

CANADA / JUDGMENT

Mathias v. Squamish Nation

2022 BCSC 1443

COURT

Supreme Court of British Columbia

DECIDED

19 August 2022

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2022 BCSC 1443 Mathias v. Squamish Nation IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Mathias v. Squamish Nation, 2022 BCSC 1443 Date: 20220819 Docket: S215000 Registry:

Vancouver Between: Chief Donald Mathias, acting on his own behalf and on behalf of all

members of the Capilano Indian Nation and Band Petitioner And Squamish Nation, Her Majesty the Queen in right of Canada, the Minister of Indigenous Services and the Minister of Finance

Respondents Before: The Honourable Madam Justice Forth Reasons for Judgment (Via

Videoconference) Counsel for the Petitioner: A. Rogerson Counsel for the Respondent, Squamish

Nation: R. Janes, Q.C. J. Harman Counsel for the Respondents, Her Majesty the Queen in right of

Canada, the Minister of Indigenous Services and the Minister of Finance: J. Ingram Place and

Date of Hearing: Vancouver, B.C. May 18, 2022 Place and Date of Judgment: Vancouver, B.C.

August 19, 2022 Table of Contents Introduction.. 3 Issue 1: Should an Injunction Be Granted?. 5

Nature of Injunctive Relief Sought 5 Legal Principles. 5 Position of the Parties. 7 Position of the

Petitioner 7 Position of Squamish Nation. 8 Position of Canada. 9 Relevant Facts. 9 Analysis. 10

Serious Issue to be Tried. 10 Irreparable Harm.. 11 Balance of Convenience. 11 Issue 2:

Application respecting Additional Affidavits. 12 Relevant Background. 12 Legal Principles. 13

Position of the Parties. 14 Position of Squamish Nation and Canada. 14 Position of the Petitioner

14 Analysis. 15 Conclusion.. 16

Introduction

[1] On July 23, 1923, a collection of Chiefs in Vancouver and the surrounding area formally petitioned the Department of Indian Affairs, as it was then known, to amalgamate under one Band, which would be known as the Squamish Nation. The Chief of the Capilano Group at the time, Chief Mathias Joe, was one of the signatories to the petition. On July 31, 1923, the Deputy Superintendent of Indian Affairs approved the request (the "Amalgamation").

[2] The petitioner, as the purported Hereditary Chief of the Capilano Indian Nation and Band (the "Capilano Band"), filed a petition on May 21, 2021, seeking to have the Squamish Nation de-amalgamated and for an accounting of funds received by the Squamish Nation since July 23, 1923.

[3] In the petition, the petitioner sought the following relief:

1. an order of the Court for the cancellation of the Amalgamation;
 2. a declaration that the Capilano Indian Nation is a Nation separate and apart from the Squamish Nation;
 3. an order by way of mandamus directing Her Majesty the Queen in right of Canada to cancel the Amalgamation and to establish the original relationship of the petitioner and Her Majesty the Queen in right of Canada that existed as of July 22, 1923;
 4. an accounting by the Squamish Nation of funds mandated by the Amalgamation; and
 5. the appointment of a receiver to supervise the accounts of the Squamish Nation.
- [4] On September 28, 2021, the Court issued reasons in *Mathias v. Squamish Nation*, 2021 BCSC 1884 in respect to an application by one of the respondents, Squamish Nation, arguing that the Federal Court had exclusive original jurisdiction to determine issues relating to the cancellation of the Amalgamation. Justice Ahmad declined to strike the relief, however, on the basis that the respondent, Her Majesty the Queen in right of Canada, the Minister of Indigenous Services, and the Minister of Finance, (collectively, "Canada"), had not properly contested jurisdiction. The issues relating to the claims against the Squamish Nation for an accounting and redistribution of the funds were found to be within the jurisdiction of this Court. The Squamish Nation has appealed this decision.
- [5] On January 10, 2022, Canada applied to strike the petition relief for lack of jurisdiction. Justice Fitzpatrick granted the application, see reasons indexed at 2022 BCSC 116, striking the petition relief relating to the Amalgamation, specifically paragraphs 1-3 of the petition. The petitioner has appealed these reasons.
- [6] The appeals are scheduled to be heard during the fall session. At the time of the hearing no appeal date had been set.
- [7] On January 5, 2022, the petitioner filed an application for injunctive relief on short notice, asking for it to be heard at the scheduled hearing for Canada's application to strike the petition relief.
- [8] On January 10, 2022, Justice Fitzpatrick adjourned the injunction application to January 19, 2022. It was then ordered reset for a special sitting on February 23, 2022. It was re-scheduled to May 18, 2022, before me (the "Hearing").
- [9] On May 11, 2022, the Squamish Nation filed an application seeking an order that affidavits filed by the petitioner after the initial date set for the injunction hearing date of January 10, 2022, (the "Additional Affidavits") be deemed inadmissible at the Hearing, since their service violated Rule 8-1(14) of the Supreme Court Civil Rules [Rules].

- [10] For the following reasons, I found that no injunction should be granted. I note that the Additional Affidavits filed by the petitioner do not assist the petitioner on the facts I have found. I will separately address at the end of these Reasons the application of the Squamish Nation respecting the Additional Affidavits. Issue 1: Should an Injunction Be Granted?
Nature of Injunctive Relief Sought
- [11] The petitioner seeks the following relief at the Hearing:
- a) an order for an interlocutory injunction to prevent the respondents or their servants from continuing to develop the Burrard Inlet Rapid Transit ("BIRT") project pending review of that project with consultation with the petitioner to determine if the project should proceed; and
 - b) an order obviating the necessity to file an undertaking in respect to damages due to the impecuniosity of the petitioner.
- [12] The respondents oppose the granting of the injunctive relief. Legal Principles
- [13] As an overarching principle, an injunction is an extraordinary remedy: *Vancouver Coastal Health Authority v. Adamson*, 2020 BCCA 145 at para. 31. In an application for interim injunctive relief, the court must consider the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385. The three factors to be considered are:
1. whether the petitioner has presented a serious issue or question to be tried;
 2. whether the petitioner would suffer irreparable harm if the injunction were refused; and
 3. whether the balance of convenience favours granting the injunction. *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 12 [Canadian Broadcasting]; *RJR-MacDonald* at 334-35.
- [14] The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 at 346, [1987] 2 W.W.R. 331 (C.A.), *aff'd* [1991] 1 S.C.R. 62, [1991] 2 W.W.R. 568; *Garcha Bros Meat Shop Ltd. v. Singh*, 2022 BCCA 36 at para. 116.
- [15] A "serious question to be tried" requires the chambers judge to undertake a preliminary investigation of the merits to determine that the application is neither frivolous nor vexatious: *Canadian Broadcasting* at para. 12.
- [16] A finding of "irreparable harm" requires a demonstration that damages would be an inadequate remedy. It requires a solid evidentiary foundation beyond mere speculation: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 60 [Vancouver Aquarium].
- [17] Factors relevant to determining the balance of convenience are numerous and will vary from case to case. The following list is often considered: · the adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if an

injunction is granted; · the likelihood that if damages are finally awarded they will be paid; · the preservation of contested property; · other factors affecting whether harm from granting or refusal of the injunction would be irreparable; · which of the parties has acted to alter the balance of their relationship and so affect the status quo; · the strength of the applicant's case; · any factors affecting the public interest; and · any other factors affecting the balance of justice and convenience. 526901 B.C. Ltd. v. Dairy Queen Canada Inc., 2018 BCSC 1092 at para. 29 [Dairy Queen].

- [18] The applicant's undertaking regarding damages is a foundational requirement for any interlocutory injunction. Without an undertaking, an injunction should not be issued unless the court has formally relieved the applicant of the required undertaking: Premium Weatherstripping Inc. v. Ghassemi, 2016 BCCA 20 at para. 9.
- [19] The injunction test is a flexible one and the ultimate focus must be on the justice and equity of the situation at issue: Vancouver Aquarium at para. 38; Dairy Queen at para. 13. Position of the Parties Position of the Petitioner
- [20] The petitioner claims that over the winter holiday season of 2021, there was work carried out on the Capilano Band's land whereby "the historic Capilano village [was] flattened by huge earthmovers".
- [21] Chief Mathias claims that he became aware that the BIRT link would desecrate the remaining land and the cultural, spiritual, and traditional practices of the Capilano Band. In support of this statement, Chief Mathias attached a brochure from the Project Working Group, which includes the Squamish Nation, respecting the BIRT Benefits Assessment (the "Brochure").
- [22] The traditional lands of the Capilano Band are located to the west of the Lions Gate Bridge on the North Shore referred to as Indian Reserve Land #5 ("Capilano IR #5").
- [23] During submissions, counsel for the petitioner suggested that the picture on the first page of the Brochure showed the traditional lands that the Capilano Band occupied in their longhouses. In reality, the bridge depicted on the first page of the Brochure is not the Lions Gate Bridge but the Ironworkers Memorial Bridge. As such, the traditional lands of the Capilano Band are not depicted.
- [24] The petitioner claims that the Brochure supports that there will be damage to the Capilano Band's land since the proposed lines, marked in purple and gold, will impact the traditional lands and render them unusable. The petitioner submits that the proposed transit link will go across the Lions Gate Bridge.
- [25] The petitioner further submits that the interlocutory injunction should be granted to preserve the status quo and promote reconciliation by ceasing development of the BIRT project and preventing further destruction, pending a complete review of the project and consultation with the Hereditary Chief of the Capilano Band.

- [26] The petitioner in reply submissions made an alternative submission that an injunction should be granted that requires the federal government, Squamish Nation, and their current leadership to consult with the Capilano Band on any matters pertaining to mass transit and curatorship until the appeals are heard by the Court of Appeal. Position of Squamish Nation
- [27] The Squamish Nation argues that under the RJR MacDonald test there is no serious issue to be tried, no irreparable harm, and the balance of convenience favours a denial of the injunction.
- [28] The Squamish Nation submits that the BIRT project has not been approved, is not being built, and the proposed path of the BIRT will not pass through Capilano IR# 5, which is the area that the petitioner claims includes the traditional lands of the Capilano Band. The proposed path for the BIRT is for it to run north of Capilano IR #5 to the Ironworkers Memorial Bridge and cross over to the south side of the Burrard Inlet.
- [29] The Squamish Nation asserts that the work that is being carried out on Capilano IR #5 is being carried out by Environment and Climate Change Canada ("ECCC") on a 55 acre parcel that Canada leased on April 11, 1974 to Public Works Lands Company Limited (presently Canada Lands Company Limited) for the purpose of a proposed Pacific Environment Centre. Since at least 1977, there has been ongoing remediation of the site to remove contaminated soil. This work has nothing to do with the Squamish Nation. There is no injunction sought to enjoin this work.
- [30] The Squamish Nation argues that the only injunction the petitioner is seeking is one to enjoin work relating to the BIRT and not work relating to the proposed Pacific Environment Centre. Further, Chief Mathias has not claimed an injunction of any kind in the petition and has not pleaded any facts in support of an injunction.
- [31] Squamish Nation seeks the dismissal of the injunction with costs. Position of Canada
- [32] Canada argues that no injunction should be granted since there is no federal involvement in the BIRT project. The work being done on Capilano IR #5 is being done to remediate the land to remove contaminated soil; it is then backfilled with clean materials for the Pacific Environment Centre. It has nothing to do with the BIRT project.
- [33] Canada seeks the dismissal of the application for the injunction but does not seek costs.
- Relevant Facts
- [34] Based on the evidence before me on this application I find the following facts.
- [35] The work that the petitioner says he witnessed during the winter holiday season of 2021 was work being carried out on Capilano IR #5 by an entity currently known as Canada Lands Company Limited for the purpose of developing a proposed Pacific Environment Centre. The work had nothing to do with the proposed BIRT project but was work being carried out to remove contaminated soil in order to replace it with imported clean backfill. The Squamish Nation is not involved in that work. The work is being carried out under a lease

that was entered into on April 11, 1974.

- [36] The proposed route of the BIRT is not to go through Capilano IR #5. The plan is for it to cross the Ironworkers Memorial Bridge and not the Lions Gate Bridge.
- [37] The BIRT is in the project exploratory phase as stated in the Brochure: In reference to the TransLink Business Case Lifecycle, BIRT is in the project exploratory phase in advance of the formal business case lifecycle process. As BIRT advances towards confirmation within Transport 2050 and the Mayor's Council Investment Plan, it has not officially entered the stage-gating process outlined in Figure 6-1. BIRT has set itself up for success through significant pre-planning work previously undertaken. Once formally accepted into the business case lifecycle process, project partners will have significant information and project history to expedite the process and efficiently make informed decisions and land on a preferred BIRT alternative to further develop. In advance of determining the best solution for technology and alignment, it is recommended that the PWG proceed liaising with regional partners and senior levels of government to further progress BIRT project planning.
- [38] The Brochure indicates that the BIRT has not yet entered the first stage as outlined in Figure 6-1, the strategic planning stage.

Analysis

- [39] I note that the RJR-Macdonald factors are not a checklist or a series of hurdles. Rather, these factors guide the consideration of whether an injunction would be fair and just in all the circumstances: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at para. 19. Serious Issue to be Tried
- [40] I will turn to the first factor of whether there is a serious issue to be tried. There is no connection between the injunction sought in the petitioner's application and the petition. Although the serious issue test is a low hurdle, it still requires the applicant to show not only that the underlying case has some merit, but also that the injunction is in service of the claim. The petition, as it remains today, does not relate to the BIRT. It only claims an accounting for funds historically paid to the Squamish Nation. There is no link between the injunction sought and the cause of action that presently exists in the petition: *SusGlobal Energy Corp. v. Hamaliuk*, 2021 ONSC 7199 at paras. 27-31.
- [41] In addition, the injunction sought is to enjoin the Squamish Nation and Canada from continuing to develop the BIRT project. Yet, the BIRT is not in development stages. It has not been adopted, the final route has not been selected, it has not received regulatory approval, and it remains only a possible future transit project in its exploratory phase.

- [42] Further, the only evidence before me is that the potential future route of the BIRT will not impact the Capilano IR #5. Rather, it is planned to potentially cross the Ironworkers Memorial Bridge at the second narrows crossing. The evidence does not support that this potential future route will have any impact on Capilano IR #5.
- [43] There was no evidence before me that the work that the petitioner complains of has anything to do with the BIRT. The only evidence I have is that the work being performed is to remediate contaminated soil for the purposes of constructing a Pacific Environment Centre.
- [44] Lastly, neither Canada nor the Squamish Nation are in control of the future development of BIRT. There is no federal involvement in the BIRT at this time.
- [45] Therefore, I find that the applicant has failed to satisfy this prong of the three-part test. Irreparable Harm
- [46] The evidence before me supports that the BIRT is at the exploratory stage and construction has not officially started. There has been no work planned, approved, or undertaken that has the potential to harm the applicant. I am not persuaded that the applicant has demonstrated any irreparable harm if the BIRT is not enjoined. As referenced above, there is no evidence that the future proposed route will even impact the Capilano IR #5. Balance of Convenience
- [47] I am persuaded that the balance of convenience favours that the BIRT project should not be enjoined. On the evidence before me, there is little likelihood of any harm to property caused by the BIRT, in particular to the Capilano IR #5. There is no strength in the applicant's case since the applicant led no evidence to support the allegations made. Therefore, there is no reason to disturb the status quo.
- [48] Further, I specifically reject that it is appropriate for the petitioner to change the nature of the interlocutory relief sought during the Hearing to a mandatory injunction requiring the federal government and the Squamish Nation to consult with the Capilano Band on any matters pertaining to mass transit and curatorship of Capilano IR #5. When an applicant brings an injunction, he has a positive obligation to provide notice of the nature of the interlocutory injunction he is seeking so that the opposing parties can prepare the proper response materials.
- [49] I find that the petitioner has failed to establish any of the factors in support of an interlocutory injunction and as such, the application is dismissed with no costs payable to Canada.
- [50] The Squamish Nation sought costs. In light of the limited time afforded at the Hearing to the petitioner to reply to the issue of costs I am not prepared to make a costs order without providing further opportunity for the parties to address this issue. If the Squamish Nation seeks an award of costs, I make the following schedule:

1. The Squamish Nation is to provide written submissions seeking costs, to the Court and the petitioner, within 30 days of these reasons being pronounced;
 2. The petitioner will have 15 days from the date of service of the costs submissions to provide written submissions responding to the costs submissions, to the Court and to the Squamish Nation;
 3. The Squamish Nation will have seven (7) days from the date of service of the petitioner's submissions to provide any reply submissions to the Court and the petitioner; and
 4. Since Canada advised that no costs are being sought, no written submissions are required from it. Issue 2: Application respecting Additional Affidavits Relevant Background
- [51] At the time the injunction application was filed on January 5, 2022, it listed the following affidavits: · The affidavits of Chief Mathias filed with the original petition, being Affidavit #1 of Chief Mathias made May 20, 2021; · Affidavit #3 of Chief Mathias made December 7, 2021; and · Statement of Elder Wayne Charles Baker dated November 11, 2021.
- [52] On the date of the scheduled hearing of the injunction application the petitioner also relied on a further affidavit #2 of Chief Mathias sworn on January 6, 2022. I note the affidavit numbers are confusing since Affidavit #3 should have been Affidavit #2 based on date chronology.
- [53] The affidavits that were served by the petitioner after January 10, 2022 consisted of the following: · Affidavit #4 of Chief Mathias made January 13, 2022; · Affidavit #1 of Wayne Charles Baker made January 24, 2022; · Affidavit #1 of Yvonne Wyss made January 14, 2022; · Affidavit #2 of Yvonne Wyss made March 23, 2022; · Affidavit #1 of Dale Harry made on March 24, 2022; and · Affidavit #5 of Donald Mathias made March 25, 2022 (collectively, the "Additional Affidavits"). Legal Principles
- [54] Rule 8-1 of the Rules governs how to bring and respond to applications. Rule 8-1(4)(d) requires the applicant to "list the affidavits and other documents on which the applicant intends to rely at the hearing of the application". Rule 8-1(7) requires the applicant to serve "a copy of each of the filed affidavits and documents, referred to in the notice of application under subrule (4)(d), that has not already been served on that person" and Rule 8-1(8) requires the applicant to serve the affidavits and documents "at least 8 business days before the date set for hearing of the application".
- [55] Rule 8-1(13) provides for reply affidavits but only those that are served "on the business day that is one full business day before the date set for the hearing".
- [56] Rule 8-1(14) provides that "[u]nless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (7), (9) and (13)". Position of the Parties Position of Squamish Nation and Canada

- [57] The Squamish Nation submits that the petitioner should be precluded from relying on any evidence filed after the initial hearing date for the injunction application, being January 10, 2022. It argues that to allow the additional affidavits would be contrary to the evidentiary rules against case-splitting and repairing one's case and would be a violation of the Rules requiring service.
- [58] Canada supports the application to strike the Additional Affidavits, relying on the proposition that the respondents are entitled to know the case they have to meet and the petitioner should be precluded from relying on additional materials. Position of the Petitioner
- [59] The petitioner submits that the Court should be more interested in dealing with the issues. The petitioner submits that the injunction application was not adjourned and since nothing took place it was an application that was not heard. The petitioner submits that the respondents are not prejudiced since they have had between four and five months to consider the evidence contained in some of the Additional Affidavits. They have had at least seven weeks since the service of the affidavits made in March 2022.
- [60] The petitioner argues that the issue respecting whether the signatures on the petition for amalgamation have been forged is one that the chambers judge should be aware of.
- [61] The petitioner submits that the Additional Affidavits should not be deemed inadmissible. Rather, the Court should review the affidavits, regardless of the strict application of the Rules, and attach whatever weight to the affidavits the Court deems appropriate.
- [62] The petitioner argues that, in any event, most of the Additional Affidavits are captured by Rule 8-1(13) in that they are reply affidavits and, if not, that the Court should apply Rule 22-7(1) and treat the failure to serve properly as an irregularity rather than a nullity.

Analysis

- [63] I have reviewed each of the Additional Affidavits. I agree that some of these affidavits could properly be described as reply affidavits, however, others are not. It is clear that the petitioner did not comply with the Rules regarding service of affidavits in support of the injunction application. The affidavits should have been served eight business days before the date set for the hearing of the application. The date set for the hearing of the application was January 10, 2022. Any reply affidavits had to be served one day before the date set for the hearing, so by January 9, 2022.
- [64] Of significance is that most of the Additional Affidavits do not address any issues relating to the injunction application before me. The Additional Affidavits do not address any of the factors set out in *RJR-MacDonald* and are irrelevant to the application of the petitioner for the interlocutory injunction. In affidavit #4 of Chief Mathias he does comment on how the bulldozers have irreparably altered the traditional lands of his people. That same information is contained in his affidavit #2 which further attaches photographs. I am not

persuaded that it would be in the interest of justice to permit the Additional Affidavits to be part of this injunction application. As such, I hold they are inadmissible.

- [65] I do point out that the petitioner has not suffered any prejudice in having the Additional Affidavits declared inadmissible since the content of the Additional Affidavits does not assist in supporting the petitioner's claim for an interlocutory injunction.
- [66] The application to declare the Additional Affidavits inadmissible at the interlocutory injunction application is granted with costs to the Squamish Nation. Canada did not seek costs and as such, no costs are awarded to Canada.

Conclusion

- [67] The four large application record binders will be returned to the registry for pick-up by the petitioner. The application record binders will be available for pick-up for three days after the release of these reasons. If the binders are not picked up the contents will be shredded. "Forth J."

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