IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Tsilhqot'in Nation v. British Columbia,***
2008 BCSC 600

Date: 20080514
Docket: 90-0913
Registry: Victoria

Between:

Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation

Plaintiff

And:

Her Majesty the Queen in Right of the Province of British Columbia, the Regional Manager of the Cariboo Forest Region and The Attorney General of Canada

Defendants

Before: The Honourable Mr. Justice Vickers

Reasons for Judgment

Counsel for the Plaintiff	D. Rosenberg and D. Christ
Counsel for British Columbia (Forestry)	P. G. Foy, Q.C. and E. Christie
Counsel for the Attorney General of Canada	J. Chow and F. Wan
Date and Place of Hearing:	9 May 2008 Victoria, B.C.

[1] In this action the plaintiff sought, *inter alia*, declarations of Aboriginal title to land in a part of the Cariboo Chilcotin region of British Columbia defined as Tachelach'ed (Brittany Triangle) and the Trapline Territory. Reasons for judgment were delivered on November 20, 2007: ***Tsilhqot'in Nation v. British Columbia***, 2007 BCSC 1700. Notices of appeal have been filed by all parties.

[2] In that judgment I concluded that the plaintiff had not pleaded and did not explicitly claim Aboriginal title to portions of the two claim areas. I was unable to find Aboriginal title existed in the entire claim area and thus, no declaration of title was made. I offered the opinion that Aboriginal title did exist in a portion of the claim areas but as the claim had been framed in an "all or nothing" manner, I was unable to make a declaration of Aboriginal title to that area.

[3] The plaintiff now seeks an order to amend the statement of claim by adding the words "or portions thereof" throughout the relevant sections of the statement of claim. This motion is brought pursuant to Rule 24(1). Counsel for the plaintiff is clear in his submission that it is not a motion to reopen the case. However, it is equally clear that should the plaintiff succeed on this motion, a further motion would follow to obtain a declaration of Aboriginal title to portions of the Claim Area. If successful, the plaintiff intends to seek judgment in accordance with the amended pleadings and the findings of fact set out in the reasons for judgment.

[4] Counsel for the plaintiff says this would not require a reopening of the trial because the plaintiff is content to abide by the findings of fact already made. No

further evidence would be required. Counsel for the defendants are equally clear that any amendment would force a reopening of the trial.

[5] A trial judge has jurisdiction and an unfettered discretion to grant an amendment to the pleadings at any time: Rule 24(1); ***Clayton v. British American Securities Ltd.***, [1934] 3 W.W.R. 257, 1 D.L.R. 432; ***Sykes v. Sykes*** (1995), 13 R.F.L. (4th) 273, 6. B.C.L.R. (3d) 296 (B.C.C.A.).

[6] The plaintiff submits that the amendment ought to be granted for the following reasons:

a. to conform with the evidence;

b. to remedy the injustice that would otherwise occur;

c. there is no real prejudice that would flow from the amendment; and,

d. in the alternative, any prejudice that may flow from the proposed amendment could be remedied.

[7] In its argument filed at the conclusion of the trial, the plaintiff sought declarations of title to portions of the Claim Area without seeking to amend the pleadings. The defendants argued that making such declarations would be prejudicial to them where no notice had been given that the plaintiff intended to seek declarations over individual specific tracts of land included within the whole Claim Area.

[8] In my reasons for judgment I concluded that the attempt to seek declarations over portions of the Claim Area was an attempt to reframe the case, and to allow the plaintiff to seek such declarations would be prejudicial to the defendants: ***Tsilhqot'in Nation***, para. 129.

[9] I am satisfied that if the amendments were made at this time it would cause a motion by the defendants to reopen the case. Counsel for British Columbia argues that if the words, "or portions thereof" had been in the original pleadings, the Province would have demanded particulars sufficient to identify specific tracts, obtained discovery and made site-specific investigation with respect to those tracts. Counsel for the Province says that to simply amend the pleadings as requested would fail to properly identify any individual tracts and would not allow for the testing of the evidence in relation to those tracts.

[10] In ***Inmet Mining Corp. v. Homestake Canada Inc.,*** 2002 BCSC 681, 23 C.P.C. (5th) 348, Satanove J. set out some principles of law concerning the reopening of a case. At para. 5, she said:

> The principles of law governing when a trial judge may re-open a case after judgment has been rendered, but before the order has been entered, has been discussed by our courts in a number of decisions. I have endeavoured to consolidate the applicable principles as follows:
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> > 1. A trial judge has the unfettered discretion to re-open a case before the entry of the order, but the discretion must be exercised judicially and sparingly. (*Sykes v Sykes* (1995), 6 B.C.L.R. (3d) 296 (C.A.)).
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> > 2. The purpose of the discretion to re-open is not intended to be an alternative method of appeal. (*Cheema v. Cheema* (2001), 89 B.C.L.R. (3d) 179 (S.C.)).

> 3. Filing of a notice of appeal does not remove the discretion of a trial judge when a *factual error* has been identified (my emphasis). (*Banyay v. Actton Petroleum Sales Ltd.* (1996), 17 B.C.L.R. (3d) 216 (C.A.)).
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> 4. The discretion may be properly exercised where the trial judge is satisfied that the original judgment is in error because it overlooked or misconstrued material evidence or misapplied the law. (*Clayton v. British American Securities Ltd.*, [1934] 3 W.W.R. 257 (B.C.C.A.)).
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> 5. It is not a proper basis for exercising the discretion if the applicant merely advances an alternative argument which could easily have been advanced at trial. (*Cheema v.Cheema; Sykes v. Sykes*). Where a court of competent jurisdiction has adjudicated upon a matter it will not (except under exceptional circumstances) re-open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but were not. (*Maynard v. Maynard*, [1951] S.C.R. 346; *Angle v. Canada (Ministry of National Revenue),* [1975] 2 S.C.R. 248).
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> 6. New evidence is not an essential prerequisite to exercising the discretion. (*Sykes v. Sykes*).

[11] A helpful review of the authorities is also found in the judgment of N. Smith J. in ***Aquiline Resources Inc. v Wilson*****,** 2005 BCSC 1461, [2006] B.C.W.L.D. 20.

[12] In the case at bar, the plaintiff seeks to have the pleadings amended in order to rely on findings of fact set out in the judgment. The plaintiff could have made an application to amend the pleadings at the end of trial. I found that if such an application had been made, it would have been prejudicial and unfair to the defendants at that stage. Such prejudice could only have been overcome by a reopening of the case and a continuation of the trial at that point.

[13] I have concluded that to allow the amendment to take place at this point would be unfair and prejudicial to the defendants. If I am wrong in my earlier

conclusions relating to an “all or nothing” claim, then no amendment of the pleadings is required. It would be open to the Court of Appeal to grant a declaration of title in accordance with the findings of fact set out in the reasons for judgment.

[14] The motion is dismissed.

“D. Vickers J.”
The Honourable Mr. Justice Vickers