Spookw v. Gitxsan Treaty Society, 2017 BCCA 16, Court of Appeal for British Columbia (Harris, Goepel and Savage JJ.A.), 12 January 2017

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The British Columbia Court of Appeal held that certain members and Bands of a First Nation did not have standing to pursue remedies against a corporate body representing the First Nation in treaty negotiations. The appellants did not fall within the meaning of "proper persons" in British Columbia's Company Act to pursue such relief. The Court of Appeal also affirmed the findings of the BC Supreme Court that there was no reasonable claim against British Columbia and Canada in these circumstances based upon breach of fiduciary duty or the Honour of the Crown.

The Gitxsan First Nation consists of six Indian Act bands and is located in northwestern British Columbia near Smithers. Gitxsan governance and social structures consist of Houses (Wilps), Clans (Pdeeks) and communities. There is both a hereditary system of governance and elected Band governments. There are 60 to 65 Houses, each with a Head Chief and Wing Chiefs. Each House is autonomous, and the Head Chiefs are "trustees" responsible for their Houses. The governing body of the Gitxsan is the Simgiigyet (the Hereditary Chiefs) structured along matrilineal lines in Wilps. The Simigiigyet hold and exercise the Gitxsan's aboriginal rights and title.

The Gitxsan entered the BC treaty process in June 1994 through the filing of a Statement of Intent, and are currently at stage 4 (negotiating an agreement in principle) of the six-stage treaty process. The respondent Gitxsan Treaty Society (“GTS”) had been incorporated by the Simigiigyet to engage in treaty negotiations with Canada and British Columbia on behalf of the Gitxsan people. The Gitxsan Nation is the principal in the treaty negotiations, with the GTS undertaking administrative tasks. The GTS receives funding through negotiation support loan agreements, with the level of such funding allocated by the BC Treaty Commission in accordance with funding criteria established by BC, Canada and the First Nations Summit. At this stage of the treaty process, no binding agreement has been reached, and any treaty would require ratification. Further, confirmation of a mandate would be required to progress to the next stage of treaty negotiations.

The underlying litigation was commenced in 2008 by five Gitxsan Hereditary Chiefs, four Indian Bands (Gitanmaax, Glen Vowell, Gitwangak and Kispiox) and the Gitksan Local Services Society. They allege that the GTS does not have a proper mandate from the Gitxsan people, and has not acted in their best interests during the treaty process, all while assuming debt of over $21 million through the BC Treaty Commission support loan agreements. Although not members of the GTS, the appellants applied for an order to wind up the GTS or be granted oppression remedies. Such relief was based upon section 71 of the provincial Society Act which, at the time that the claim was filed, incorporated provisions of BC's Company Act . The appellants asserted that they fell within the meaning of “proper persons” within the Company Act and therefore had standing to seek such remedies.

The Appellants also brought claims against the BC Treaty Commission, Canada and British Columbia based upon breach of fiduciary duty and the honour of the Crown. They alleged that the Crown breached such duties by continuing to negotiate with the GTS after receiving notice from the Appellants that the GTS did not have a proper mandate, and continued to fund the GTS by loans for which the Gitxsan people may be liable.

The action against the BC Treaty Commission had been dismissed in 2011 (2011 BCSC 1001), and was not appealed. Harris J.A. noted:

... the [2011] judgment reflected a theme that emerges in the judgment under review, namely that the courts should be cautious (at a minimum) about interfering in the internal affairs of, or political conflicts within, First Nations, especially where they relate to self-government for the purpose of engaging in the Treaty Process.

In 2013, an application was made by the GTS pursuant to section 85 of the Society Act for the approval of new members, as part of a process to correct a defect in its bylaws. The proposal would involve all Hereditary Chiefs being voting members of the GTS. The Court approved the proposed structure (2013 BCSC 974), and viewed the restructuring process as directed towards making the GTS more inclusive and representative. However, the Appellants did take up the “invitation” to join the GTS, and “persisted in pursuing relief from the outside as if they were members”.

In June 2014, the BC Supreme Court dismissed all of the appellants' claims: 2014 BCSC 1100. Mr. Justice McEwan held that the Appellants were not “proper persons” to pursue the relief being sought. At the core of the chambers judge's reasoning was that the Hereditary Chiefs had the opportunity to become members of the GTS and advance their concerns from within, but “chose to pursue their interests from the outside”. McEwan J. also dismissed the claims against the Crown. In the context of a treaty process, imposing an obligation on the Crown to intervene in an internal dispute would conflict with the principle of First Nations self-governance enshrined in the BC treaty process.

Standing to Pursue Corporate Remedies

A decision to grant or deny standing to the appellants under s. 271(4) of the Company Act involved an exercise of discretion. The Court of Appeal held that McEwan J. made no error in principle, and his decision was not clearly wrong. This aspect of the appeal was therefore dismissed.

The Court of Appeal noted the argument of the appellants that they could not submit to the GTS application process as that would violate Gitxsan law. Harris J.A. stated:

In approaching this question, it is important to note the careful considerations that courts must bring to bear in cases dealing with the interaction between indigenous legal traditions and those of non-Aboriginal sources, such as the Company Act and Society Act, and related case law.

Although primarily expressed in the context of claims of Aboriginal title and other property rights (e.g., fishing rights), the Supreme Court of Canada has encouraged courts to be sensitive to Aboriginal perspectives, and to take them into account alongside the perspective of the common law...

The Court of Appeal held that McEwan J. had been alive to these considerations, which is why he had directed more extensive consultation during the section 85 restructuring process. It remains open for the appellants to become members of the GTS, and then have standing to seek relief under the Society Act and the Company Act . However, the appellants had forsworn their opportunity to become members, and were improperly making their arguments from the outside. Justice McEwan's decision to deny “proper person” standing was not in error.

The Court of Appeal also found that McEwan J. made no error in finding that the appellants only had a contingent interest. At this stage in the treaty negotiations, there are no binding agreements since ratification would be needed. The GTS is merely an agent of the Gitxsan people. Harris J.A. stated:

In my view, underlying the approach taken by the judge in handling this litigation is the recognition that the way in which the Gitxsan nation organizes itself to engage in treaty negotiation is a matter of internal self-government. What role, if any, the Bands and the Gitksan Local Services Society play in that process is to be decided by the community itself. Granting standing to these organizations as proper persons would be inconsistent with this approach. The judge's analysis of the Bands as being organizational manifestations of the relationship between government and the Gitxsan people is accurate, reflects the fact that the Bands do not form part of the traditional government of the Gitxsan nation, and in my view, was properly taken into account in denying them standing.

Claims Against Canada and British Columbia

The Court of Appeal affirmed the decision of the chambers judge to dismiss the claims against British Columbia and Canada. McEwan J. made no reversible error in finding that it was plain and obvious that such claims would fail. Harris J.A. stated:

In my view, the judge was aware of, and acceded to, Canada's submissions to the effect that the essence of the litigation is a dispute within the Gitxsan community, in which the Crown has no role. The Treaty Process, established by parallel provincial and federal legislation, created an arm's-length entity to assess a First Nation entity's negotiating mandate and to allocate negotiation support funding. Accordingly, no fiduciary obligation can arise on the part of Canada with respect to that matter. The claim is premature as the harms alleged are contingent rather than imminent because there is still no

agreement in principle. Similarly, as I will discuss later, the honour of the Crown cannot be relied on to require the Crown to intervene in an internal dispute. Such intervention would be in conflict with the principle of self-government. The Crowns' role and conduct are limited by their respective statutory obligations under the relevant legislation.

There are unique dynamics engaged in treaty negotiations between the Crown(s) and indigenous peoples. The interests being negotiated are sui generis . In this case, both the Crowns and the BC Treaty Commission have an obligation to respect the self -governance of the Gitxsan, and it “would be inconsistent with that obligation to require the Crown to respond to, or decide, factional disputes within the Gitxsan nation”. No fiduciary duty of the Crown arises here, as it would be inconsistent with the nature of treaty negotiations for the Crown to act in the best interests of the First Nation. The Court of Appeal held:

The concept of arms-length treaty negotiations — and the fact that Canada represents all Canadians in the negotiations — precludes Canada from putting the appellants' best interests above all others in the negotiations. This applies similarly to British Columbia.

in regards to the Appellants' claim based upon the Honour of the Crown, the Court of Appeal agreed with the chambers judge that this is not a free-standing cause of action, and that there was no genuine issue to be tried. Harris J.A. stated:

In my view, the chambers judge correctly observed that breach of the duty of honour of the Crown is not a recognized cause of action. Equally, the alleged breaches of the honour of the Crown are inconsistent with the obligations undertaken by the Crown(s) within statutory framework governing the Treaty Process. Taken jointly, these conclusions are sufficient to uphold the judge's order.

The Court of Appeal also commented that it is not for the Crown(s), as a matter of fiduciary duty or honour, to interfere with internal political debates of a First Nation. Courts should also respect how an indigenous community resolves internal issues

The Court of Appeal therefore dismissed the appeal.

https://courts.gov.bc.ca/jdb-txt/ca/17/00/2017BCCA0016.htm

By

Scott Kerwin, Ramsey Glass

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

T 613.237.5160
F 613.230.8842

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200 Burrard Street
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V7X 1T2

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F 604.687.1415

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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
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