

CANADA / JUDGMENT

Giesbrecht v. British Columbia

2017 BCSC 1920

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Supreme Court of British Columbia

DECIDED

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2017 BCSC 1920 Giesbrecht v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Giesbrecht v. British Columbia,

2017 BCSC 1920

Date: 20171026

Docket: S161339

Registry: Vancouver

Between:

Chief Ronald Giesbrecht on his own behalf and on behalf of all members of the Kwikwetlem First Nation

Plaintiff

And

Her Majesty the Queen in Right of British Columbia, the Greater Vancouver Regional District, the British Columbia Housing Management Corporation, the Corporation of the City of Port Coquitlam, the Minister of Forests, Lands and Natural Resource Operations, and the Provincial Rental Housing Corporation

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page on November 2, 2017

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

September 15, 2017

Place and Date of Judgment:

Vancouver, B.C.

October 26, 2017

Introduction

- [1] This is an application by the plaintiff, pursuant to Rule 3-7 (22) of the Supreme Court Civil Rules, for further and better particulars of certain allegations set out in the responses to civil claim filed by the defendants, Her Majesty the Queen in Right of British Columbia and the Minister of Forests, Lands and Natural Resource Operations (the "Province"), and the Greater Vancouver Regional District ("GVRD").
- [2] The plaintiff is the Chief of the Kwikwetlem First Nation and he brings the underlying action on behalf of all members of the First Nation. I will refer to the plaintiff as "KFN".

Background

- [3] On February 9, 2016, KFN filed a notice of civil claim in which it claims Aboriginal title to several parcels of land of which the Province or GVRD are the registered owners in fee simple.
- [4] The Province filed its response to civil claim on April 29, 2016. GVRD filed a response to civil claim on May 2, 2016, and an amended response to civil claim on May 4, 2016.
- [5] On June 22, 2016, KFN served each of the Province and GVRD with a demand for particulars. GVRD provided its response on July 22, 2016, and the Province on August 31, 2016.
- [6] KFN takes issue with certain responses provided by each party.

Legal Framework

- [7] A useful summary of the principles governing particulars is found in *Hayes Heli-Log Services Ltd. v. Acro Aerospace Inc.*, 2006 BCSC 80, aff'd 2006 BCCA 306, at para. 5:

Particulars will be ordered when it is necessary to delineate the issues between the parties. It is different from discovery because particulars are not to be used to obtain information about how an issue will be proven. The purpose of particulars is to inform the other side of the nature of the case it has to meet, to prevent surprise at trial, to enable the other side to determine what evidence is necessary to prepare for trial, to limit the generality of pleadings, to limit and decide issues for purposes of discovery and trial, and to tie the hands of the party providing particulars.

- [8] A demand for particulars may be refused where it seeks disclosure of evidence (*Hoy v. Medtronic, Inc.*, 2004 BCSC 440, at para. 47) or where the demand would require a party to provide legal argument (*British Columbia Teachers' Federation v. British Columbia*, 2012 BCSC 1722, at para. 14).

The Province

- [9] At para. 14 of its demand for particulars issued to the Province, KFN sought particulars of the following facts set out in paragraph 1, Division 3 of Part 1 of the Province's response to civil claim:

In 1904, the Province purchased from Edward Pohlman parcels of land totalling approximately 1000 acres and comprised of four District Lots, in particular District Lots 305, 170, 60 and 23, for the purpose of building and operating a mental hospital.

- [10] Paragraphs 14 (b) and (c) of the demand for particulars asked the following:
 - b. Clarify whether the 1000 acres of land was subject to any colonial, federal or provincial Crown grant.
 - c. If so, provide particulars as to:

- i. When the Crown grant was made.
- ii. What consideration was paid.
- iii. What legislation applied in making the Crown grant.
- iv. Whether there [was] an intention to extinguish Aboriginal title in making the Crown grant.
- v. If so, how the intention formed and manifested.

[11] The Province provided particulars in response to these demands. With respect to the demands set out in paragraphs (c)(iv) and (v), the Province stated:

iv. The Province says that this demand for particulars is objectionable in that it calls for legal argument. However, and without prejudice to this objection, the Province says that the grants of lands for consideration to the persons identified in paragraphs 2 and 4 of Division 3 of Part 1 of the Province's Response was intended to secure their valid and enforceable title to the land, and to provide them with the sole rights to occupy the land, to determine the uses to which the land would be put, and to derive the economic benefits of the land, subject to any rights of the Crown in the lands.

v. The Province says that this demand for particulars is objectionable in that it calls for legal argument. However, and without prejudice to this objection, the Province says that the grants of land made pursuant to the colonial and provincial statutes were for the purpose of securing the grantee's valid and enforceable title to land in a manner consistent with the land registry system established to facilitate the transfer of real property within the colony of British Columbia and, later, the Province of British Columbia.

[12] KFN takes issue with the sufficiency of these answers. It denies that the demands call for legal argument and submits that it is seeking further material facts which are necessary to properly address the Province's defence. Alternatively, KFN submits that the Province must state the legal basis for its statements.

[13] The Province submits that KFN's demands do not relate to a matter pleaded by the Province, in that the Province has not pleaded extinguishment. The Province submits further that, in any event, it has provided an adequate response setting out the intention underlying the Crown grants in issue.

[14] The material fact pleaded by the Province concerns the Province's purchase of certain parcels of land in 1904. The details of that purchase are clearly set out in paragraph 1, Division 3 of Part 1 of the response to civil claim. Subsequent paragraphs provide further details about the history of the subject parcels. These facts are clearly laid out and there is no need for further particularization.

- [15] Nowhere in those paragraphs does the Province allege extinguishment, thus I agree with the Province that the demand for particulars that asks whether there was an intention to extinguish Aboriginal title and, if so, how that intention formed and manifested, does not relate to a matter pleaded by the Province.
- [16] I agree further that, in any event, the Province has provided adequate particulars of the intention underlying the grants in question. What KFN seeks is the Province's legal characterization of the facts pleaded. In my view, that goes beyond the proper scope of a demand for particulars.
- [17] The application with respect to paragraphs 14(c)(iv) and (v) of the demand for particulars is therefore dismissed.
- [18] KFN also sought particulars of paragraph 4 of Part 3 of the Province's response to civil claim, which states:

In further response to the whole of Part 3 of the NOCC, and in the alternative, the Province says that if the ancestors to the Plaintiffs ever held aboriginal title to areas within the Claimed Lands, the co-existence of that title is inconsistent with and displaced by the estate of any fee simple land owner. The Province says that the legal and beneficial interests held by the Defendants in fee simple were lawfully granted and remain valid to their full force and effect in accordance with the provisions of the Land Title Act, RSBC 1996, c. 250.

[19] KFN demanded the following particulars with respect to that paragraph:

17. With respect to paragraph 4 in Part 3:

- a. Define what is meant by "displaced".
- b. Clarify whether the Province alleges any displacement has the effect of extinguishing Aboriginal title.
- c. Clarify whether the Province alleges there is a difference between extinguishment [and] displacement of Aboriginal title.
- d. Provide particulars as to what legislation and/or authority was applied to displace KFN of their Aboriginal title for each grant alleged to have "displaced" Aboriginal title.
- e. For each grant described above, provide particulars as to who specifically formed the intention to extinguish Aboriginal title, and how that intention was made plain and clear.

[20] The Province provided the following responses:

- a. Without restricting the ordinary meaning of the word, the Province says that displaced means to take the place of; to oust from its place and occupy it instead.
- b. This demand is objectionable in that it calls for legal argument rather than material facts and is not necessary to plead or define the issues.

- c. This demand is objectionable in that it calls for legal argument rather than material facts and is not necessary to plead or define the issues.
- d. The particulars with respect to the Crown Grants for the Claimed Lands provided in the Response and above in this Response to the Demand for Particulars # 15 and 16 are the extent of the particulars known to the Province at this time.
- e. This demand is objectionable in that it calls for evidence and legal argument rather than material facts.

- [21] KFN takes issue with the Province's refusal to answer items (b), (c), and (e) of paragraph 17 of its demand. It submits that under the established jurisprudence, the Crown has only two defences available to a claim for infringement of Aboriginal rights and title: either the rights and title have been extinguished or the infringement is justified. KFN submits further that the concept of "displacement" advanced by the Province is not known in law and accordingly, KFN is entitled to know exactly what the Province's position is.
- [22] The Province submits that it has clearly set out its position that if the ancestors of KFN held Aboriginal title to any of the subject lands, that title is inconsistent with and was displaced by the estate of any fee simple land owner. Further, the Province provided a definition of "displaced" with which KFN took no issue. The Province submits as well that it has pleaded the material facts on which its position is based and no further clarification or particulars are required. In terms of paragraph 17(e), the Province submits again that it has not pleaded extinguishment, thus the demand is misplaced, and that, in any event, the demand seeks to elicit evidence and not material facts.
- [23] With respect to the demands set out in paragraphs 17 (b) and (c), I am satisfied that the Province has set out its position, and the underlying material facts, with sufficient clarity that no further particulars are required. While the concept of displacement may be novel, whether it is valid, is an issue for trial. Given the definition of displacement offered by the Province and its statement as to the effect of fee simple ownership, I am not satisfied that KFN requires additional clarification at this time in order to prepare its case.
- [24] With respect to the demand set out in paragraph 17(e), I agree that it refers to a matter not pleaded by the Province, i.e. extinguishment, and that, in any event, it seeks disclosure of evidence and not material facts.
- [25] For these reasons, KFN's application with respect to paragraphs 17(b), (c) and (e) of its demand for particulars is dismissed.

GVRD

- [26] At paragraph 7 of the demand for particulars issued to GVRD, KFN sought particulars of the following fact alleged at paragraph 38 of Part 3 of GVRD's amended response to civil claim:

The Claim Area includes privately held land, including the Park Lands, which are held in fee simple or similar interest and are inconsistent with the Kwikwetlem's assertion of Aboriginal title.

[27] Paragraph 7 of the demand asked:

provide particulars as to how fee simple or similar interests in the Claim Area are inconsistent with KFN's assertion of Aboriginal title.

[28] In its response, GVRD refused to answer this demand because it "is in the nature of legal argument and is not necessary for the Plaintiffs to plead or define the issues".

[29] KFN submits that paragraph 7 is a demand for particulars of a material fact not legal argument. Alternatively, it submits that GVRD must clarify its legal position so that KFN can properly understand this defence.

[30] GVRD submits that Aboriginal title is based on exclusive use and occupation of land which, on its face, is inconsistent with the concept of fee simple. It says that no further explanation is needed in order for KFN to know and understand its position.

[31] I am satisfied that paragraph 38 of the amended response pleads GVRD's position with sufficient clarity and that no further particulars are required. The material fact pleaded is the inconsistency between fee simple title and Aboriginal title and the request for an explanation of "how" that inconsistency arises, is, in my view, beyond the proper scope of particulars.

[32] KFN's application with respect to paragraph 7 of its demand for particulars issued to GVRD is therefore dismissed.

[33] Paragraph 8 of KFN's demand for particulars addresses paragraph 40 of Part 3 of GVRD's amended response, which pleads the following:

In the alternative, if the Kwikwetlem had Aboriginal title in respect of the Park Lands or any portion of the Park Lands or any other portion of the Claim Area in which GVRD has legal or beneficial interest, which is not admitted but specifically denied, the Defendant pleads that Parliament extinguished such Aboriginal title prior to April 17, 1982 and that Parliament had the clear and plain intention to do so, including, but not limited to, by means of the granting of fee simple title, absolute fee title, or similar interest in respect of such lands prior to April 17, 1982.

[34] At issue are GVRD's responses to the particulars requested in paragraphs 8(b) and (c) of KFN's demand:

(b) Provide particulars as to the specific legislation and/or authority to which Parliament is alleged to have extinguished Aboriginal title prior to April 17, 1982 for each parcel of land described above. Specifically,

- (c) Provide particulars as to who specifically formed the intention to extinguish Aboriginal title and how that intention was made clear and plain.

[35] GVRD responded to paragraphs 8(b) and (c) together as follows:

To the extent that the Kwikwetlem ever had Aboriginal title in respect of the lands referred to in response to Demand 8(a.), above (which is not admitted and is specifically denied), the Imperial Crown formed an intention to extinguish such Aboriginal title to the extent that the Colony of British Columbia granted absolute fee title to the parcels of land particularized in paragraph 14 of the Response. Following British Columbia entering Confederation in 1871, Parliament formed the intention of extinguish Aboriginal title over any parcels of land referred to in response to Demand 8 (a.), if any, over which Aboriginal title then existed and was not extinguished. The balance of this demand is refused as the information requested is in the nature of legal argument and/or evidence and is not necessary for the Plaintiffs to plead or to define the issues.

[36] I am satisfied that the particulars provided by GVRD, when read in conjunction with the detailed history of the subject lands set out in its amended response, sets out GVRD's position with sufficient clarity that no further particulars are required. Further, the request for particulars as to "who" formed the intention to extinguish Aboriginal title and "how" that intention manifested, is a request for evidence that goes beyond the proper scope of particulars.

[37] KFN's application with respect to paragraphs 8(b) and (c) of its demand to particulars issued to GVRD is therefore dismissed.

[38] Paragraph 9 of KFN's demand for particulars, sought particulars of paragraph 41 of Part 3 of GVRD's amended response, which pleads:

To the extent that Aboriginal title ever existed in respect of the Park Lands (which is specifically denied), such Aboriginal title was displaced by the fee simple title or similar interest in respect of such lands. In particular, the determinable fee simple title that GVRD holds in respect of all the Park Lands was lawfully granted and remains valid.

[39] KFN sought the following particulars:

9 (a) Define what is meant by "displaced".

(b) Clarify whether any displacement has the effect of extinguishing Aboriginal title.

(c) Clarify the difference between extinguishment of Aboriginal title plead in paragraph 40 of Part 3, and displacement of Aboriginal title.

(d) Provide particulars as to what legislation and/or authority was applied to displace KFN of their Aboriginal title for each grant alleged to have "displaced" Aboriginal title.

(e) For each grant described above, provide particulars as to who specifically formed the intention to extinguish Aboriginal title, and how that intention was made plain and clear.

[40] GVRD responded as follows:

9 (a) Without limiting the plain and ordinary meaning of the term "displaced", the meaning of "to displace" includes to supersede and take precedence over.

(b) GVRD pleads and relies on both extinguishment of Aboriginal title and displacement of Aboriginal title. This [sic] balance of the demand is refused as the information requested is in the nature of legal argument and is not necessary for the Plaintiffs to plead or to define the issues.

(c) This demand is refused as the information requested is in the nature of legal argument and is not necessary for the Plaintiffs to plead or to define the issues.

(d) To the extent that the Kwikwetlem ever had Aboriginal title in respect of the lands referred to in response to Demand 8 (a.), above (which is not admitted and is specifically denied), the granting of fee simple and similar interests in respect of such lands, including by the Colony of British Columbia, the Province of British Columbia, and Canada, displaced such Aboriginal title.

(e) This demand is answered in response to Demand 8 (c.), above.

[41] KFN takes issue with GVRD's responses to demands 9(b)-(e). It submits that the particulars sought are all of material facts or, alternatively, GVRD should be required to clearly state its legal position. GVRD submits that KFN is seeking information in the nature of legal argument, which is beyond the proper purpose of particulars.

[42] In my view, GVRD's position is clearly pleaded in paragraph 41 of Part 3 of its amended response, that being that Aboriginal title, if it existed, was displaced by the grant of fee simple title. GVRD defines "displaced" to mean "to supersede and take precedence over". As I held with respect to the similar demand for particulars issued to the Province, while the concept of displacement may be novel, the validity of that concept is an issue for trial.

[43] When GVRD's responses are read in conjunction with the detailed history of the subject lands set out in its amended response, I am satisfied that both its legal position, and the relevant material facts, are pleaded with sufficient clarity and detail that no further particulars are required.

[44] KFN's application with respect to paragraphs 9(b)-(e) of its demand for particulars issued to GVRD is therefore dismissed.

Conclusion

[45] KFN's application is dismissed. Costs will be in the cause.

"Skolrood J."

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