SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Te Kiapilanoq v. British Columbia,*** 2008 BCSC 54

Date: 20080114
Docket: S036483
Registry: Vancouver

Between:

Te Kiapilanoq (Capilano) also known as Gerald Johnston, suing on his own behalf as a Squamish Indian Hereditary Chief and person and on behalf of all Squamish Indian People

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada

Defendants

Before: The Honourable Mr. Justice Parrett

Reasons for Judgment In Chambers

Counsel for the Plaintiff:	Chief Johnston, In Person and G. Kapelus
Counsel for the Applicant Squamish Nation, Squamish Indian Band and Chief Gilbert Jacob:	J.R. Rich and K.D. Lee
Counsel for the Attorney General of Canada::	J. L. Ott and S. Eustace
Counsel for Her Majesty the Queen in Right of the Province of British Columbia:	M. Akey
Date and Place of Hearing:	April 21, June 29 and November 14, 2006; April 24, May 17 and June 28, 2007 Vancouver, B.C.

INTRODUCTION

[1] The present application is brought by notice of motion by the Chief and Council of the Squamish Nation and Squamish Indian Band, and Chief Gilbert Jacob, on his own behalf and on behalf of all members of the Squamish Nation and Squamish Indian Band.

[2] In their notice of motion the applicants seek to be added as defendants in this action pursuant to Rule 15(5) and to have the action struck.

[3] In the alternative the applicants seek to have the representative action of the plaintiff on behalf of the Squamish Indian People struck and the style of cause in this proceeding amended so that the name of the plaintiff appears in his individual capacity only.

BACKGROUND

[4] When this application first came before me the plaintiff was unrepresented. As matters progressed Mr. Kapelus took on the role of representing the plaintiff. As this matter eventually moved towards completion there were delays occasioned by health problems on the part of Mr. Kapelus and the plaintiff, an application to call *viva voce* evidence, and finally delays in the preparation and delivery of material.

[5] In essence, this is a relatively straightforward application, predicated on the submission by the applicants that the plaintiff in this action has no authority to act on behalf of the Squamish Nation and its members and that he is, in all the circumstances, not a suitable person to bring this type of representative action.

[6] The present action was commenced on December 2, 2003 and is brought "on his own behalf as a Squamish Indian Hereditary Chief and person on behalf of all Squamish Indian people".

[7] A second similar action was commenced under action number S036521 on December 4, 2003. This action was commenced by the duly elected Council of the Squamish Nation on behalf of the Squamish Indian Band.

[8] The relief sought in both actions is substantially similar, centered around a claim for declaration of aboriginal title and rights in respect of what is claimed to be the Squamish Nation's traditional territory. The defendants are, in each case, the governments of British Columbia and Canada.

[9] The plaintiff, Gerald Johnston, is a Squamish Nation member but he is not an elected member of the Council. He asserts a claim to be a Hereditary Chief but that claim is itself disputed.

A BRIEF HISTORICAL PERSPECTIVE

[10] The Crown Colony on the mainland of what is now British Columbia was established in 1858. It merged with the Crown Colony of Vancouver Island in 1866. In 1871 British Columbia joined confederation with the federal government assuming responsibility for all matters involving "Indians" and any reserves that had been established by the Colonial governments of British Columbia.

[11] The first ***Indian Act*** came into force in 1876. That same year, the *Joint Indian Reserve Commission* ("JIRC") was established under the ***Indian Act***. During

the course of this Commission's work 28 reserves were established for Squamish Indian people. From 1876 until 1923 the Department of Indian Affairs of the Canadian Government administered each of these reserves including a separate bank account for each reserve.

[12] Between April of 1922 and July of 1923 there were a series of six meetings of Squamish people at which votes were taken and petitions signed. The last of those meetings took place on July 17, 1923 and the handwritten minutes of that meeting were taken by Indian Agent C.C. Perry. These minutes record the passage of a unanimous resolution dealing with amalgamation and the creation of a Council of Chiefs.

[13] By a petition dated July 23, 1923, and signed by 16 Squamish Chiefs and 72 other Squamish Indians, the signators advised, in part, that:

> With a view of properly conducting the affairs of the Squamish Indians we have unanimously agreed to have a council to transact the affairs of our people in co-operation with the Indian Department, said council to be composed of all the chiefs of the Squamish Nation of Indians, and we may say that said council has met with approval of every chief of the Squamish Indians and the people.

[14] In a letter dated July 31, 1923, Indian Agent C.C. Perry advised that:

> The formation of a Council of Chiefs was also approved, the standing chiefs to be constituted as a Squamish Council until further arrangements are agreed upon.

[15] From 1923 until 1981, the Council for the Squamish Nation was comprised of the 16 Hereditary Chiefs or their designates. No elections to council took place during this period from the membership-at-large.

[16] In 1985, as a result of the passage of Bill C-31, the new provisions of the ***Indian Act*** allowed Bands to establish their own membership codes. In 1987, as a result of a Council initiative, a Squamish Membership Code was adopted and a second Code was adopted and implemented to replace it in July 2000.

[17] As of February 13, 2006, the membership records for the Squamish Nation list 3,362 members, 2,255 of whom are adults who are eligible to vote in elections for the positions of Chief and Councillors.

[18] Since 1981 the Squamish Nation elects 16 council members to represent them.

DISCUSSION

[19] The Rules specifically deal with cases involving multiple claims and parties and R. 5(11) with representative claims. It reads:

> (11) Where numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (17), the proceeding may be commenced and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.

Under this provision the court has a discretion as to whether or not a representative action should be continued (***McLellan v. I.C.B.C.*** (1981), 32 B.C.L.R. 154 (B.C.C.A.)).

[20] The provisions of R. 19(24) also allow the court to strike out or amend the whole or part of a pleading:

> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
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> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[21] The applicant submits that the present action is unnecessary, frivolous and or vexatious and that it is otherwise an abuse of the process of the court as well as duplicating the claims brought in the action commenced by the elected Chief and Council.

[22] The plaintiff, Gerald Johnston, filed a number of affidavits, including those of Chief Russell Kwakseestahla, Debbie Sheree Peterson, Chief Richard Douglas Bill, as well as a second affidavit of his own. Meaning no disrespect to any of these individuals the contents of these affidavits would be useful if this application required a determination of whether or not the plaintiff is in fact a Hereditary Chief of the Squamish Nation. With respect, that is not the issue before the court on the present application.

[23] The class identified within the present action only has meaning if it co-exists with the present structure of the Squamish Nation.

[24] This group has, according to the legislation, adopted a Membership Code and an elected Council to represent these people in their affairs.

[25] In my respectful view, the elected Council representing the Squamish Nation is the proper party with the authority of this defined class of people to conduct a case which is aimed at determining the questions of Aboriginal rights and title. The collective nature of these rights requires an authority from the people who are, in this case, collectively represented by their elected Council.

[26] There is no evidence in the plaintiff's material that he has the resources or a plan capable of properly conducting such litigation; indeed, the absence of legal counsel throughout the present application needlessly complicated that process and could potentially jeopardize the rights of all those in the class he claims to represent.

[27] Even more significantly, in my view, the plaintiff has not asserted authority arising from the class of people themselves, other than his assertion that he is in fact a Hereditary Chief.

[28] In ***Metlakatla Indian Band v. Leighton,*** [2006] B.C.J. No. 349, Satanove J. found that the action before her arising from the alleged misappropriation of Band assets and funds could not be pursued by an individual Band member in a representative capacity.

[29] This conclusion flows from the decisions in ***Joe v. Findlay*** (1987), 12 B.C.L.R. (2d) 166; ***Wewayakai Indian Band v. Chickite***, [1998] B.C.J. N0. 860; and ***Mack v. Mack***, [1994] B.C.J. No. 1000.

[30] The issue of authority to bring an action is generally considered to be a question of mixed fact and law which the Supreme Court of Canada has held to be

best determined by the trial judge (***Oregon Jack Creek Indian Band v. Canadian National Railway Co.***, [1989] 2 S.C.R. 1069).

[31] This, however, is a case where two actions have been commenced, both of which assert issues of Aboriginal title and rights, and the authority of the plaintiff in this action is questioned.

[32] In my view, the difficulties and uncertainties arising from the existence of two such actions cannot be allowed to impact the orderly assertion of the rights in question.

[33] In ***Western Canadian Shopping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534, the Supreme Court of Canada considered the conditions that must be met to allow a representative action to proceed.

[34] At para. 34 Chief Justice McLachlin said:

> Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them. However desirable comprehensive legislation or class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action practice.

[35] While British Columbia has enacted such legislation in the form of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 and amendments thereto, the option remains to proceed under R. 5(11).

[36] The four conditions that must be met are found in ***Dutton*** to be:

1) the class must be capable of clear definition;

2) there must be issues of fact or law common to all class members;

3) success for one class member must mean success for all; and

4) the class representative must adequately represent the class.

[37] In describing the fourth condition the Chief Justice, at para. 41, said the following:

> . . . In assessing whether the proposed representative is adequate, the court may look at the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class . . .

[38] In my respectful view, the plaintiff lacks the capacity to be an adequate representative for the Squamish people in advancing this representative claim even if he had the authority to take this action on their behalf.

[39] Allowing this action to proceed as a representative action would jeopardize the very action brought on the Squamish Nation's behalf to advance their claims through their elected Council.

[40] I am not persuaded that the plaintiff necessarily has no cause of action beyond the representative claim, but, there is no doubt that the pleadings must be substantially recast to reflect the claims he wishes to advance in his individual capacity.

DISPOSITION

[41] There will be an order that the applicants, the Chiefs and Council of the Squamish Nation and Squamish Indian Band, and Chief Gilbert Jacob on his own behalf and on behalf of all members of the Squamish Nation and Squamish Indian Band, be added as defendants in this action pursuant to R. 15(5) of the Rules of Court.

[42] There will also be an order that the representative action of the plaintiff on behalf of all Squamish Indian people be struck and an order that the style of cause in this proceeding and the statement of claim be amended to reflect that the plaintiff's claim is being advanced in his individual capacity only.

[43] If the parties are unable to agree on costs, they may be spoken to.

The Honourable Mr. Justice Parrett

January 21, 2008 – ***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that it has been brought to my attention that counsels' names and the parties they represent are in error on page one of my released reasons.

Ms. Ott and Ms. Eustace represented the Attorney General of Canada on this matter, and Mr. Akey was counsel for Her Majesty the Queen in Right of the Province of British Columbia.

Those changes are noted and applied.