Yahey v. British Columbia, 2017 BCSC 899, Supreme Court Of British Columbia (Burke J.), 31 May 2017

June 21, 2017

The British Columbia Supreme Court dismissed an injunction application by a Treaty 8 First Nation that would have restrained the Province of British Columbia from authorizing various industrial developments within a 10,000 sq. km area in northeastern British Columbia.

The application was brought by the Blueberry River First Nations (BRFN) who are signatories to Treaty 8. The BRFN had commenced the underlying action against the Province of British Columbia in 2015, alleging that the cumulative effects of various industrial developments within their claimed territory (particularly forestry and oil and gas activities) have taken away the meaningful ability to exercise their Treaty rights.

In July 2015, the Court dismissed an earlier injunction application by the BRFN in which they sought to enjoin the Province from selling certain Timber Sales Licenses within what were alleged to be "critical areas" in its territory. The Court dismissed that application on the basis that it was not satisfied the timber sales would materially increase the cumulative impacts on Treaty rights: 2015 BCSC 1302 [summarized in our e-Newsletter of 26 August 2015]. Mr. Justice Nathan Smith had observed that the relief sought would not accomplish what the BRFN alleged was needed to address its concerns over cumulative effects — effectively an embargo on industrial development within the territory.

In this application, heard in late October 2016, the BRFN applied for an injunction seeking much broader relief. It sought to prohibit the Province from authorizing industrial development relating to forestry and oil and gas activities within defined "Critical Areas". These Critical Areas overlap significantly with the Montney formation — one of North America's most significant natural gas plays. As a result, the injunction would have had a significant impact not only on the Province but also on many companies with operations in the area.

The chambers judge concluded that the BRFN had satisfied the first two criteria of the *RJR-MacDonald* test for obtaining an injunction: they established a *prima facie* case on the basis of its pleadings, and there was sufficient evidence of "irreparable harm". In regards to the latter point, Burke J. noted that there was a dispute as to whether the

BRFN's allegations of harm were accurate, which could only be resolved at trial, but that the assertions of harm in affidavits filed by BRFN members were sufficient to establish irreparable harm for the purpose of this application.

The Court held that the BRFN failed to satisfy the remaining criterion of the *RJR-MacDonald* test for injunctions, and dismissed the application on the basis that the balance of convenience did not favour granting the injunction. Burke J. relied on several factors in reaching this determination:

- Affidavit evidence from various government representatives established that the injunction would have a significant negative impact on government revenue and the economy – particularly the local economy in and around Fort St. John, which the Court noted had already been experiencing a significant slow down.
- The injunction would harm third parties. The Court referred to affidavits filed by various companies, including oil and gas producers and distributors and forestry companies, which spoke to significant financial harm and potential loss of employment that would ensue if the injunction was granted.
- The proposed terms of the injunction were vague and uncertain. The injunction purported only to prevent “future” authorizations within the Critical Areas of Blueberry River's territory. However, given that active projects often require ongoing authorizations, the injunction would in fact impact these previously approved projects. Furthermore, given the interconnected nature of industrial development in the area, the injunction would also impact projects and activities falling outside the Critical Areas and Blueberry River's territory.

The Court noted that the imminent trial date (March 2018) for this action as one factor that would limit any harm to the BRFN in the interim. Further, Burke J. referred to the scope of the relief being sought in this injunction application, and held that "the court should be wary of governing by interlocutory order, as it might do here by making adjudication between the merits of the Province's measures and the framework proposed by Blueberry River". Such issues will have to be resolved at trial.

Editor's note: the Province was represented in this matter by Patrick Foy, Q.C., Rick Williams and Tim Pritchard of BLG]

By

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