

CANADA / JUDGMENT

# Dene Tsaa First Nation v. Canada

2001 FCT 820

COURT

Federal Court

DECIDED

25 July 2001

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20010725 Docket: T-705-97 Neutral citation: 2001 FCT 820 BETWEEN: CHIEF LISA WOLF on her own behalf and on behalf of the members of the DENE TSAA FIRST NATION, otherwise known as the PROPHET RIVER INDIAN BAND Plaintiffs

- and - HER MAJESTY THE QUEEN Defendant REASONS FOR ORDER (delivered from the bench at Calgary, Alberta on July 19, 2001) HUGESSEN J.

- [1] This is a motion by the Crown in which it seeks to strike out a large number of paragraphs of the Statement of Claim.
- [2] In the view that I take of the law, I think it is important to mention the timing of the motion which was served just a month ago and was heard today, on July 19, 2001. The action itself was launched in the Spring of 1997 and by the end of July of that year, pleadings were closed. Since that time, particulars have been sought and given and the parties have engaged in fairly substantial discovery, both documentary and oral.
- [3] In my view, the great weight of the case law in this Court is to the effect that a motion which is based on the subparagraphs of Rule 221 other than subparagraph a) must be brought before the defendant has pleaded over, or if brought after that time the plea itself must have contained a reservation with regard to the impugned paragraphs. I am satisfied to cite only one case in support of that proposition and that is the decision of the Court of Appeal in *Proctor & Gamble Co. v. Nabisco Brands Ltd.*[1]
- [4] There is a reason for the rule, namely that where a motion to strike is based on paragraph a), that is to say that the statement of claim or the impugned paragraphs do not disclose a reasonable cause of action, the motion goes to the very heart of the action itself and it is appropriate that the Court should be able to deal with matters of that sort at any stage with perhaps only cost consequences flowing if the person making the motion does so on a late basis. However, where the motion is based on paragraphs b) to f) of the Rule, it is essentially a technical pleading matter and the policy of the Court is, and has for many years, been that parties should be encouraged to put those matters behind them at an early stage. If a party

wishes to take issue on a technical basis with another party's pleading, that must be done as soon as possible in the proceedings, otherwise the party must hold his or her peace.[2]

- [5] In the present case, the defendant Crown asserts grounds which are arguably based on paragraph a) and I shall deal with those in a moment, but it also asserts a number of other grounds, in particular that certain allegations are frivolous, or vexatious, or redundant, or surplusage, or inconsistent. All of those are grounds which do not go to the heart of the action itself, but simply to the technicalities of pleading. Coming as it does some four years after the close of pleadings, I find that the motion is not timely to raise those issues.
- [6] However, as I have said, the motion does raise some matters which do go to the heart of the plaintiffs' claim. I divide them into two headings. First, the plaintiffs claim in several paragraphs that they were at relevant dates under a disability. This allegation is clearly made in the context of section 7 of the British Columbia Limitation Act with a view to combatting or rebutting any claim of limitation under that Act. (I mention in passing that I do not think that the plaintiffs can abandon their claim that they are under a disability by saying that that is simply an adjunct to their claim for breach of fiduciary duty. It may be of some assistance to them in their claim of breach of fiduciary duty that they say that they were under disability, but quite clearly, those allegations are designed to rebut, as I say, a plea of limitation.)
- [7] The Crown says that these allegations are bad because the nature of the disability, as alleged by the plaintiffs, is not the normal physical or mental disability which one would anticipate. It is indeed a quite unique claim of disability, namely that the plaintiffs say that they are under a cultural and linguistic disability arising from the fact that they are an unsophisticated or were at the relevant times an unsophisticated and uneducated people speaking no English and having in their own language no terms appropriate to describe the various transactions into which they say they were induced. I do not say for a moment that that is likely to be an easy proposition to establish. It is certainly a novel proposition, but it is trite to say that one does not strike out a claim simply because it is difficult or novel. I think the plaintiffs are likely to face considerable difficulties in establishing their claimed disability. The burden will certainly be upon them. But I am not willing at this stage to strike it out. [3]
- [8] I would add that amongst the difficulties I see the plaintiffs facing is one that was mentioned in argument by Crown counsel, namely that the plaintiffs are a collectivity and it is likely to be difficult but not necessarily impossible for a collectivity to establish that it was under a disability. So I shall not strike those paragraphs in which the plaintiffs claim they were under disability.
- [9] The second broad area in which the Crown's motion rests upon paragraph a) of the Rule are a number of allegations in which the plaintiffs claim variously certain rights under treaty, claim that the fiduciary duty which was owed to them by the Crown was breached and claim that they were victim of fraudulent misrepresentations. The position taken by the Crown in

its motion is that those allegations are so deficient, are so lacking in essential averments as not to disclose a reasonable cause of action. I have re-read the allegations recently and I am not satisfied that the attack can be sustained. While the Statement of Claim, when it is read as a whole and in conjunction with the particulars which have been furnished with regard to it may not be a model of draftsmanship, it certainly, in my view, states a claim which is known to the law under all of those headings and states it with sufficient particularity to allow the Crown to know the case it has to meet.

[10] Accordingly, I am satisfied that on this basis too, the Crown's motion to strike must fail. The result will be that the motion will be dismissed. I do not think that there should be any particular order as to costs other than the usual order that costs will follow the event and in that case, will go to the plaintiffs on the motion. Judge Ottawa, Ontario July 25, 2001

[1] (1985) 62 N.R. 364 at 366)

[2] The same principle is embodied in Rules 56 and 58 to the effect that formal defects are to be treated only as irregularities and must be invoked at the earliest possible time.

56. Non-compliance with any of these Rules does not render a proceeding, a step in a proceeding or an order void, but instead constitutes an irregularity, which may be addressed under rules 58 to 60.

58. (1) A party may by motion challenge any step taken by another party for non-compliance with these Rules.

(2) A motion under subsection (1) shall be brought as soon as practicable after the moving party obtains knowledge of the irregularity.

56. L'inobservance d'une disposition des présentes règles n'entache pas de nullité l'instance, une mesure prise dans l'instance ou l'ordonnance en cause. Elle constitue une irrégularité régie par les règles 58 à 60.

58. (1) Une partie peut, par requête, contester toute mesure prise par une autre partie en invoquant l'inobservation d'une disposition des présentes règles.

(2) La partie doit présenter sa requête aux termes du paragraphe (1) le plus tôt possible après avoir pris connaissance de l'irrégularité.

[3] By the terms of paragraph 7(1)a of the British Columbia Limitations Act disability is expressly stated to be a question of fact.

7. (1) For the purposes of this section,

(a) a person is under a disability while the person

(i) is a minor, or (ii) is in fact incapable of or substantially impeded in managing his or her affairs, and ...

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