Stoney Nakoda Nations v. Canada, 2016 ABQB 193, Alberta Court of Queen's Bench (Jeffrey J.)

April 05, 2016

The Alberta Court of Queen's Bench dismissed a claim by Aboriginal plaintiffs against Canadian Pacific Railway relating to mineral rights on reserve lands transferred by Canada to the railway over 100 years ago. The claim against CPR for damages was outside the limitation period under Alberta legislation. The Aboriginal plaintiffs discovered or ought to have discovered the basis for their potential damages claim by at least 1982, which was 17 years prior to the filing of this litigation. Applying the statutory limitation period does not have the effect of extinguishing any Aboriginal rights, since these claims are for damages alone. CPR is no longer in possession of the mineral rights, so any claim against it for recovery of *in situ* minerals is without merit. The Court, however, did not summarily dismiss the claim against the co-defendant Encana Corporation. The factual record is insufficient to dismiss the claims upon the basis that any Aboriginal interest in the mineral rights had been alienated in 1893, or that the doctrine of indefeasible title defeated any such claim. It could not be said that there is "no genuine issue for trial", or that it would be fair and just to resolve the claim against Encana on a summary basis.

The underlying action involves the ownership of petroleum, natural gas and related hydrocarbons ("PNG") located on lands that had been set aside as reserve lands for the Bearspaw, Chiniki and Wesley Bands (the "SNN") pursuant to Treaty 7. The lands are located near Morley, Alberta. Between 1893 and 1917, Canada transferred portions of the SNN reserve lands to the defendant Canadian Pacific Railway Company (CPR) for a railway right-of-way. These lands, and the PNG, were purportedly conveyed by CPR to its wholly-owned subsidiary, now known as Encana Corporation, in 1965.

This action was commenced in 1999 by the Stoney Tribal Council on behalf of the SNN. They sued Encana and CPR in trespass and conversion of the PNG, and further claimed that Canada had breached its duties by transferring the PNG without their consent. They claimed that the transfers were invalid, unlawful, or ineffective, and that they are either still the owners of the PNG, or that the reserve lands (along with the PNG) have reverted back to them. They made an alternative claim in relation to the compensation that had been paid at the time of the transfers in the late 1800s and early 1900s.

Encana and CPR brought a motion for summary dismissal of the SNN's claims on the basis that they are barred by limitations legislation, and on the basis of other defences. The test for summary dismissal in Alberta is that there be "no genuine issue for trial", and that the court can make a fair and just determination on the merits without a trial.

Nature of SNN's Claim

A preliminary issue for the Court was whether the SNN was claiming only damages against Encana and CPR. Upon review of the pleadings filed in the action, and the extensive particulars supplied by the SNN, the Court concluded that the SNN's claim is not limited to damages only. They also seek the return of any PNG that remains *in situ*. Jeffrey J. stated:

I find the SNN's pleadings entail a foundation for more than just a claim in damages or an accounting against Encana and CPR. The SNN assert that the PNG were either always the SNN's property or reverted back from CPR for their benefit at the time CPR attempted to convey them to CPOG. In their various sets of meandering pleadings and expanding particulars, enough facts are pleaded to support the SNN's position that their interest in the PNG was not extinguished when Canada granted the Railway Lands to CPR from 1893 to 1917 and they now seek the full return of any PNG remaining *in situ*. ...

Since the SNN claim that the PNG never stopped being part of the Reserve Lands (or alternatively reverted to being part of the Reserve Lands or to Canada for the SNN's benefit as Reserve Lands), claim trespass and conversion of produced PNG, and claim recovery of *in situ* PNG, neither Encana nor CPR should be left with any doubt about the core allegations they are now called on to answer. The functional not technical approach to pleadings in Aboriginal cases endorsed by the Supreme Court of Canada in *Tsilhqot'in Nation* further compels this conclusion. ...

In summary on this threshold issue, I find that the SNN claim the following relief. Against CPR they claim for damages and/or an accounting for unlawful possession, use or occupation, trespass and conversion (collectively, the "Trespass Related" claims). The SNN's claim in the alternative for an accounting by CPR for all PNG unlawfully removed from the Railway Lands is not a separate further cause of action, but a notice of the further step they intend to pursue to determine the quantum of damages if a "remedial order" (in the sense used in applicable limitations legislation) is granted based on one of the Trespass Related claims. Therefore, I find that all Trespass Related claims are claims for damages. They also claim for recovery of *in situ* PNG. In the alternative, if CPR validly received the PNG as part of its original acquisition of the Railway Lands, then the SNN claim for damages from CPR for it under-paying for lands that included mineral rights. Against Encana the SNN claim the Trespass Related claims and for return of *in situ* PNG.

Claim Against CPR

The Court granted CPR's application for summary dismissal of all claims against it.

There was no evidence of CPR having any current interest in the PNG or being in possession of the PNG. Even if the SNN prove at trial that Canada still owns the PNG

for their benefit, or that ownership of the PNG reverted back to the SNN, that would not involve a return from the CPR. The latest date that the CPR would have owned the PNG, if at all, was either 1965 (when *The Canadian Pacific Oil and Gas Limited Minerals Act* was enacted by the Alberta legislature) or 1977 (when the conveyance of the PNG to Encana's predecessor was registered). Jeffrey J. concluded that only one of three possibilities occurred: (1) CPR never had title to the PNG; (2) CPR received title to the PNG when it acquired a fee simple interest in the lands, and then conveyed it to Encana's predecessor in 1965; or (3) CPR received title to the CPR subject to a determinable reversionary interest which was either triggered or conveyed in 1965. Since CPR had no current interest in the *in situ* PNG, any claim against it for recovery of *in situ* PNG is "pointless". The SNN's claim against the CPR for return of *in situ* PNG is therefore without merit and must be dismissed.

The Court held that the remaining claims against the CPR, all of which concern monetary damages, were statute-barred by limitations legislation.

The SNN argued that limitation laws do not apply to Aboriginal claimants when the effect would be the extinguishment of substantive rights. The Court noted the uncertainty in the law as to whether limitations legislation is substantive or procedural, but rejected the SNN's argument that the legislation is inapplicable. There are various cases in which limitations legislation has been applied to claims by Aboriginal groups, such as *Blueberry River* and *Lameman*. In the recent case of *Samson Indian Nation and Band v. Canada*, 2015 FC 836, the Federal Court noted that limitations legislation applies to the remedy being sought, not the cause of action. Jeffrey J. stated:

I consider myself bound by the Supreme Court of Canada precedents. Provincial limitations legislation is constitutionally applicable to damages claims of First Nations, such as the Trespass Related claims. The operation of such legislation does not extinguish any underlying Aboriginal Right, but it limits the time within which proceedings may commence to claim damages as a remedy for a breach of any such right.

The SNN also argued that the constitutional doctrines of interjurisdictional immunity and paramountcy preclude the limitation defences. The Court disagreed. Following the recent Saskatchewan decision of *Peter Ballantyne Cree Nation* (2014 SKQB 327), the Court held that the doctrine of interjurisdictional immunity does not apply in relation to claims about Aboriginal reserve lands. Further, the provincial limitations legislation does not relate to the "unassailable core" of Parliament's exclusive jurisdiction over Indians and Indian lands. Such legislation is of general application, and aimed at regulating the time to commence any claim in order to ensure a fair balancing of interests between the parties. The SNN's claims about paramountcy were dismissed due to a failure to demonstrate any conflict or inconsistency with federal legislation, as well as deficiencies in the Notice of Constitutional Question filed by the SNN.

Alberta's *Limitation of Acts Act*, R.S.A. 1980, c. L-15 was in force when this litigation was commenced in 1999. Limitation periods ranged from 2 to 10 years depending on the type of action. The common law rule of discoverability also applied. Upon a review of the evidence, the Court held that the SNN first knew, or by the exercise of reasonable diligence ought to have known, the material facts giving rise to this action by 1982 at the latest. There was evidence of correspondence in the early 1960s about inquiries by the Stoney Band for information about how the CPR acquired its right-of-way.

Correspondence from 1971 specifically addressed the question of who owned the mineral rights, and indicated that the Band Council may hire a lawyer to look into the matter. Correspondence from 1978 concerned the compensation that had been paid at the time of the original purchase. Jeffrey J. reviewed minutes from a Band Council meeting in 1981 and stated that this evidence reflects that "the SNN at the highest levels were thinking about the CPR's original grant of the railway right-of-way and the contested ownership of the associated mines and minerals". Further correspondence in 1982 made clear that third parties, including Canada, considered that ownership of the mines and mineral rights belonged to CPR. Jeffrey J. concluded:

... I have no doubt the SNN had knowledge [by 1982] of the material facts to bring their claims against CPR, or by then they ought to have been discovered by the SNN through the exercise of reasonable diligence. The SNN have not pointed to any evidence that would hint otherwise. The SNN have not refuted this evidence.

This, at the very latest, triggered the start to the limitation period. The Trespass Related claims were not commenced until 17 years later, in 1999, which is well beyond the two- and six-year limitation periods under ss 4 and 51 of the *Limitations of Actions Act*. Those claims against the CPR are therefore without merit. The effect of the application of limitations legislation as a valid defence for CPR does not extinguish any rights to the PNG since, as explained above, CPR does not currently have the title to them. Therefore, a finding that the SNN are out of time (or would be out of time regardless of the other issues addressed later) with respect to CPR cannot have the effect of extinguishing any underlying rights to the PNG.

The alternative claim of the SNN was that CPR failed to properly compensate them at the time of the original purchase. This is also a claim for damages. The Court held that the amount of compensation was known over 100 years ago, or at least by 1982, and fell outside the 6-year limitation period imposed by the *Limitation of Actions Act*.

The Court therefore allowed the CPR's claim for summary dismissal.

Claims Against Encana

The Court rejected Encana's application for summary dismissal.

Encana claimed that the SNN's Aboriginal interest in the PNG was extinguished by alienation at the time of the original transfers of the railway lands in 1893. In response, the SNN argued that the PNG was never conveyed to the CPR in 1893 or, in the alternative, it reverted back when the CPR no longer needed the PNG for railway purposes. Further, any alienation of their interest in the PNG would be equivalent to extinguishment, and there was no "clear and plain intent" to extinguish their interests.

Determining the nature and extent of a railway company's interest in land involves a consideration of the relevant statutes, documents, actions of the parties and declarations. The Court reviewed in detail the railway legislation that was in force at the relevant dates. Further, it was noted that Aboriginal interests are inalienable except to the Crown, and that they could be surrendered or (prior to 1982) unilaterally extinguished by federal legislation. With reference to provisions of the *Indian Act* concerning the taking of reserve lands, it was noted that there had not been a surrender by the SNN prior to the conveyance to the CPR.

At the time of the registrations of the lands in the name of CPR, section 170(2) of the *Railway Act, 1906* was in force. This section provided that a railway company, as registered owner of land that had previously been reserve land, was entitled to the underlying mines and minerals if they were "expressly named" as included. Jeffrey J. held:

In the case of both the 13T3 lands and the 15T133 ballast pit lands, the Certificate of Title did not expressly name the mines and minerals (or as a subset thereof, the PNG) as thereafter being owned by CPR. Therefore, by operation of law, on this record it does not appear so conclusive as to warrant summary dismissal of the SNN's claim for *in situ* PNG, that Canada intended the PNG be alienated from the SNN to CPR at the time of CPR's purchase of Railway Lands. This is provided that the federal *Railway Act* was in fact operative in the face of any contrary provisions of other federal law or the provincial *Land Titles Act*, such as perhaps those on indefeasibility.

Encana relied upon provisions in the CPR Contract for the argument that Canada was required to extinguish Indian title to reserve lands taken for railway purposes. The Court disagreed that such provisions of the CPR Contract were triggered or that Encana had demonstrated "to the summary dismissal standard" that these parcels were caught by such provisions. Jeffrey J. held:

From considering the entirety of the CPR contract, Clause 12 thereof does not apply to land over which Canada held the legal title but not the beneficial interest. It does not apply to land that CPR would have to purchase. It only applied to lands Canada would grant to CPR as described in the CPR Contract. Reserve land was not among those lands. No section of the *CPR Act*, including any clause of the CPR Contract or of Schedule A thereto, dealt with the acquisition of reserve land and therefore, based on the record before me, I am unable to conclude that the SNN's Reserve Lands were lands "herein appropriated". Therefore, I am also unable to find any conflict between the *CPR Act* and the *Railway Act of 1906*. On this record it is not without merit for SNN to say that subsection 170(2) of the *Railway Act of 1906* applied at the time of the registration or, at the very least, that it informs the context.

The Court found that Encana had not met its burden of proving that Canada had intended an alienation of the PNG to CPR, such that the SNN's claim was without merit. The current record did not support a finding that the SNN were dispossessed of the PNG or that the PNG had been expressly included in the conveyance to the CPR. The Court held:

The nature of the transactions between Canada and CPR regarding the SNN's interest at the time of the transfers remains insufficiently clear to warrant dismissing summarily the SNNs' claim to recover the *in situ* PNG. Whether the Railway Lands' PNG were originally transferred to CPR is an issue that does not lend itself to a fair and just determination summarily on this record. Therefore, I dismiss Encana's Application on this ground.

Encana also relied upon the doctrine of indefeasibility of title, and claimed that it was a *bona fide* purchaser for value. The Court reviewed this doctrine and the Torrens system of land registration more generally. Indefeasibility is at the core of the Torrens system. Pursuant to Alberta legislation, a certificate of title is conclusive proof of ownership. However, trespass to land is not concerned with title or ownership; it is

concerned with legal possession of land. Further, indefeasibility does not apply in all cases, such as when the titleholder was not a *bona fide* purchaser for value. In the end, the Court concluded that the issue of whether Encana's titles to the PNG are indefeasible cannot be decided on a summary basis. Jeffrey J. listed four points: (1) CPR could not convey to Encana's predecessor a greater interest than it owned, and the nature of CPR's interest raised complex issues of fact and law; (2) it was not clear that Encana's predecessor was a *bona fide* purchaser for value; (3) whether Encana's titles are indefeasible is not certain due to, among other things, a lack of clarity about the transfer from CPR to Encana's predecessor; and (4) resolution of these issues required complex determinations based on legal issues, and social, historical, legislative and corporate facts.

The Court also held that there was no persuasive evidence, on the current record, of a clear and plain intent to alienate the PNG and extinguish the SNN's interests in it.

The Court therefore rejected Encana's application for summary dismissal:

The claim against Encana for recovery of *in situ* Railway Lands' PNG is not dismissed at this time. The factual record is insufficient to allow the fair and just resolution of the issues of alienation and indefeasibility, the grounds Encana advanced as the basis for its application.

Due to this conclusion, Jeffrey J. held that it was not necessary for him to deal with issues raised in cases like *Chippewas of Sarnia* and *Manitoba Métis* about equitable defences or the constitutional applicability of provincial legislation.

https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb193/2016abqb193.html

https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb193/2016abqb193.pdf

By

Scott Kerwin

Expertise

Indigenous Law

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749