prothonotaries are to be accorded deference on review (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215).

[17] In *Hospira*, the Federal Court of Appeal explicitly decided to do away with the *de novo* review of discretionary orders made by prothonotaries and replaced it with the standard set out by the Supreme Court in *Housen v Nikolaisen*, 2002 SCC 33 (*Hospira*, above at paras 57, 65).

[18] In the present case, I am of the view that the appropriate standard is that which is set out in *Housen*. Mister Justice David Stratas, in *Imperial Manufacturing Group Inc v Decor Grates Incorporated*, 2015 FCA 100 concluded that "[i]n accordance with Housen, absent error on a question of law or an extricable legal principle, intervention is warranted only in cases of palpable and overriding error" (*Imperial Manufacturing* at para 29). The unanimous bench of five judges of the Federal Court of Appeal in *Hospira* agreed with the remarks made by Justice Stratas (*Hospira*, above at paras 71-72).

[19] Therefore, Prothonotary Aylen's Order may only be interfered with by this Court if there was an error of law or a palpable and overriding error of fact or mixed fact and law. Where there

is an error of law, it is reviewable on the correctness standard (*Housen*, above at para 36; *Hospira*, above at para 64).

V. Analysis

> *Did the Prothonotary make an error of law or a palpable and overriding error of fact or mixed fact and law by concluding that this Court does not have jurisdiction to grant land-related remedies involving provincial land?*

[20] The Plaintiffs' claim was stayed by Prothonotary Aylen on the basis that this Court does not have jurisdiction over a claim to provincial lands located in Alberta and British Columbia. In addition, there would be a risk of inconsistent findings between those of this Court and those of the provincial superior courts, as the Plaintiffs currently have an action before the British Columbia Supreme Court. I am of the opinion that Prothonotary Aylen has made no error of law or palpable and overriding error of fact or mixed fact and law in granting the stay. I therefore see no reason to interfere with her Order.

[21] The essence of the Plaintiffs' claim is land-related, as they seek the following remedies: a declaration of existing aboriginal title, Indian title and aboriginal rights over the Traditional Lands located in Alberta and British Columbia, a declaration that the Traditional Lands are lands reserved for Indians and under the exclusive legislative jurisdiction and administrative authority of the Crown, a declaration that their rights to the Traditional Lands were not extinguished by script or treaty, a declaration that the Crown has breached its trust, fiduciary, constitutional, statutory, common law and equitable obligations and duties owed to the Plaintiffs, and a declaration that the Plaintiffs have suffered damages in the amount of $5 billion.

[22] As such, I agree with the Defendant that this Court does not have jurisdiction over the land-related relief involving provincial lands being sought by the Plaintiffs. As for the ancillary claims flowing from the land-related claims, Prothonotary Aylen properly dealt with these, stating:

> Any elements of the [Plaintiffs'] claims that remain outstanding following the determination of the claims before the provincial superior courts can then move forward in this Court, should it be necessary to do so (Order, at para 16).

[23] The Plaintiffs challenge Prothonotary Aylen's decision on three grounds: first, they argue that Prothonotary Aylen incorrectly found that this claim for provincial lands ought to be heard in provincial superior courts; second, they allege that this Court does have jurisdiction to hear their claim because Alberta and British Columbia do not possess rights in relation to the Traditional Lands, instead arguing that those rights were excluded by the provisions of the *Rupert's Land and North-Western Territory Order*, an exclusion they argue was confirmed by the *Constitution Act, 1930*; and third, they argue that Prothonotary Aylen erred by failing to consider either section 19 or 25 of the Act, which they state grants this Court jurisdiction to hear their claim. Respectfully, I disagree with all three grounds of appeal.

[24] First, I am of the opinion that Prothonotary Aylen correctly concluded that in light of case law arising out of the Supreme Court of Canada, the Federal Court of Appeal, and this Court, the Federal Court has no jurisdiction to make declarations or apply remedies that involve the rights of a province.

[25] The Plaintiffs take issue with Prothonotary Aylen's reliance on *Huron-Wendat* and *Côté*. Prothonotary Aylen relies on *Huron-Wendat* for the principle that the Federal Court has no jurisdiction to make declarations or apply remedies that involve the rights of a province. The Plaintiffs argue that paragraph 65 of *Huron-Wendat* was not determinative, and was "merely a passing remark applicable to Québec". I do not agree.

[26] It is rather a well-established legal principle supported by jurisprudence from the Supreme Court of Canada in *Joe*, the Federal Court of Appeal in *Vollant v Canada*, 2009 FCA 185, and this Court in *Sylvain v Canada (Attorney General)*, 2004 FC 1474.

[27] In *Huron-Wendat*, the outcome of the judicial review was a declaration that the Crown had failed to consult (*Huron-Wendat*, above at para 123). That is not what is being sought here. The Plaintiffs did not bring an application for judicial review; they brought an action for title to provincial lands. Additionally, in *Huron-Wendat*, the relief sought was procedural in nature and did not involve the provincial Crown in any way (*Huron-Wendat*, above at para 67). It was not an action for land-related remedies, such as the present case. Although the principle regarding Federal Court jurisdiction enunciated at paragraph 65 was not determinative in Huron-Wendat, I am not persuaded by the Plaintiffs' argument that Prothonotary Aylen erred by relying on the general principle repeated therein, which is itself based on past jurisprudence.

[28] The Plaintiffs also disagree with Prothonotary Aylen's reliance on *Côté*. They state that *Côté* is not applicable because it involves the province of Québec, which they argue should receive different constitutional treatment from Alberta and British Columbia. In her decision,

Prothonotary Aylen notes that the Plaintiffs' assertion is "entirely baseless", as they "have put before the Court no cases which would suggest that the principles enunciated in the decisions cited in *Côté* are somehow restricted in their application to only certain specific provinces" (Order, at para 13). The same applies to the position the Plaintiffs took before me; they still bring no jurisprudential support for their argument. Therefore, I agree with the Defendant that Prothonotary Aylen did not err in relying on *Côté*.

[29] The Plaintiffs also ask the Court to distinguish the present case from its decision in *Innu of Uashat Mak Manu-Utenam v Canada*, 2015 FC 687 (aff'd 2016 FCA 156), wherein I stayed the Québec Innu's action against Her Majesty the Queen in Right of Canada seeking, amongst other things, a judgment declaring that they had aboriginal and treaty rights with respect to territory within Newfoundland and Labrador. Similar to the Plaintiffs' argument that Québec should receive different constitutional treatment from Alberta and British Columbia, the Plaintiffs further argue that Newfoundland and Labrador, although not one of Canada's first four provinces, must also be treated differently from Alberta and British Columbia, as it joined the country under unique conditions.

[30] The *Newfoundland Act*, 12 & 13 Geo. VI, c 22 (UK), along with its Schedule – *Terms of Union of Newfoundland with Canada* was filed at the hearing at the request of the Court and counsel for the Plaintiffs was unable to convince the Court that a distinction should be made between Newfoundland and Labrador, on the one hand, and the Traditional Lands, on the other. The first joined Canada in 1949 but kept, from that date, jurisdiction over lands and natural resources, whereas the second joined Canada in 1870, with Alberta and British Columbia

receiving jurisdiction over those lands and natural resources in 1930. All provinces now have jurisdiction over lands and natural resources located within their boundary, subject to their First Nations aboriginal and treaty rights.

[31] Just as was the case in *Innu of Uashat Mak Manu-Utenam*, the majority of the Plaintiffs' claims, if granted, would impact the rights of the provinces of Alberta and British Columbia. It is well known that the Federal Courts lack jurisdiction against any of the Canadian provinces.

[32] Second, I do not agree with the Plaintiffs' argument that Prothonotary Aylen erred in her decision because the Traditional Lands are not provincial lands by virtue of the *Rupert's Land and North-Western Territory Order* and the *Constitution Act, 1930*.

[33] The Plaintiffs submit no case law to support this assertion. Instead, they reproduce passages from the *Rupert's Land and North-Western Territory Order* stating that the lands at issue joined Confederation in 1870 pursuant to specific terms, terms which prescribe that any claims to compensation for lands shall be disposed of by the Canadian Government. The Crown was thus assuming this responsibility and relieved the Imperial Government and the Company of Adventurers of England trading into Hudson's Bay of all responsibility in respect of aboriginal claims.

[34] Contrary to the Plaintiffs' argument, the fact that jurisdiction over lands and natural resources was only transferred to those provinces in 1930, subject to any interests existing prior

to 1930, does not mean that Alberta and British Columbia do not possess rights in relation to the Traditional Lands.

[35] I do not see how federal obligations arising out of these agreements should result in this Court having jurisdiction over lands located in Alberta and British Columbia. Absent any case law or further arguments as to why this would be the case, I find this assertion to be without merit.

[36] Finally, as for the applicability of sections 25 and 19 of the Act, I agree with the Defendant that these provisions do not find application in the case before us.

[37] Section 25 reads as follows:

> The Federal Court has original jurisdiction, between subject and subject as well as otherwise, in any case in which a claim for relief is made or a remedy is sought under or by virtue of the laws of Canada if no other court constituted, established or continued under any of the *Constitution Acts, 1867 to 1982* has jurisdiction in respect of that claim or remedy.

[38] Section 25 clearly states that it only applies if no other court has jurisdiction in respect of the claim or remedy. Since I am already of the opinion that the Plaintiffs' claim and the remedies they seek are properly before the provincial superior courts, that a proceeding was before the Court of Queen's Bench of Alberta until it was discontinued by the Plaintiffs, and that a proceeding relating to the Traditional Lands is already before the British Columbia Supreme Court in the BC Action, I do not find that section 25 provides this Court with jurisdiction to hear their claim. Section 25 does not constitute a valid statutory grant of jurisdiction and is therefore

of no assistance where the Plaintiffs could seek relief in the superior court of any province, such as is the case here (*Moudgill v Canada*, 2014 FCA 90 at para 9; *Creighton v Franko*, 1998 CanLII 8155 (FC) at para 25).

[39] Similarly, I do not find that section 19 grants this Court jurisdiction over this matter. Section 19 reads as follows:

> If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies.

[40] The Federal Court of Appeal clearly stated in *Canada v Toney*, 2013 FCA 217 that section 19 "cannot be invoked if an individual or company commences an action against both the Federal government and a provincial government" (*Toney* at para 23). Instead, it can only grant this Court with jurisdiction if Canada commences third party proceedings against a provincial Crown (*Toney* at para 23). Canada has not done so. Therefore, I am not convinced that section 19 grants this Court jurisdiction over the Plaintiffs' claim.

[41] The Federal Court of Appeal's decision in *Canada v Peigan*, 2016 FCA 133 cannot be of assistance to the Plaintiffs since the agreement entered into by the Defendant in that case, the federal Crown and the province of Saskatchewan, on which the Defendant's claim was based, specifically stated that, save from specific issues that would be referred to arbitration, any debate that would arise from the interpretation and application of that agreement would be referred to the exclusive jurisdiction of the Federal Court. At paragraph 51, the Federal Court of Appeal

specifically states that “section 19 of the FCA has been held to be insufficient to render the Crown in right of a province amenable to suit before the Federal Court at the instance of a third party, even in circumstances where Canada is a co-defendant and might advance a claim against the province [citation omitted.]”

[42] It is true that the Plaintiffs have not added the provinces of Alberta and British Columbia as defendants in the present case but I respectfully think that, as a result, the rights of those provinces cannot be altered *in absentia*.

VI. Conclusion

[43] In light of the above, the Plaintiffs have not convinced me that Prothonotary Aylen made an error of law or a palpable and overriding error of fact or mixed fact and law. Consequently, the Plaintiffs’ motion for an appeal of a stay of proceedings is dismissed.

JUDGMENT in T-1685-96

THIS COURT'S JUDGMENT is that:

1. The Plaintiffs' motion for an appeal of Prothonotary Aylen's Order, dated February 7, 2017, is dismissed;
2. Costs are granted in favour of the Defendant.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1685-96
STYLE OF CAUSE:	CLIFF CALLIOU ACTING ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE KELLY LAKE CREE NATION WHO ARE OF THE BEAVER, CREE AND IROQUOIS PEOPLES AND KELLY LAKE CREE NATION v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
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