IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***The Tsawwassen First Nation et al. v. Vancouver Port Authority et al.,*** 2004 BCSC 515

Date: 20040422
Docket: S021209
Registry: Vancouver

Between:

The Tsawwassen First Nation (also known as The Tsawwassen Indian Band), and Chief Kim Baird, on her own behalf, and on behalf of the individual members of the Tsawwassen First Nation and on behalf of the said Tsawwassen First Nation

Plaintiffs

And

Vancouver Port Authority, British Columbia Ferry Corporation, Her Majesty the Queen in Right of British Columbia, Her Majesty the Queen in Right of Canada, B.C. Transportation and Financing Authority, and B.C. Rail Ltd.

Defendants

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Plaintiffs:	Gregory J. McDade, Q.C. Lesley Giroday
Counsel for the Defendant: HMTQ/British Columbia	Lisa J. Mrozinski Paul E. Yearwood
Counsel for the Defendant: HMTQ/Canada	Robert A. Kasting Lorne D. Lachance
Counsel for the Defendant: Vancouver Port Authority	D. Barry Kirkham, Q.C. Gregory J. Tucker

Counsel for the Defendant: William K. McNaughton
B.C. Ferry Corporation Richard L. Williams

Date and Place of Hearing: April 14, 2004
Vancouver, B.C.

INTRODUCTION

[1] This lawsuit relates to the Tsawwassen First Nation (the "TFN") and the Tsawwassen Indian Reserve #0. The reserve is at Roberts Bank near Delta, British Columbia, and borders on the Straight of Georgia. The TFN and the individual plaintiffs object to two large land and water industrial operations on Roberts Bank, which border the foreshore of the reserve. One is the B.C. Ferries Tsawwassen Terminal on the south end of the reserve. The other is the Roberts Bank Superport on the north end. Each operation includes a man-made offshore island terminal and a causeway to link the island terminal to the foreshore. The trial has been scheduled to commence February 14, 2005.

[2] British Columbia has applied for an order that the trial be adjourned for two years, so that it will commence February 14, 2007. The other defendants support the adjournment application. The plaintiffs oppose any

adjournment. The plaintiffs say that if the trial is adjourned, it should be on terms including the condition that the Vancouver Port Authority not commence any construction activities in relation to the expansion of their facilities until the trial is concluded.

[3] British Columbia argued that it will be prejudiced if the trial proceeds as scheduled, on the basis that it will not be adequately prepared in time. It argued that it has become increasingly clear that the scope of the plaintiffs' claims raise issues of aboriginal title and aboriginal rights, even though the statement of claim does not seek a declaration of such rights or allege infringement of them. British Columbia referred to writs issued in December 2003 by parties including the plaintiffs in this lawsuit as demonstrating the broad scope of the plaintiffs' claims. British Columbia argued that there is no urgency for the trial to be heard when scheduled. It also argued that it is not in the interests of justice for the hearing to proceed while British Columbia, Canada, and the TFN are negotiating a treaty.

[4] As I understand it, British Columbia's suggested two-year adjournment is based on the parties not proceeding in this lawsuit during a period of 12-15 months of treaty

negotiations, and then having a period of 21-24 months to prepare for trial.

[5] The plaintiffs argued that they will be prejudiced if the trial is adjourned. They argued that the scope of their claim has not changed, and that the writs issued in December 2003 will not affect this lawsuit. They argued that if the trial is adjourned, they will be effectively required to choose between pursuing the treaty and having their day in court on the claims in this lawsuit. They argued that if the trial is adjourned, they will be in a worse position to stop the anticipated expansion of the Superport than they would be if the trial proceeds as scheduled.

FACTS

[6] The statement of claim was issued February 28, 2002. In it, the plaintiffs allege that the operations of the ferry terminal and the Superport constitute a continuing nuisance, that the developments constitute an interference with their riparian or littoral rights, and that Canada has breached its alleged fiduciary duty to protect the TFN's lands from harm.

[7] The plaintiffs' claim against the Vancouver Port Authority and Canada are in connection with the Superport.

Their claims against British Columbia, British Columbia Ferry Corporation, and B.C. Transportation and Financing Authority are in connection with the lands at and between the causeways for the ferry terminal and the Superport. Their claim against B.C. Rail is in connection with the rail facilities at the Superport.

[8] There is an issue about the scope of the plaintiffs' claim. The position of the defendants is that the nuisance claim must arise from either: (a) use and occupation of property, like any fee simple landowner, or, (b) from aboriginal title.

[9] The position of the plaintiffs is that the law does not limit their claim to one of those two positions. The plaintiffs argue that their claim arises from a reserve interest, which is a statutory interest overlaid on an aboriginal interest, and therefore may be somewhere between the rights of a fee simple landowner and a holder of aboriginal title, and may be constitutionally protected. Mr. McDade, counsel for the plaintiffs, stated that this "middle ground" was a novel claim that has not been considered in the case law.

[10] Mr. McDade argued that the plaintiffs have made their position clear for well over a year. British Columbia argued that the position has only become clear recently.

[11] On June 20, 2002, when British Columbia filed its statement of defence, it raised an issue about the scope of the plaintiffs' claim. British Columbia alleged that the plaintiffs have not sought a declaration of aboriginal rights and so certain paragraphs of the statement of claim should be struck as unnecessary or vexatious, and in the alternative, that if the plaintiffs' claim is based on proving the existence of aboriginal rights, including aboriginal title, then the plaintiffs have failed to plead sufficient particulars as to this claim, such that British Columbia does not know the case it must meet.

[12] British Columbia applied for particulars of the statement of claim and the hearing proceeded before Mr. Justice Lowry on March 6, 2003. The outcome of the application is not significant for the purposes of this adjournment application, but the argument about the scope of the plaintiffs' claim is significant.

[13] During argument, Mr. Gouge, counsel for British Columbia, argued that it was clear that the plaintiffs rely on

aboriginal rights as part of their claim. Mr. Kirkham, counsel for Vancouver Port Authority, and Mr. McNaughton, counsel for B.C. Ferry Corporation, also referred to the plaintiffs' allegations of aboriginal rights. Mr. Gouge argued that there was apparently also a claim for aboriginal title, and British Columbia may need to apply to add other parties who have claims to be the aboriginal nation which owns the aboriginal title.

[14] On March 6, 2003, Mr. Justice Lowry directed counsel to arrange a trial date, and the February 15, 2005 dated was scheduled.

[15] Since at least May 2003, the Vancouver Port Authority has been planning an expansion of the Superport. The construction is planned to commence in mid-2005. The plan is to expand the container handling facilities from an existing capacity of 850,000 Twenty-foot Equivalent Units (“TEUs”) to 3,200,00 TEUs. The plan is to add about 80 hectares (approximately 200 acres) to the existing 65 hectares (approximately 162 acres). The plan is to dredge the ocean floor to accommodate the new structures and to expand the ship turning basin, and to upgrade the rail infrastructure, which may require a widening of the causeway.

[16] The position of the plaintiffs is that an expansion of the Superport will exacerbate the existing problems.

[17] For a period prior to July 2003, the TFN, Canada and British Columbia were in treaty negotiations. On July 9, 2003, an Agreement-in-Principle was initialled by the treaty negotiators. It required approval by the TFN membership and execution by the parties. It includes this item 61 in Chapter 2 General Provisions:

> The parties acknowledge that Tsawwassen First Nation is engaged in litigation, against Canada and British Columbia as well as other parties, which is proceeding in the Vancouver Court Registry under No. S021209 (“the Litigation”). Tsawwassen First Nation acknowledges and agrees that to the extent that the Litigation is related to claims of aboriginal rights or title by Tsawwassen First Nation, the Litigation must be finally resolved no later than Final Agreement.

[18] The elected Chief of the TFN, Kim Baird, deposed that if this litigation is not resolved by trial or settlement, the TFN will be prevented from achieving a treaty. She also deposed that the TFN would prefer to resolve its aboriginal rights and title issues through negotiation.

[19] I became case management judge following the appointment of Mr. Justice Lowry to the Court of Appeal. The first case management conference before me was held September 16, 2003.

The second was held October 20, 2003, at which I made an order, with the consent of all counsel, that certain steps in this litigation be completed by specified dates.

[20] On December 9, 2003, the plaintiffs commenced a second lawsuit against the parties which are defendants in this lawsuit. I will refer to the writ as the Aboriginal Title Writ. It seeks declarations of aboriginal title and rights over a territory which is far greater than the area of Reserve #0.

[21] Chief Baird deposed that the Aboriginal Title Writ was filed out of an abundance of caution, and based upon legal advice received by the First Nations Summit in respect of a possible limitation period that could arise on December 10, 2003. She understands that some 68 other First Nations in British Columbia filed similar writs for protective purposes in the days or weeks prior to December 10, 2003.

[22] Chief Baird said that the TFN has not served the Aboriginal Title Writ nor taken further steps in connection with it. She deposed that it is not the TFN's intention to proceed with that litigation, pending the resolution of the treaty, and that the TFN is prepared to enter into an abeyance agreement with British Columbia or to withdraw the litigation

on proper assurances that it would be without prejudice to limitation issues. Chief Baird understands that British Columbia is preparing a general abeyance agreement for general use throughout the province. She expects aboriginal title issues to be resolved in the treaty.

[23] On December 10, 2003, the TFN membership approved the Agreement-in-Principle.

[24] On January 13, 2004, British Columbia Ferry Corporation applied to extend the time for preparation of its list of documents. I made an order extending that time, and also extending the time for completion of some of the other pretrial steps. However, some dates were not changed, including the October 15, 2004 date for delivery of expert reports and the November 30, 2004 date for completion of examinations for discovery. The existing schedule permits parties to be added as late as April 30, 2004, pleadings to be amended, interrogatories delivered, and materials filed on summary trial applications as late as May 30, and interrogatories completed by July 31.

[25] Counsel stated at the January 13, 2004 hearing that it looked like the litigation was on track for the scheduled trial date. Mr. Tucker, as counsel for the Vancouver Port

Authority, emphasized his client's "absolute key concern" to ensure nothing was done to jeopardize the trial dates in early 2005. In my reasons for judgment, I stated as follows:

> I do want it to be clear to counsel that I have every intention of doing everything I can to make sure that this trial date is met. Please do not look at this as a signal that I will be relaxed about extensions. I hope there will not be a need for any further extensions.

[26] The parties have exchanged extensive lists of documents. By January 30, 2004, British Columbia's document list had reached approximately 13,000 documents. By March 1, 2004, Canada's document lists had reached about 6,500 documents. All the lists of documents were due by March 1, 2004.

[27] On March 15, 2004, the parties signed the Agreement-in-Principle. Chief Baird signed for the TFN, the Minister of Indian Affairs and Northern Development signed for Canada, and the Attorney General and Minister Responsible for Treaty Negotiations signed for British Columbia. The parties agreed that the Agreement-in-Principle is not legally binding, but will form the basis for concluding a final agreement.

[28] Sometime after March 15, 2004, British Columbia first raised the issue with the other parties to this lawsuit that the trial ought to be adjourned.

[29] Ms. Beedle, the Chief Negotiator in the Treaty Negotiations Office of the Ministry of the Attorney General, referred in her affidavit to the six-stage treaty process among the TFN, British Columbia, and Canada. She deposed that stage four of the process was completed with the signing of the Agreement-in-Principle, and the parties have now commenced stage 5. She deposed that her instructions are to try to complete a final agreement within the next twelve to fifteen months.

[30] Ms. Beedle deposed that in her opinion, the litigation being advanced by the TFN "may significantly hamper the parties (sic) ability to conclude a treaty." She deposed that there was a willingness on behalf of British Columbia to negotiate a settlement as it pertains to the matters in this litigation. She also deposed that in her opinion it is "in the interests of all the parties to this action to attempt to resolve the issues raised in this action through negotiation, and to do so in a non-adversarial environment."

[31] Mr. Gustafson, a research officer in the aboriginal litigation and research group of the Ministry of the Attorney General of British Columbia, deposed as follows:

> To date, the research on the issue of aboriginal rights and title and infringement has focussed on the Plaintiffs (sic) claim of pre-sovereignty aboriginal society, and their claim of aboriginal rights over the foreshore and inter-causeway area in front of the reserve. This research is not yet complete, and any findings in that regard, would have to, in my opinion, be made within the context of a full study of the aboriginal rights and title now claimed by the Tsawwassen First Nation in the [Aboriginal Title Writ], and also the overlapping claims of other First Nations which have now been filed. An assessment of the connection of a First Nation to an area of land, or whether a First Nation lived on the land as a distinctive society with their own integral (something which makes that culture what it is) pre-contact practices, customs and traditions, cannot be made in a vacuum absent the full context and extent of the First Nation's claim to aboriginal rights and title, and a consideration of claims by overlapping First Nations. To investigate the issues raised by the [Aboriginal Title Writ] together with the overlap claims raised by the Writs filed by the above named groups would, I believe, necessitate an extensive review of historical and ethnographic sources. This review would necessarily include sources related to other Aboriginal communities in order to develop an understanding of the pre-contact and pre-1846 relationships amongst the various groups now making claims. From my prior experience I believe that the type of research project that would be required to prepare for a trial of this magnitude would take a minimum of one year, and quite possibly longer.

[32] Mr. Gustafson then lists a number of locations of possibly relevant records. His affidavit does not detail what resources British Columbia has devoted to the research to date, nor what resources it plans to devote in the period prior to trial.

[33] While the other defendants supported British Columbia's request for an adjournment, none of them alleged prejudice from the trial proceeding as scheduled. As I understand it, Vancouver Port Authority and B.C. Ferry Corporation intended to essentially leave the aboriginal aspects of the case to be defended by government. Canada "reluctantly" supported the adjournment application, on the basis that it was the best of a number of poor alternatives.

DISCUSSION

[34] The court has a discretion to adjourn a trial. As stated by Vickers, J. in ***Nemaiah Valley Indian Band v. Riverside Forest Products Ltd***. (2001), 95 B.C.L.R. (3d) 371, 2001 BCSC 1641:

> I must balance the interests of the parties, bearing in mind that the paramount consideration in the exercise of my discretion is to ensure that there will be a fair trial on the merits of the action: ***Sidoroff v. Joe*** (1992), 76 B.C.L.R. (2d) 82 (C.A.); ***Cal-Wood Door, a division of Timberland Industries Inc. v. Olma***, [1984] B.C.J. No. 1953 (B.C.C.A.). In the exercise of its discretion the court must have regard to the object of the Rules of Court, namely, "to secure the just, speedy and inexpensive determination of every proceeding on its merits" (Rule 1(5)).

[35] Two things have occurred since the original schedule of pretrial steps was ordered by consent. First, the Aboriginal Title Writ was issued, as were the writs of other First Nations. Second, the Agreement-in-Principle was ratified and executed. British Columbia refers to both as creating prejudice to it in meeting the February 15, 2005 trial date. I will deal with the issues relating to the Agreement-in-Principle first.

[36] British Columbia has argued that an adjournment is in the public interest, because it will permit the parties to continue the treaty negotiations to the next stage without being engaged in the adversarial process in this litigation.

[37] Parties to litigation should always strive for an acceptable settlement. However, if they cannot achieve it, they are entitled to a decision from the court.

[38] TFN argued that section 61 of the Agreement-in-Principle was included to permit it to resolve this claim through the court because it was not resolved in the treaty negotiations. British Columbia argued that the section only required the issue to be resolved, and that could occur through negotiation even if the trial is adjourned.

[39] A party's bargaining power in negotiations is naturally diminished if there is no real prospect of obtaining a court decision in its favour. If the trial is adjourned to a date that is so long away that it cannot be resolved during the anticipated period of final treaty negotiations, Canada and British Columbia will not face a realistic threat that the court could make a decision in the plaintiffs' favour during those negotiations. This is a form of prejudice to the plaintiffs.

[40] Section 61 is significant for what it does not say. It does not provide that the litigation shall be adjourned pending the final treaty negotiations. This fact, and the fact that the Agreement-in-Principle was negotiated and signed during the period that this litigation was underway, satisfy me that there is no prejudice to British Columbia in its treaty negotiations in permitting this litigation to continue.

[41] Ms. Mrozinski, as counsel for British Columbia, argued that the Aboriginal Title Writ was essentially "further particulars" of the plaintiffs' claim in this lawsuit. The plaintiffs do not agree.

[42] It is apparent that the plaintiffs wish to proceed on the basis that their rights regarding the reserve land are

enhanced in some way by their aboriginal practices and heritage, but in a way that falls short of being a claim for a declaration of aboriginal title and rights and a claim for infringement of such rights. They object to the efforts by the defence to simplify their claim in a way that neutralizes the aboriginal component.

[43] In short, the plaintiffs wish to proceed with something less than a full claim for aboriginal rights and title, but something more than the nuisance claim of a non-aboriginal landowner. This position is not surprising, given that it appears there may be a treaty resolution of the claims to aboriginal rights and title, and that litigation to establish full aboriginal rights and title, which would involve not just the reserve but the entire territory claimed by the plaintiffs, would likely take longer and cost more than the claim the plaintiffs wish to pursue in this lawsuit.

[44] In the course of argument, I asked Mr. McDade whether it was inevitable that the claims in this lawsuit will be joined with the claims made in the Aboriginal Title Writ. He responded that it may not be inevitable, and that a factor in whether the lawsuits should be heard together would be the plaintiffs' position that the claims in the Aboriginal Title

Writ may never proceed if the Agreement-in-Principle leads to a completed treaty.

[45] Mr. Kirkham, counsel for the Vancouver Port Authority, supported the application for an adjournment, in stark contrast to his previous submissions that it was essential that this case proceed on the scheduled trial date. Mr. Kirkham explained the change in his client's position as arising from the Aboriginal Title Writ. He argued that his client previously thought that a decision in this lawsuit would clarify whether his client had the right to proceed with the planned expansion. He argued that the Aboriginal Title Writ now demonstrates that resolution of this lawsuit will not clarify his client's position.

[46] I am concerned about the impact of the Aboriginal Title Writ. I anticipate that there will be an application to have it consolidated with this lawsuit or heard at the same time. However, the parties may make some agreement which will make that application unnecessary, or the application may fail. I must decide this adjournment application on the basis of the present state of this lawsuit.

[47] Similarly, the fact that other First Nations commenced lawsuits in December 2003 which claim aboriginal title to

areas which overlap the areas claimed by the plaintiffs in the Aboriginal Title Writ is not relevant to the present state of this lawsuit. The possibility that other defendants ought to be parties to this litigation is a matter which was raised before me at previous case management conferences and mentioned during the submissions on March 6, 2003 about particulars. So far, no one has applied to add another First Nation as a party, and no party has applied to be added to this litigation. Again, I must consider the adjournment application on the basis of the state of this lawsuit today.

[48] Nothing has changed in this lawsuit to make it more complex than it appeared previously. The complexity of this case has been apparent since at least the argument before Mr. Justice Lowry on March 6, 2003. The trial date was set with that knowledge, as were the original and revised schedules of steps to be taken in this lawsuit.

[49] Mr. Gustafson’s affidavit provides his opinion about the time to investigate issues raised by the Aboriginal Title Writ and the writs claiming overlapping territory. His affidavit does not deal with the research time required to deal with the existing claims in this lawsuit.

[50] The Aboriginal Title Writ and the overlapping claims appear to simply put in litigation form claims that First Nations have made in treaty negotiations over many years. It would be surprising if the research work undertaken to date did not take into account potential overlapping claims, and there is no evidence before me to the effect that it did not. Mr. Gustafson's affidavit simply expresses a desire for all-encompassing research, and fails to establish that British Columbia will be unable to proceed on the presently scheduled trial date on the issues in this lawsuit.

[51] I next consider whether the plaintiffs will suffer prejudice if the trial is adjourned.

[52] If this trial is adjourned, the plaintiffs' bargaining position in seeking a negotiated resolution of this lawsuit will be impaired, because there will be no realistic risk that this court will make an order within a relevant time period favouring the plaintiffs. Therefore, the plaintiffs will effectively have three options:

1. settle this lawsuit on the available terms and complete the treaty;

2. abandon the treaty; or

3. delay completion of the treaty until this lawsuit is concluded.

If the trial is not adjourned, the plaintiffs will have the additional option of resolving this case at trial, as well as being in an enhanced position in negotiations. There will be a greater likelihood that they will complete the treaty sooner, and thereby obtain the financial compensation detailed in the Agreement-in-Principle.

[53] Mr. McDade argued that if the plaintiffs succeeded at trial, they would be in a better position to obtain an injunction restraining the Vancouver Port Authority from completing the expansion. Ms. Mrozinski argued that the plaintiffs would be in an equally poor position both before and after a trial, because the Crown will be able to establish justification for infringement, and that in any event, the plaintiffs can seek judicial review of any failure of the Crown to consult with them to accommodate their interests even before proof of rights or title.

[54] It would not be appropriate for me to comment on the strengths of these arguments at this stage. I will simply say that the plaintiffs may be in a better position if this court

has held that the Superport constitutes a nuisance than they would be before such a decision.

[55] Mr. McDade also argued that the plaintiffs will suffer financially if the trial is adjourned. The work required to get to trial may expand to fit the time available, and in that way, the trial may be more costly for all parties if it is adjourned.

[56] I am not satisfied that the trial of the issues presently raised in this lawsuit will be unfair if the trial proceeds on the date presently scheduled. In contrast, I am satisfied that there will be prejudice to the plaintiffs if the trial is adjourned. As a result, I dismiss British Columbia's adjournment application.

[57] If the parties wish to make submissions about costs, they may do so in writing on a schedule to which they agree. Otherwise, the plaintiffs are entitled to their costs of this application against British Columbia in any event of the cause, and there will be no other order regarding costs.

"V. Gray, J."
The Honourable Madam Justice V. Gray