
CANADA / JUDGMENT

Okanagan Indian Band v. Johnston

2020 BCSC 1749

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Supreme Court of British Columbia

DECIDED

14 October 2020

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2020 BCSC 1749 Okanagan Indian Band v. Johnston

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Okanagan Indian Band v. Johnston,

2020 BCSC 1749

Date: 20201014

Docket: S125027

Registry: Kelowna

Between:

Okanagan Indian Band

Plaintiff

And:

Marilyn Johnston

Defendant

Before: The Honourable Madam Justice Watchuk

Oral Reasons for Judgment

Counsel for the Plaintiff:

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Justin Dalton

Place and Dates of Hearing:

Kelowna, B.C.

October 7-8, 2020

Place and Date of Judgment:

Kelowna, B.C.

October 14, 2020

I. INTRODUCTION

- [1] This matter arises from the residence of the defendant, Marilyn Johnston, on the reserve of the plaintiff, the Okanagan Indian Band (the "OKIB" or the "Band"). Ms. Johnston, who was a former member of the OKIB but is not a present member, was bequeathed property on the reserve from her aunt who died in 2013. Section 50 of the Indian Act, R.S.C., 1985, c. I-5, thus prevents Ms. Johnston from inheriting her aunt's property. The OKIB says that she must therefore vacate the property and Okanagan Reserve No. 1 ("the Reserve"). Ms. Johnston applied to the Band in 2002 for the transfer of her membership back to the OKIB, and has been taking steps since then to reinstate her membership in the OKIB.
- [2] There are two applications before the Court. The OKIB applies by way of summary trial pursuant to Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg 168/2009 for the following relief:
- (a) a declaration that the plaintiff is the beneficial owner of the Lots (described below) pending their sale pursuant to s. 50 of the Indian Act;
 - (b) a declaration that the defendant, Marilyn Johnston, is trespassing on the reserve lands of the plaintiff;
 - (c) an injunction to restrain the defendant from entering or occupying the Lots;
 - (d) an order of vacant possession of the Lots located on the reserve lands of the plaintiff;
 - (e) a writ of possession in favour of the plaintiff;
 - (f) costs of this application payable forthwith; and,
 - (g) such further and other relief as this Honourable Court deems just.

These remedies are most, but not all, of those that the OKIB seeks in its Notice of Civil Claim.

- [3] The defendant seeks an order that proceedings be stayed pending:

- (a) the disposition of the defendant's protest to the Protest Unit of Indigenous Services Canada ("ISC") pursuant to the plaintiff's Band Membership Transfer Policy and s. 14.2(1) of the Indian Act; and
 - (b) any subsequent appeal commenced by the defendant in the British Columbia Supreme Court; or
 - (c) any subsequent judicial review commenced by the defendant in the British Columbia Supreme Court or Federal Court.
- [4] In oral submissions, the defendant sought a stay of two years.
- [5] The defendant submits that the Court has jurisdiction to grant a stay of proceedings under s. 8(2) of the Law and Equity Act, R.S.B.C. 1996, c. 253, which states:
- (2) Nothing in this Act disables the court from directing a stay of proceedings in a cause or matter pending before it, if it thinks fit.
- [6] At the hearing, both applications were argued in full so that all of the relevant facts, case law and submissions would be put before the Court. All have been considered, although not all will be set out or repeated in these Reasons.

II. Facts

- [7] Ms. Johnston, the defendant, is a registered Indian of the Nak'azdli Whut'en Indian Band in Fort St. James, B.C. Prior to becoming a member of the Nak'azdli Whut'en Indian Band, she was a member of the OKIB. She is 70 years of age.
- [8] The plaintiff, the OKIB, is a band within the meaning of the Indian Act. The OKIB is the beneficiary of six reserves set aside for its use and benefit by the federal Crown pursuant to s. 18 of the Indian Act. Okanagan Reserve No. 1 is one of the reserves set aside for the OKIB.
- [9] The defendant transferred her band membership from the OKIB in 1988 to enhance her credibility and trust with the community members she worked with in the victim services program in Fort St. James. She had moved to that area in approximately 1976 and worked there in the social service sector.
- [10] It was always the defendant's intention to return from the Nak'azdli Whut'en Indian Band to the OKIB. In 2002, the defendant contacted the OKIB to transfer her membership back to the OKIB.
- [11] In 2009, the defendant moved from Fort St. James to live with her aunt, Rhoda Simla, on Ms. Simla's farm on the Reserve.

- [12] The defendant has extensive ties to the Reserve. Her father and siblings are all OKIB members. In her childhood, her mother was unable and unwilling to raise her, her mother's sister and husband, Rhoda and Raymond Simla, along with the defendant's maternal grandfather, raised her as a daughter to them on the OKIB Reserve. She attended school in Vernon and spent weekends and holidays on the Simla farm.
- [13] When the defendant first contacted the OKIB in 2002 to transfer her membership, she was advised that the OKIB was in the process of adopting a new band membership transfer policy. When there were 20 applicants, the Band said that it would process her application and she would be registered as a member. Her letters dated August 19, 2002 and July 20, 2003, along with her cheque dated February 4, 2003 for payment of the \$50 membership transfer fee, were filed in evidence. The materials include further letters that the defendant sent to the OKIB in 2009 requesting that her membership transfer be dealt with and expressing her understanding that there were now more than 20 applicants.
- [14] In 2011, the defendant was advised that there was a new membership policy and asked to resubmit her application with all documents on the checklist and the \$50 fee. Internal band correspondence dated June 23, 2011 and disclosed to the defendant in these proceedings indicates that all required documents had been provided by the defendant. An internal band memo dated January 13, 2012 states that the defendant "has fulfilled all the requirements to apply for transfer to" the OKIB. It resolves that the defendant "has been accepted into the membership" of the OKIB.
- [15] However, as the transfer was not processed, later in 2012 the defendant wrote to Aboriginal Affairs and Northern Development Canada ("AANDC") to request assistance with the refusal of the OKIB to consider her application to transfer back.
- [16] On November 13, 2013, the defendant's aunt, Ms. Simla, died. The defendant was named in Ms. Simla's Will as the sole beneficiary. The assets of the estate included the following interests in land on the OKIB Reserve No. 1:
- Lot 144-1 Block 4 CLSR 80912 (the whole interest);
- Lot 9 Block B Fry Sketch 319-36 Parcel 2 No Plan (the whole interest);
- Lot 10 Block 4 Rem RSBC 551 (an undivided 1/2 interest);
- and Lot 10 Block B Fry Sketch 319-36 No Plan (the whole interest).
- (the "Lands").
- [17] The defendant lives with her daughter and grandson on the Lots, which are the parcels of the Lands described as Lot 9, and Lot 10 Block B Fry Sketch above. She lives in a two-bedroom home with her grandson and her daughter lives in a trailer. They have five horses which they feed with hay grown on the Lots, which comprise 60 acres.

- [18] In order for the defendant to inherit the Lands, she must be a member of the OKIB pursuant to s. 50 of the Indian Act. There is an issue between the parties as to whether the membership requirement in s. 50 should be interpreted as being a member of the band at the date of the testator's death, or whether it is retrospective and can be cured by membership granted after the date of death of the testator.
- [19] The usual process under s. 50(2) of the Indian Act where a beneficiary is unable to inherit the lands is for the lands to be sold to a band member and the proceeds of the sale provided to the beneficiary. Should the lands not sell, the lands would revert to the OKIB pursuant to s. 50(3).
- [20] The defendant was advised by AANDC in August 2015 that the other parcels of the Lands had been sold. She was provided with the proceeds of sale.
- [21] The OKIB has since engaged surveyors to attend at the Lots to conduct a survey. The defendant has prevented the surveyors from conducting surveys by demanding that the surveyors leave the Lots. On September 27, 2016, a member of the Band present with the surveyors alleged that the defendant had threatened to get her gun if they did not leave. The defendant denies this allegation, as discussed below, and states that she does not own a firearm.
- [22] In February 2017, the defendant wrote to the AANDC registry department and requested that they intervene in her membership transfer application. She also wrote letters to AANDC and to the OKIB dated May 18, 2017 requesting that her application be processed and the transfer granted.
- [23] The defendant also wrote to Indigenous Services Canada ("ISC") to inform that she had applied to have her band membership transferred but that no decision had been made. On April 16, 2018, ISC notified the OKIB and Ms. Johnston that the s. 50 sale of the Lots would be postponed to allow the defendant's application to be processed.
- [24] On April 16, 2018 and May 7, 2018, the OKIB then advised the defendant that documentation she had provided was incomplete. She had provided a letter from the Nak'azdli Whut'en Indian Band indicating she did not hold any property on that reserve. The OKIB indicated that a letter from the band office was not sufficient as it needed to be signed by the Chief. Ms. Johnston immediately made attempts to get the documentation that the OKIB requested, but there were delays due to forest fires in the area of the Nak'azdli Whut'en Indian Band reserves, which resulted in evacuations.
- [25] On July 30, 2018, the OKIB issued a band council resolution denying the defendant's application on the basis that she failed to provide the information requested. OKIB notified ISC that they should proceed with the s. 50 sale.
- [26] On January 7, 2019, the OKIB reconsidered the defendant's application. After reconsideration, the OKIB denied the defendant's application for membership on the basis that she displayed aggressive and threatening behaviour to the OKIB staff and guests and

that she would not make a positive contribution to the community. Documents provided to the defendant indicate that those two incidents of alleged threats occurred prior to July 30, 2018, the date of the first denial of membership: in September 2016 as discussed above regarding the surveyors; and on May 28, 2018, when she was allegedly aggressive and rude in the Band Office. The defendant says she did not commit the behaviour or acts alleged and that there is no reasonable basis to deny her membership. The defendant states that she did not threaten to harm the OKIB staff or guests with physical violence or at all. She says that she does not own or possess a firearm as alleged.

[27] On September 17, 2019, the plaintiff filed a Notice of Civil Claim seeking remedies which include those sought on this Rule 9-7 application and other remedies. These other remedies include a declaration that the OKIB, as beneficial owner of the Lots, is entitled to all the rents, both actual and potential, in respect of the Lots since the death of Rhoda Simla; damages arising from trespass and conversion; and, an order enjoining the defendant from entering the Reserve and the Lots.

[28] The defendant appealed the OKIB Band Council decision to deny her membership with a formal application to the Protest Unit of ISC pursuant to the OKIB's Band Membership Transfer Policy and s. 14.2(1) of the Indian Act (the "Protest").

[29] The right of appeal arises from s. 4.10 of the OKIB's Band Membership Transfer Policy, which provides:

Any Applicant wishing to appeal a decision of Chief and Council under this Policy may submit a protest to the Indian Land Registrar under Section 14.2(1) of the Indian Act.

[30] The Protest was sent on January 14, 2020 by registered mail and accepted on January 17, 2020. Follow up letters to the Protest Unit were sent on May 5, 2020, and June 18, 2020. In addition, on June 18, 2020 by letter to the Minister of ISC, the assistance of the Minister was sought with regard to the failure to receive a response to the Protest.

[31] The defendant has not yet received a reply to the Protest or to any letter.

[32] The basis for the Protest is that the decision to deny the transfer of membership to the OKIB was made without proper consultation and was significantly delayed. The defendant has also expressed concerns with respect to the potential bias in the decision-making process. Additionally, the defendant says that she was not provided the opportunity to dispute the allegations of inappropriate behavior.

[33] On August 4, 2020, the plaintiff filed this Notice of Application. On August 17, 2020, the defendant filed her application seeking a stay of proceedings to permit the membership process to complete, by way of appeal if necessary.

[34] As the defendant has not received a notice of the outcome of the Protest, she is considering filing an application for Judicial Review in the Federal Court on the basis of the failure to respond.

[35] If the defendant's Protest is unsuccessful, she intends to appeal that decision to the British Columbia Supreme Court pursuant to s. 14.3 of the Indian Act. Following the exhaustion of the appeal process outlined in the OKIB's membership transfer policy, the defendant intends to file a judicial review.

III. POSITIONS OF THE PARTIES

[36] The OKIB submits that its application should be granted. It states in part:

Ms. Simla bequeathed the Lots to an ineligible recipient and as a result the Lots must be sold as provided under s. 50 of the Indian Act (the "Section 50 Sale") with the proceeds to Ms. Simla's beneficiaries.

Ms. Johnston's continued presence on the Lots has interfered with the Section 50 Sale of the Property by, inter alia: Ms. Johnston's refusal to vacate the Property; and, Ms. Johnston's refusal to allow access to the Property and its boundaries by surveyors including by threat of violence.

Ms. Johnston's interference with the surveyors not only affects the proper identification of the boundaries of the Lots for the Section 50 Sale but also those of the neighbouring parcels of land belonging to OKIB.

As a result of Ms. Johnston's unlawful occupation of the Lots and continued trespass on the Reserve Lands, the Section 50 Sale has not occurred, to the detriment of the members of OKIB and the beneficiaries of the estate of Ms. Simla. Further, OKIB's ability to protect and preserve the Lots pending a s. 50 sale has been impacted.

[37] Section 50 of the Indian Act states:

Non-resident of reserve

50(1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

Sale by superintendent

(2) Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.

Unsold lands revert to band

- (3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation of land is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

Approval required

- (4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.
- [38] The plaintiff further submits that the defendant has not met the test for the granting of a stay. Therefore, it says that the stay application ought to be dismissed and the summary trial application, especially regarding the declaration of ownership and trespass, granted.
- [39] The defendant submits that the matter is not suitable for hearing by way of a summary trial. Further, fairness dictates that she be entitled to pursue any appeal or judicial review of the decision to deny her membership transfer by the OKIB, and that the OKIB should not be entitled to an order of vacant possession for the Lots which she would have rightfully inherited had the membership transfer application been considered in a timely and fair manner.
- [40] Further, the defendant says that the hearing of this summary trial application is premature. This is not an application for this action to be stayed generally and indefinitely but an application for a temporary stay of proceedings. Therefore, a grant of stay of proceedings will not bar the plaintiff, the OKIB, from pursuing judgment on the merits in due course.

IV. DISCUSSION

- [41] Given the nature of the two applications before the Court, it is, in my view, necessary to first consider the issue of the stay of proceedings sought by the defendant. If that application is not successful, I will consider the plaintiff's application for relief.
- [42] It is not in issue that the Court has inherent jurisdiction to grant a temporary stay in a proceeding before it: Law and Equity Act, s. 8(2).
- [43] The test adopted by our courts regarding the stay of a proceeding is that set out in *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 347-349 [R.J.R.-MacDonald]. It requires that the applicant prove that:

- there is a serious question to be determined;

- irreparable harm would be occasioned to the Applicant if the stay was refused;
- on balance, the inconvenience to the Applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

[44] The first criteria to be addressed is whether there is a serious question to be determined.

The plaintiff first says that the defendant's appeal of the membership decision discloses no meritorious or arguable ground of appeal. Further, it says that there is an insufficient link between the appeal of the membership application and the action brought by the OKIB to justify a stay.

[45] The defendant submits that there is a serious question to be determined. The evidence that the OKIB relies upon to support the orders it seeks is that the defendant is a non-member of the OKIB and has no right to possess the Lots by devise or descent. This evidence is subject to change should the defendant be successful in the related proceedings which pertain to the defendant's membership in the OKIB. This present proceeding will be rendered substantially moot if the defendant is granted membership in the OKIB, as she may then inherit the Lots pursuant to the Indian Act and her aunt, Rhoda Simla's, testamentary intentions.

[46] Further, if the defendant's application for membership transfer to the OKIB is denied after all appeals and reviews are exhausted, she will not be able to inherit the Lots or to remain on the property bequeathed by her aunt. Thus, the plaintiff will have its remedies of vacant possession and a declaration of beneficial ownership of the Lots. The only issues remaining will be financial such as those in which the plaintiff seeks damages for trespass and conversion.

[47] With regard to the issue of the ability to inherit the Lots if membership is granted after the death of the testator, Ms. Simla, the parties disagree. The plaintiff submits that even with membership granted, in order to inherit the Lots, the defendant would have to do two things. First, she would have to establish that, contrary to the plain language of the Indian Act, her membership status obtained after Ms. Simla's death is sufficient to entitle her to possess the Lots by devise or descent. Second, she would have to obtain the approval of the Minister of her legal interest as required by s. 49 of the Indian Act. There are, in other words, more hurdles to surmount even with membership.

[48] The threshold to be met by the defendant on this branch of the test is a low bar. It is not necessary that the applicant establish a strong prima facie case; rather, the issue is whether there is a serious question to be tried. In my view, there is an intrinsic link between the membership application issue and the plaintiff's claims against the defendant. If she is not successful in achieving membership, the primary claims of the plaintiff will be realised as the defendant can no longer reside on the Lots without OKIB membership. In the event that she becomes a member, there will likely be the two hurdles identified by the plaintiff, the retrospectivity of the operation of s. 50, and the permission of the Minister pursuant to s. 49. The first hurdle is a question of law and the second is a matter of Ministerial discretion.

Both put the parties further ahead in the resolution of their dispute, thus rendering at least some of the present proceeding moot.

[49] I am satisfied in the circumstances of this case that the defendant meets the merit criteria, and that the first branch of the R.J.R.-MacDonald test is met.

[50] Turning to the second requirement, the defendant must prove that she will suffer irreparable harm if the stay is not granted. This case involves the potential sale of property, the Lots, which are part of the childhood home of the defendant, as she was raised there on the larger Lands by her aunt in the place of her mother. Now the home of herself, her daughter and grandchild is on the Lots. If the Lots are sold by way of a s. 50 sale, the defendant will receive the proceeds of sale, but she will lose her home. On the whole of the evidence, there is no realistic possibility that if she is ultimately successful with the membership application and in surmounting the two hurdles discussed above, that the Lots would be sold back to her. Nor can the proceeds of sale adequately compensate her for the loss of her family home.

[51] In this regard, I rely on *Dixon v. Morgan*, 2020 BCCA 200, where in similar but less compelling circumstances, Mr. Justice Goepel stated at para. 27:

I find that if the sale is not stayed and the premises are sold prior to the hearing of the appeal, Mr. Morgan would suffer irreparable harm. He would be forced to leave his residence of 4 years to find new accommodation for himself and his family. The sale would render his appeal moot, leaving only in issue the question of how the proceeds of the sale would be divided.

[52] I find that irreparable harm would be occasioned to Ms. Johnston if the stay was refused. The second branch of the test is met by the defendant.

[53] The third branch of the test requires that the defendant establish that on balance, the inconvenience to her if the stay was refused would be greater than the inconvenience to the OKIB if the stay was granted. I must consider in addition to the relative weight of the convenience and inconvenience of the order sought, the paramount measure - the interests of justice.

[54] The position of the Band is set out in para. 46 of their Reply to the defendant's Notice of Application:

On the other hand, if the Applicant is able to maintain possession of the Lots, OKIB will be, for an indefinite period of time:

- a) Denied its ability to effectively administer and control the lands set aside for its use and benefit and to effectively fulfill its duty to manage reserve lands in the interests of the band as a whole;
- b) Denied its ability to deal certainly with its own land to border on the Lots due to the Applicant's refusal to allow surveyor to properly demarcate the legal boundaries;

- c) Denied any revenues or any other benefits of the land belonging to the Band while the Applicant unlawfully occupies the Lots; and
- d) Denied the ability to protect and preserve the Lots while they remain in limbo pending a s. 50 sale or any challenge thereof by the Applicant.

[55] In considering the balance of convenience, it is important to note that the defendant first applied to the Band for a transfer back of her membership in the Band in 2002. The decision denying the application was made in 2019. In the intervening time, Ms. Johnston returned to live with her aunt in 2009, and her aunt died in 2013. Internal band documents indicate that in 2012 there was no impediment to approving the membership application. There were many attempts made by Ms. Johnston to communicate with the Band and further her application throughout the years from 2002 to 2019.

[56] Had the Band completed the process promptly or at least in 2012, the defendant would have been a member of the Band when her aunt died. She would have received the bequest of the Lands for transfer pursuant to s. 50, subject to the Minister's approval. The lack of certainty of the future of the Lots lies at the feet of the Band as a result of their delays.

[57] With respect, I find that the prejudice to the defendant is far greater than that to the Band. On considering the balance of convenience, I would maintain the status quo. The stay will therefore be granted.

[58] The length of the stay is for one year. It is the responsibility of the defendant to take all steps necessary to expedite in any way possible all matters with regard to her application. After the expiry of the stay, if matters remain unresolved, the defendant is at liberty to apply for an extension of the stay. Such application is to be made within one month after the expiry of the one year, and may be made a week prior to the expiry of the one year period.

[59] I agree that the Band should have the survey of the Lots. It is a term of the stay that the defendant will co-operate with the Band and allow surveyors to conduct a survey, including their entry on the Lots, at a pre-arranged time. It is not necessary that any Band members attend on the defendant's property with the surveyors.

[60] The summary trial application of the plaintiff is adjourned, and all matters with regard to Kelowna file number KEL-125027 are stayed for one year.

[61] Costs of this hearing are costs in the cause.

"The Honourable Madam Justice Watchuk"

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Prepared on 26 October 2026 · Esheria