

CANADA / JUDGMENT

Harry v. British Columbia

2002 BCSC 1489**COURT**

Supreme Court of British Columbia

DECIDED

25 October 2002

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Source record**2002BCSC1489****Citation:** Harry v. British Columbia**Date:** 20021025
2002 BCSC 1489**Docket:** C944747
Registry: Vancouver
IN THE SUPREME COURT OF BRITISH COLUMBIA**BETWEEN:** RICHARD HARRY, SUSAN BLANEY, MAVIS COUPAL,
BRIAN LEO AND DARREN BLANEY ON THEIR OWN BEHALF,
AND ON BEHALF OF ALL THE MEMBERS OF THE
HOMALCO INDIAN BAND, AND THE HOMALCO INDIAN BAND
PLAINTIFFS**AND:** HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA
DEFENDANT**AND:** THE ATTORNEY GENERAL OF CANADA
DEFENDANT**REASONS FOR JUDGMENT****OF THE****HONOURABLE MR. JUSTICE VICKERS****Counsel for the Plaintiffs:**

H.C.R. Clark, Q.C. and

D. L. Kydd

Counsel for the Defendant HMTQ:

R. A. Wright

Counsel for the Defendant

Attorney General of Canada:

G. M. Dickson, Q.C. and

K. Gleeson

Dates and Place of Hearing/Trial:

October 2, 3 and 4, 2002

Vancouver, BC

Introduction

- [1] This action concerns the transfer of administration and control over certain lands in Orford Bay Indian Reserve No.4 of the Homalco Indian Band (the "Band"), by Her Majesty the Queen in right of Canada, to Her Majesty the Queen in right of the Province of British Columbia ("HMQBC"), on September 3, 1964, for forest road purposes, pursuant to s. 35 of the Indian Act ("the 1964 Taking").
- [2] The plaintiffs allege that the lands at issue, which became part of the Orford Forest Service Road ("the Orford FSR"), were improperly removed from Orford Bay Indian Reserve No. 4 ("IR No. 4"). The Amended Statement of Claim alleges causes of action in, inter alia, trespass as against the defendant HMQBC, breach of statutory duty as against the defendant the Attorney General of Canada ("Canada"), and breach of fiduciary duty as against both defendants.
- [3] Both defendants plead, inter alia, limitations and laches, and contend that the plaintiffs received significant and valuable benefits from the Orford FSR.
- [4] The plaintiffs plead postponement in reply to the limitations and laches defences. They deny that they received any benefits from the Orford FSR, other than those which otherwise would have accrued to them. The defendants argue that in doing so, the plaintiffs have placed their financial position from 1964 to 1994 directly in issue, together with the extent of their control over their own affairs.

Nature of the Application

- [5] This is an application by the defendants pursuant to Rules 1, 2, 26, 27 and 57 of the Rules of Court for the following Orders (referred to hereinafter as "Order No.1," "Order No. 2" etc.,respectively):

1. An Order that the plaintiffs disclose all documents on the plaintiffs' 7th Supplementary List of Documents dated September 28, 2001 (the "7th List"), without redaction in whole or in part, other than with respect to post-August 29, 1992 documents over which the plaintiffs continue to maintain a claim of privilege.
2. An Order that complete copies of the originals of the Homalco Indian Band files listed on the plaintiffs' 3rd and 5th Supplementary Lists of Documents dated August 15, 2000 and February 22, 2001, respectively, and of all such files on the 7th List, be paginated and made available for inspection, subject to any claim of privilege relating to post-August 29, 1992 documents, or as otherwise determined by the Court.
3. An Order that the plaintiffs disclose all documents on the plaintiffs 10th List of Documents dated June 13, 2002, without redaction in whole or in part, including all documents listed in Part III of the said list, other than post-August 29, 1992 documents.
4. An Order that the plaintiffs disclose all Homalco Indian Band and Band Council Meeting Agendas and Minutes, Workshop Minutes, Band Council Resolutions and Statements of Revenue and Expenses from 1964 to 1994, inclusive, in their possession and control.
5. An Order that the plaintiffs disclose all pre-August 29, 1994 correspondence in their possession or control between the plaintiffs and Helmut J. Urhahn, TERA Environmental Consultants Ltd. and Tera Planning Ltd. relevant to the financial position of the Homalco Indian Band.
6. An Order that the plaintiffs disclose all pre-August 29, 1994 files, records and documentation in their possession or control with respect to Golden Salmon Farms Ltd., Bute Inlet Development Corporation and the Homalco Trust, including files, records and documents of the said corporations, relevant to the financial position of the Band.

Orders Nos. 1, 2 and 3

- [6] In the course of argument agreements were reached between the parties on most of the issues raised by these orders. The only remaining issue is with respect to a claim of privilege asserted by the plaintiff on all invoices and accounts of Donna Kydd, Barrister and Solicitor, rendered to the plaintiff for services related to these proceedings up to August 29, 1992. These documents were included in the 7th List. All of the documents on that list were subject to a claim of privilege.
- [7] In my Reasons for Judgment issued on November 9, 2001 I found that, based on their pleadings, the plaintiffs had waived privilege for the entire period up to the filing of the Writ of Summons on August 29, 1994. The plaintiffs were ordered to produce documents relating to matters raised in certain questions put to their deponent on examination for discovery, over which the plaintiffs had claimed privilege (the "Order"). See *Harry v. Her Majesty the Queen*, 2001 BCSC 1556.

- [8] The plaintiff appealed the Order insofar as it related to post-August 29, 1992 questions and documents. This appeal was dismissed on October 15, 2002: see *Harry v. British Columbia*, 2002 BCCA 557.
- [9] The questions, which I ordered to be answered in my earlier judgment of November 9, 2001, cover the invoices and accounts issued by Donna Kydd and the correspondence relevant thereto. Accordingly there will be an order that these documents be produced for the reasons set out in the earlier judgment.

Orders Nos. 4, 5 and 6

a) General Background

- [10] Richard Harry became the Band Administrator in 1983 and Chief in 1984. He has held both of these positions since that time.
- [11] Chief Harry is one of a new generation of leaders who became active in Band affairs in the early 1980s and who, at that time, began working on a strategy for cultural, economic and community renewal for the Homalco First Nation.
- [12] By the time he became active in Band affairs in 1983, Chief Harry was familiar with the world of business. His understanding of project management, and the importance of planning, was evident in the administration of the Band's affairs. Early in his tenure, the Band prepared two plans, one entitled the "Fisheries Development Plan," and the other the "Community Development Plan."
- [13] The Community Development Plan, designed in 1984, contained proposals respecting the following five elements: self-government, land claims, land and housing, human resources and economic development.
- [14] The proposal for economic development was based on "two economic cornerstones, the fishery and forestry."
- [15] By late 1983, plans in relation to fisheries already included a roe-on-kelp permit and a salmonid enhancement project. Forestry plans at this time included the enhancement of the leases with Weldwood on IR No. 4, and the negotiation of a favourable deal in connection with the Ministry of Forests' proposal for a Forest Service Road across Homathco IR No. 1.
- [16] Chief Harry recognized the necessity to retain professional assistance where and when necessary. By August of 1983, the plaintiffs had retained the firm of Dave Hill and Associates. This firm was to provide, inter alia, secretarial, bookkeeping, budget and management counselling services.
- [17] In about the mid-1980s the Band also retained the services of Helmut J. Urhahn, an independent consultant, as an advisor to the Band. From that point, until the mid to late 1990s, Urhahn was involved in advising the Band on a wide range of matters.

- [18] Additional advisors were hired for other purposes. Klaus Roethel was one of the advisors employed in connection with forestry issues. Roethel was also an independent consultant.
- b) Fishery
- [19] An aquaculture program was established at Church House, one of the Band's reserves, in 1984. The aim of this program was to establish a fish farm that would generate significant income for the Band. Feasibility and marketing studies in connection with the fish farm were carried out by both Urhahn and the consulting firm of Ference Weicker.
- [20] In November 1987 the Band incorporated the ongoing fish farm operation as Golden Salmon Farms Ltd. The new firm was wholly owned by the Band. Chief Harry became President, while Urhahn and another Band consultant/staff member, Lyndon Hrytzak, became Secretary and Treasurer, respectively. Urhahn prepared a detailed business plan for Golden Salmon Farms Ltd. He also undertook a Trade Mission to the European Economic Community on behalf of the firm.
- [21] An unaudited financial statement of the firm for March 31, 1989, covering the period from incorporation to that date, shows net assets of \$1,103,106 and liabilities of \$925,801. Scotiabank, Indian and Northern Affairs Canada ("INAC") and the Department of Regional Industrial Expansion contributed capital to the firm. From its Ottawa trust accounts, the Band itself made contributions to the firm totalling \$110,000: \$60,000 in 1988 and \$50,000 in 1990. None of this money was secured.
- [22] In addition to the \$110,000 from the Band's trust accounts, unaudited financial statements from March 31, 1989 and March 31, 1990 show other long term debt of \$518,526 owing to the Band. This debt was incurred by the firm sometime before November 23, 1987 (the date of incorporation) and March 31, 1989 (the date of the first financial statement). It was secured against the property and equipment of the firm.
- [23] Band trust accounts held by INAC do not disclose any origin for this debt of \$518,526. Similarly, the indebtedness of Golden Salmon Farms Ltd. to the Band is not recorded in either the March 31, 1989 or March 31, 1990 audited financial statements of the Band, except with respect to the \$110,000 from the Ottawa trust accounts. In both of those statements, the auditor indicates that he has been instructed to examine only transactions relating to certain programs.
- [24] The affairs of the firm appear to have deteriorated in 1990. The March 31, 1990 unaudited financial statements of Golden Salmon Farms Ltd. record that the plaintiffs wrote off \$51,893 of accrued interest on their loan of \$518,526 to the firm.

- [25] The last Annual Report of the firm covered the period to November 23, 1991. Financial statements of the Band to March 31, 1992 show the purchase of the assets of Golden Salmon Farms Ltd. for \$111,308. The purchase price appears to be made up by forgiving the \$93,308 still outstanding from the \$110,000 loan from the Ottawa trust funds, plus a payment of a further \$25,000. There is no information in any of the financial statements regarding the eventual disposition of the \$518,526 loan by the Band to the firm.
- [26] The hatchery equipment from Golden Salmon Farms Ltd. was moved to a logging camp at IR No. 4, where it operates to this day as a part of the Band's Fisheries Development Plan for Bute Inlet. The hatchery is now managed by Bute Inlet Development Corporation. This corporation was formed in 1992 while Golden Salmon Farms Ltd. was in the process of winding up its affairs. It is also owned by the Band.
- c) Forestry
- [27] Documents disclosed by all parties to this action show that in the 1960s, 1970s and 1980s Weldwood of Canada Ltd. ("Weldwood") had a licence or licences to harvest timber in the Orford River valley, above IR No. 4. Weldwood leased land on IR No. 4 for a logging camp, a water line right of way, and a 1,660 foot long spur road known as "Graham Main". In the case of Graham Main, Weldwood also paid haulage charges for timber taken out over the road.
- [28] There is a dispute between the parties as to whether Weldwood also paid road haulage fees for the use of the Orford FSR. This issue is still under investigation. The defendants say that the records sought on these applications may assist in that investigation.
- [29] Renegotiation of the Weldwood leases on IR No. 4 was one element of the forestry component of the economic development plan of the Band in the early 1980s. By October 5, 1983 the Homalco Indian Band had hired Cunningham & Rivard Appraisals Ltd. ("Cunningham & Rivard") to conduct an appraisal "for the purpose of establishing a just and reasonable lease agreement between the band and Weldwood of Canada." The Band asked Indian Affairs to reimburse it for the cost of the appraisal, to a maximum of \$10,000.
- [30] Clarine Ostrove, Barrister & Solicitor, researched the lease issues for the Band through the auspices of the Union of British Columbia Indian Chiefs. Ms. Ostrove provided an opinion to the Chief and Band Council on August 24, 1983. Chief Harry testified on discovery that he renegotiated the camp and Graham Main leases after receiving an appraisal from Cunningham & Rivard.
- [31] In subsequent years, negotiations with Weldwood were conducted by Chief Harry and Helmut Urhahn on behalf of the Band. New arrangements were put in place, although no finalized agreements for the period 1986-1994 have been produced by the Band.
- [32] For the purposes of these applications, the plaintiffs rely on a statement of Carl Rathburn, a former Vice-President of Weldwood. In his statement, Mr. Rathburn says that one of the agreements entered into between the Band and Weldwood was for the use of the Orford Forest Service Road, and its widened shoulders, as an airstrip. A number of documents

confirm that the Band wanted to be paid for the airstrip, and that Weldwood was willing to pay. In addition, the defendants submit that the existence of an airstrip agreement is consistent with a comparable value found in a 1985 report prepared by Cunningham & Rivard Appraisals Ltd. However, no copy of an airstrip agreement has been disclosed by the Band. The defendants say that the income it generated, if any, is as yet unknown. Chief Harry testified on discovery that during his tenure no compensation was ever paid for the airstrip.

- [33] The amounts Weldwood paid for the use of land on IR No. 4 increased significantly during Chief Harry's tenure. Negotiations with the Ministry of Forests with respect to the Homathco IR No. 1 Forest Service Road (the "Homathco FSR") were also concluded during this period. By December 1986, the Band had negotiated a price of \$150,000 for the 12.32 acres of land required for the Homathco FSR. Chief Harry reported on these negotiations to the Band on December 9, 1986. He characterized the contract negotiated as a "precedent setting contract."
- [34] Compensation pursuant to the contract was eventually paid in land at Campbell River. The Band received 165 acres in return for the 12.32 acres on IR No.1. In addition, the Band is entitled to the return of the 12.32 acres when the Homathco FSR is no longer necessary for logging purposes.
- [35] By December 1986, the Band had prepared a Forestry Management Plan for its reserve lands. It had also retained a Forestry Consultant who had trained band members to conduct timber cruises.
- [36] Around this time the Band was also applying for a Woodlot licence. This application appears to have been handled by Klaus Roethel on behalf of the Band. Roethel also handled the presentation on the forestry economic development initiatives at the Annual General meeting of the Band in 1987.
- [37] Following the preparation of a logging plan by Roethel, revenues from log sales and interest income to the Band were \$2,629,165.94 for the four-month period ending on December 22, 1992. Of this amount, \$1,888,837.20 was revenue and interest from the operations at Orford River.
- [38] The defendants say that none of this approximately \$2.6 million in revenue is recorded in the Ottawa trust accounts of the Band or in its audited financial statements. Of the approximately \$2.6 million in revenue during that period, it appears that \$506,342.01 was paid to Bute Inlet Development Corporation. This payment appears not to have been reported in the audited financial statements of the Band.

- [39] Bute Inlet Development Corporation was established by the Band in 1992 "to promote Homalco employment and business opportunities." The corporation administers the harvest of timber on Band reserves. The President of the corporation reports to the Homalco Trust. The Homalco Trust was formed in 1993 to run the forestry, fisheries and housing programs of the Band.
- [40] In October 1993, the Homalco Trust reported that the Band expected to make \$4.8 million from harvesting the timber on its reserves by the end of 1993.
- [41] Counsel for the plaintiff says that in seeking Orders 4, 5 and 6, there is a vast overreaching for documents by the defendants. In his submission the time and expense involved in seeking these documents far exceed any benefits that might be achieved through their disclosure.
- d) Order No. 4
- [42] The plaintiffs contend that an historical and special relationship exists between themselves and the Crown. They say that that relationship is governed by "the vulnerability and dependence of the Plaintiffs on the Crown."
- [43] The plaintiffs further contend that a "unique relationship ... exists between the Plaintiffs and the Crown, at all material times." They say that the defendant Canada owed certain duties to the plaintiffs, including "a duty to alleviate the Plaintiffs' sense of powerlessness in their dealings with the Crown in regard to 'reserve' lands."
- [44] Consistent with the allegations of dependence, vulnerability and powerlessness, the plaintiffs in argument have taken the position that "the Crown controls the business affairs of the band, the spending of money by the band."
- [45] Counsel advise that the plaintiffs have delivered an expert report based on the premise that until 1996 the Crown, and not the Band, controlled the negotiations with respect to the campsite and road use fees on IR No. 4. It appears that the damages claim advanced by the plaintiffs is based in large part on the alleged failure of the Crown to negotiate better rates on behalf of the plaintiffs.
- [46] The ambit of the special relationship, including the vulnerability, dependence and powerlessness of the plaintiffs, as well as the extent of the control of the Band's affairs, financial and otherwise, by the Crown, are issues in this action.
- [47] The extent and ambit of any fiduciary duties owed by the Crown to the plaintiffs are grounded in the actual relationship between the parties. As a result, the exact nature and quality of that relationship are issues in any action in which a claim is made for damages for breach of fiduciary duties, as in this case. See *Fairford First Nation v. Canada*, [1999] 2 C.N.L.R. 60 (F.C.T.D.).

- [48] In their argument, the defendants limited the scope of the order originally requested. They now seek an order that the plaintiffs disclose the Band and Band Council Minutes, and related materials, as well as all Band Statements of Revenue and Expenses, in the Band's possession and control.
- [49] It is fair to say that the original request of the defendants was extremely broad. But now it has been limited to documents that in my view would clearly be relevant to any inquiry into the relationship of the parties. Some Band minutes have already been disclosed and there can be no good reason for withholding other Band minutes.
- [50] Insofar as Statements of Revenue and Expenses are concerned, the evidence is that by no later than December 1986, the Band was producing its own monthly financial statements. One of the Band's advisors said at that time: "Financial statements are run off the computer each month so that accurate records can be kept."
- [51] Only two such statements have been disclosed. There can be no logical reason for a lack of production of the balance. Complete financial statements should also provide an explanation for the \$518,526 loaned to Golden Salmon Farms Ltd. by the plaintiffs between 1987 and 1989, and any record of the instrument securing the loan.
- [52] Accordingly there will be an order that the plaintiffs disclose Band and Band Council minutes and related materials and all Band Statements or Statements of Revenue and Expenses in the Band's possession and control.
- e) Orders 5 and 6
- [53] The defendants in this action have pleaded limitations and laches.
- [54] In answer, the plaintiffs contend that they lacked the means of knowledge of the facts and the benefit of appropriate legal advice at all material times. They say that prior to the issuance of the writ they proceeded to ascertain the facts and obtain such advice. They specifically plead and rely on the postponement provisions of limitations legislation.
- [55] When questioned on discovery about the delay in bringing the action, Chief Harry testified that if the plaintiffs had sufficient resources when he became involved in Band affairs in 1983, and afterwards, the plaintiffs would have initiated legal action at that time.
- [56] In addition, the issue of the revenue received by the Band from activities on Orford Bay IR No. 4 is raised on the pleadings.
- [57] The plaintiffs have filed an expert report claiming damages based on lost revenue, and a shortfall of revenue, from road use and other fees on Orford Bay IR No. 4.
- [58] In my earlier judgement of November 9, 2001, I said that "[i]t appears the financial resources of the Homalco Indian Band in the period before the issuance of the writ, including the resources of the Band in the period 1983-1994, are issues in the action": *Harry v. The Queen*, 2002 BCSC 0304, at para. 13.

- [59] Helmut J. Urhahn was retained by the Band in the mid-1980s, no later than December, 1985. From then until the Writ in this action was issued on August 29, 1994, Urhahn acted in the capacity of advisor to the band. His involvement in the affairs of the Band, financial and otherwise, was extensive.
- [60] Counsel for Helmut Urhahn has indicated that Urhahn hand-delivered his files and records to the Homalco Indian Band in November, 1997.
- [61] The plaintiffs do not oppose the defendants' Rule 26(11) application for the records of Helmut Urhahn and Tera Planning Ltd., an Urhahn company, which has been brought at the same time as the applications herein.
- [62] Golden Salmon Farms Ltd. was an element of the Band's Fisheries Development Plan, which in turn was one of the cornerstones of the Band's economic development program. The corporation drew some of its financial resources from the Band. Of the \$628,526 that came from the Band, only \$110,000 is recorded in the audited accounts of the Band. For the purposes of these applications, the plaintiffs have disclosed some of the financial records of Golden Salmon Farms Ltd.
- [63] Bute Inlet Development Corporation was incorporated on August 13, 1992. The corporation administered the harvest of timber on the Band's reserves, which was another cornerstone of the Band's economic development program. In 1992 it received a payment of at least \$506,342.01 from the Band.
- [64] The Homalco Trust was formed in 1993. At that time it ran the forestry, fisheries and housing programs of the Band. As previously noted, forestry and fisheries were key to the Band's economic development program.
- [65] Helmut Urhahn, Tera Planning Ltd., Golden Salmon Farms Ltd., Bute Inlet Development Corporation and the Homalco Trust were all involved in the Band's financial affairs during the relevant period. I am satisfied that their activities and the financial affairs of the Band justify an Order for the production by the plaintiffs of the records in their possession and control relating to the activities of Urhahn, the various corporations, and the Homalco Trust.
- [66] Accordingly there will be an order in the terms set out in Orders 5 and 6.
- [67] In summary there will be the following orders:
- that the invoices and accounts issued by Donna Kydd and the correspondence related thereto be produced;
 - that the plaintiff disclose Band and Band Council minutes and related materials and all Homalco Indian Band Statements of Revenue and Expenses in their possession or control;
 - that the plaintiffs disclose all pre-August 29, 1994 correspondence in their possession or control between the plaintiffs and Helmut Urhahn, TERA Environmental Consultants Ltd. and Tera Planning Ltd., relevant to the financial position of the Homalco Indian Band; and

· that the plaintiffs disclose all pre-August 29, 1994 files, records and documentation in their possession or control with respect to Golden Salmon Farms Ltd., and the Homalco Trust, including files, records and documents of the said corporations, relevant to the financial position of the Band.

"D.H. Vickers, J."

The Honourable Mr. Justice D.H. Vickers

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