

CANADA / JUDGMENT

MacMillan Bloedel Ltd. v. British Columbia

2000 BCCA 422

COURT

British Columbia Court of Appeal

DECIDED

30 June 2000

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2000 BCCA 422 Citation: MacMillan Bloedel v. HMTQ Date: 20000630 2000 BCCA 422 Docket: CA026728/ CA026729 Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA ORAL REASONS FOR JUDGMENT Before: The Honourable Mr. Justice Hollinrake June 30, 2000 The Honourable Madam Justice Ryan The Honourable Madam Justice Huddart Vancouver, B.C. CA026728 BETWEEN: MACMILLAN BLOEDEL LIMITED PLAINTIFF (RESPONDENT) AND: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and THE ATTORNEY GENERAL OF BRITISH COLUMBIA DEFENDANTS (APPELLANTS) CA026729 BETWEEN: TIMBERWEST FOREST LIMITED PLAINTIFF (RESPONDENT) AND: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and THE ATTORNEY GENERAL OF BRITISH COLUMBIA DEFENDANTS (APPELLANTS) D.C. Prowse and G. Underwood appearing for the Appellants D.G.S. Rae, Q.C. and H.A. Brinton P.G. Voith appearing for the Respondent MacMillan Bloedel Limited appearing for the Respondent Timberwest Forest Limited

- [1] HOLLINRAKE, J.A.: This is an application to vary an order of a single justice in Court of Appeal Chambers pursuant to s. 9(6) of the Court of Appeal Act. The proceedings are described by the judge in the court below as follows: In these two proceedings, MacMillan Bloedel Ltd. and Timberwest Forest Ltd. seek damages against Her Majesty the Queen in Right of the Province of British Columbia which they claim arise from the passage of a law, the Forest Amendment Act, 1995. This law changed the manner in which the plaintiffs have historically paid the Crown for harvesting timber under their timber licences. The plaintiffs assert that the change (from paying royalty to paying stumpage: amounts, in the circumstances, to a breach of contract, a breach of fiduciary duty and a taking of property rights without compensation, all of which the plaintiffs claim entitles them to damages. The defendant applies under Rule 19(24) to strike out the plaintiffs' claims on the ground that, even accepting the factual allegations as accurate, as it must, it is plain and obvious the plaintiffs' claims cannot succeed. The judge below concluded as follows: It is apparent that the question of whether a change in legislation affecting property goes beyond regulation and amounts to a taking is a question of mixed fact and law. The question is whether it can be said, at this stage, and based upon the pleadings, that there is plainly no question of law or mixed law and fact that there has been a diminution of rights amounting to a

compensable taking. Certainly that decision depends largely on the facts. As this is a Rule 19(24) application where evidence is not admissible, it is difficult to answer this question summarily. I note that the cases to which I have referred on this aspect of the pleadings were not cases decided under rules similar to Rule 19(24). Finally, the defendant argues that there must be a legislative basis for compensation even if the plaintiffs established a complete taking and corresponding enrichment. The Crown says that if there is a taking, it is always a matter of statutory construction whether the legislature intended that there be compensation. Further, it is argued that the legislation clearly contemplates that compensation would not be paid for the legislative change from the payment of royalty to stumpage. The defendant asserts that expropriation does not exist at common law and, there is no common law right to compensation when an expropriation occurs: *Patterson v. British Columbia (Ministry of Transportation and Highways)* (1997), 41 BCLR (3rd) 117 (C.A.) The defendant also relies on *British Columbia Medical Association v. British Columbia* (1984), 58 B.C.L.R. 361 (C.A.) where the Province, by legislation, removed the right of physicians to balance bill under the Medical Services Plan. Lambert J.A. concluded, as a matter of construction, that if the legislature had intended the Crown to pay compensation to the doctors for the loss of their option of balance billing, it would "in this case, have expressly said so." The Crown argues that *Cream Silver*, supra makes it clear that there is no rule that the Crown is obliged to pay for all takings regardless of the legal nature of the property or how the taking occurs unless the enabling legislation expressly provides for compensation. The plaintiffs argue that, in fact, there is a prima facie right to compensation unless the statute expressly eliminates that right. See *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508, *Manitoba Fisheries*, supra and *The Queen in Right of British Columbia v. Tener*, [1985] 1 S.C.R. 533. As Lord Atkinson stated in *Attorney-General v. De Keyser's Royal Hotel Ltd.*, at 542: "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation." There appears to be a serious issue as to, if there is a taking, whether there is a right to compensation unless the statute clearly eliminates it. There are important legal questions that must be resolved in light of all of the factual circumstances that will be revealed at trial. It is not plain and obvious to me that the plaintiffs' claims for compensation for an alleged taking are doomed to fail. CONCLUSION The applicant has not demonstrated that it is plain and obvious that any of the plaintiffs' claims will fail. With respect to the issues of contract, fiduciary duty and expropriation I think the underlying facts of the claims must be thoroughly examined before the legal issues are addressed. Moreover, these claims raise interesting issues in areas of law which could be said to be developing or, at least, are not currently settled. Those issues include the liability of the Crown for breach of contract resulting from its legislation, whether the legislation can give rise to an actionable breach of fiduciary duty and whether there has been a taking for which the plaintiffs are entitled to compensation. In deciding this motion, I am, of course, not determining the merits of the plaintiffs' claims, only that the defendant has not demonstrated on the pleadings that it is plain and obvious that the claims must fail. [2] Leave to appeal to this court was sought and denied by Mr. Justice Finch in Chambers who said this: It is common ground that the

learned chambers judge applied the correct test for an application under Rule 19(24) namely, whether it was plain and obvious that the plaintiffs' claims were bound to fail. As this is a proposed appeal from a discretionary order, the question on this leave application is whether there is any reasonable prospect of the defendants satisfying a panel of this Court that the chambers judge was clearly wrong in the exercise of his discretion. In my respectful view the defendants have failed to meet that test. The Supreme Court of Canada has recently held in *The Queen in Right of Newfoundland v. Wells* (1999), 177 D.L.R. (4th) 73 that a party holding contractual rights against the Crown may maintain an action for the breach of those rights because, even though the Crown may lawfully extinguish those rights by legislative enactment, it may remain liable for the legal consequences of doing so. So it is not clear that the plaintiffs are bound to fail on the important legal issue in this case. Moreover, the learned chambers judge held that the plaintiffs' claims for breach of contract, breach of fiduciary duty and the taking of property rights should all be resolved in a proper, factual context, and not in a vacuum. Those considerations appear to me to be within the proper exercise of the judge's discretion. I have not been persuaded that the learned chambers judge erred in the way he exercised his discretion, and having applied the correct legal test, it follows that this Court would not interfere. As there is no merit in the proposed appeal, I would dismiss the application for leave. The appellant now seeks a review of this denial of leave to appeal of this court.

- [3] It has not been shown to me that the Court of Appeal judge in Chambers fell into any error of principle which could leave this court in a position to vary his order as sought. The standard of review by a panel of this court of a decision of a single judge has been said to be that the court will not interfere unless it is satisfied that the Chambers judge was wrong in the legal sense and not merely that he or she exercised discretion incorrectly: see *Frew v. Roberts* (1990), 44 C.P.C. (2d) 34 (B.C.C.A.). In my opinion that test is not met in this case.
- [4] I would dismiss this review.
- [5] RYAN, J.A.: I agree.
- [6] HUDDART, J.A.: I agree.
- [7] HOLLINRAKE, J.A.: The review is dismissed. "The Honourable Mr. Justice Hollinrake"

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