

CANADA / JUDGMENT

Rain Coast Water Corp. v. British Columbia

2010 BCSC 54

COURT

Supreme Court of British Columbia

DECIDED

15 January 2010

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2010 BCSC 54 Rain Coast Water Corp. v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rain Coast Water Corp. v. British Columbia,

2010 BCSC 54

Date: 20100115

Docket: A963919

Registry: Vancouver

Between:

Rain Coast Water Corp.

Plaintiff

And

Her Majesty the Queen in Right of the Province of British Columbia,

Bill Vander Zalm, Elwood Veitch (Estate of), David Parker, Richard Roberts

(a.k.a. Dick Roberts), Cliff Serwa, Richard Dalon, Margaret Annett, and

W.C.W. Western Canada Water Enterprises Inc. (a.k.a. Western Canada Beverage Corporation)

Defendants

Before: The Honourable Mr. Justice Leask

Reasons for Judgment

Appearing on behalf of the Plaintiff:

C. Beach

Counsel for the Defendants:

W. Pearce

Written submissions received:

December 21, 2009

Place and Date of Judgment:

Vancouver, B.C.

January 15, 2010

INTRODUCTION

- [1] The plaintiff seeks an order under Rules 18A(8)(b) and 18A(11)(a), that the application of the defendants under Rule 18A be dismissed, except for one issue regarding the validity of the cancellation of their foreshore licence. In the alternative, the plaintiff seeks an order under Rule 18A(10)(b) that certain affiants attend for cross-examination upon their affidavits.
- [2] The defendant opposes the application and submits that the issues raised by this case are suitable for disposition under Rule 18A.

BACKGROUND

- [3] The plaintiff company ("Aquasource") was engaged in the business of trading and dealing in fresh water from sources in British Columbia. The company is now called Rain Coast Water Corp., but has gone by the names Coast Mountain Aquasource Ltd. and Aquasource Ltd. Colin Beach is the president, director and founder of Aquasource, and is representing Aquasource in this action.
- [4] In 1983, Aquasource proposed to withdraw water from Freil Lake, British Columbia, to further its plans to export fresh water to foreign countries. The plaintiff was actively negotiating to sell water to purchasers in California. In 1985, the Crown issued a foreshore licence to the plaintiff permitting it to occupy foreshore lands on Hotham Sound for the purpose of transmitting water in bulk from Freil Lake to marine transport vessels for commercial shipment. In 1986, the Crown issued a water licence to the plaintiff to extract 1,125 acre feet of water per year from Freil Lake.
- [5] Under the Water Act, R.S.B.C. 1979, c. 479, rental fees had to be paid on the amount of water that was reserved for a licensee, whether the amount allotted in the licence was actually used or not.
- [6] On March 28, 1985, by Order in Council No. 630, the Crown established a tariff of rates for application fees and water rentals under the Water Act.

- [7] One of the plaintiff's main complaints regards a contract received by a competitor, Western Canada Water ("WCW"), to extract water from Link Lake, British Columbia. Link Lake is located in front of the small town of Ocean Falls. Ocean Falls was originally a pulp mill town owned by a forestry company. In 1975, as the pulp mill was verging on being closed, the provincial government purchased the entire town and set up the Ocean Falls Corporation ("OFC").
- [8] Link Lake water was licenced to the OFC for the purpose of bulk export of water. By a letter dated December 11, 1985, Ray Williston, Chairman and President of the OFC, advised WCW that it would grant WCW a right to extract fresh water from Link Lake. The OFC entered into an agreement with WCW on March 21, 1986. At some point subsequent to this agreement, the OFC dissolved and responsibility for the maintenance of the contract devolved onto the Crown. The water licences in the name of the OFC were subsequently taken out in the name of the Crown to satisfy the contractual requirements to WCW.
- [9] The plaintiff's complaints with respect to this contract are the following:
- (1) WCW obtained an exclusive right to export bulk water for a period of three years from Link Lake. Licensees such as the plaintiff did not obtain any exclusive rights to export from a particular water source.
 - (2) The WCW contract was renewable for a total of 25 years. In contrast, a Water Act licensee's tenure does not exceed 15 years.
 - (3) WCW was not required to pay the equivalent of Water Act fees. WCW only paid royalties based upon water extracted.
- [10] The central issue in this application arose in 1990 and 1991, when the plaintiff's foreshore and water licences were cancelled for failure to pay outstanding fees.
- [11] Subsequent to the cancellation of the plaintiff's licences, in March 1991, OIC 331 was passed to limit the issuance of further licences for bulk water export by marine transportation vessels. The restriction on water licences imposed by OIC 331 was continued by OICs 922, 1040 and 0861, and ultimately incorporated into the Water Protection Act, R.S.B.C. 1996, c. 484.
- [12] Following the cancellation of the plaintiff's licences, the plaintiff made a proposal along with three other companies to the Goleta Water Board in California, for a contract to source bulk water to their district. The plaintiff's proposal was not accepted. The plaintiff alleges that the lack of a licence had a bearing on the Board's decision and is claiming damages representing a loss of opportunity associated with the unlawful cancellation of the foreshore licence.
- [13] In the defendants' submissions on the merits of the plaintiff's case, the primary argument put before the Court was the absence of evidence of damages. Defendants' counsel submitted that neither the plaintiff company, nor any of its competitors, had a viable business opportunity to export British Columbia water in bulk at the relevant time. Crucial

to this submission is his analysis of the situation of the Goleta Water District in California. Goleta certainly sought tenders to obtain bulk water supplies and considered proposals from the plaintiff and other companies offering to export British Columbia water in bulk. The defendants submitted that Goleta's course of action was motivated by a severe drought affecting its normal source of water. Before any contract for the supply of bulk water was concluded, the rains returned to southern California. Hence no contract for the supply of bulk water was necessary. Therefore, whatever disadvantages the plaintiff may have suffered from the actions of the defendants are immaterial, and did not contribute to a loss of opportunity as alleged.

- [14] Among the claims advanced, the plaintiff is alleging: misfeasance in public office; unlawful interference with economic interests; negligent misrepresentation by agents of the Crown in reliance upon which the plaintiff invested time and money and suffered reasonably foreseeable loss; and that the OICs and the Water Protection Act are unconstitutional as being ultra vires the Province.

SUITABILITY FOR AN 18A

- [15] The relevant provisions of the Rules of Court are as follows:

Ancillary orders and directions

- (8) On an application heard before or at the same time as the hearing of an application under subrule (1), the court may
- (b) dismiss the application under subrule (1) on the ground that
- (i) the issues raised by the application under subrule (1) are not suitable for disposition under this rule, or
- (ii) the application under subrule (1) will not assist the efficient resolution of the proceeding.

Judgment

- (11) On the hearing of an application under subrule (1), the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- [16] The plaintiff submits that each of the four impediments to the appropriateness of a summary trial contained in the subrules are present in this case and therefore the defendants application should be dismissed.

Subrule 18A(8)(b)(i)

- [17] The factors to consider in determining whether an application is suitable for disposition under this Rule include: the amount involved; the complexity of the matter; the cost of a conventional trial in relation to the amount involved; the course of the proceedings; the time required for summary trial; whether credibility is a crucial factor; and whether the application will really save time and complexity: *Dahl et al. v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at paragraphs 11 and 12, 46 B.C.L.R. (4th) 342, *aff'd* 2006 BCCA 369, 272 D.L.R. (4th) 344; see also *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 214, 36 C.P.C. (2d) 199 (C.A.).
- [18] The issues raised in the present matter are not suitable for disposition by way of summary trial because of the factual complexity of the matter. The issues presented cannot be characterized as straightforward on their facts. The factual background of the allegations spans well over 20 years. There are multiple defendants and multiple issues involved, canvassed in a large volume of materials and being addressed by an unrepresented litigant. In the interest of ensuring that an informed and fair judgment can be reached, it is necessary that these issues have the benefit of a full trial by way of viva voce evidence.
- [19] The Court of Appeal addressed these issues expressly and succinctly in *Cannaday v. Sun Peaks Resort Corp.* (1998), 44 B.C.L.R. (3d) 195, 166 W.A.C. 241 (C.A.), where at paragraph 53, the Court stated:
- [53] One point which may properly be taken from this case is that the summary trial procedure is not well suited to factually complex cases. The difficulty, of course, is all the greater where not all parties are competently represented, and perhaps greater again where the application is brought by the defendant. All too often, proceedings such as these place an inordinate burden on the judge and in the end prove to be a waste of time and effort. In its place, Rule 18A is a useful procedure for permitting speedy and inexpensive resolution of cases, but it is doubtful that its place extends beyond cases which are relatively straightforward on their facts.
- [20] Numerous other authorities in this province have supported this view of the unsuitability of cases for determination under Rule 18A where they involve complex questions and large quantities of material: *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138, 164 B.C.A.C. 300; *Chu v. Chen*, 2002 BCSC 906 at paras. 91 and 99, 22 C.P.C. (5th) 73; *Great Canadian Oil Change Ltd. v. Dynamic Ventures Corp.*, 2002 BCSC 1295 at paras. 65 and 69, 21 C.P.R. (4th) 318; *Inspiration Management; R.C. Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C.*, 2008 BCSC 918; and *Simon Fraser Student Society v. Canadian Federation of Students*, 2009 BCSC 1081, [2009] B.C.J. No. 1598.
- [21] In considering these issues, it is important to keep in mind the words of Chief Justice McEachern, as he then was, in *Inspiration Management*, at 214:

The procedure prescribed by R. 18A may not furnish perfect justice in every case, but that elusive and unattainable goal cannot always be assured even after a conventional trial and I believe the safeguards furnished by the Rule and the commonsense of the chambers judge are sufficient for the attainment of justice in any case likely to be found suitable for this procedure. Chambers judges should be careful but not timid in using R. 18A for the purpose for which it was intended.

[22] However, I note that the safeguards he mentions are sufficient "in any case likely to be found suitable for this procedure" (emphasis added), which illustrates that there will be cases that are inappropriate for an 18A and suitability remains a pre-condition. He also went on to say, at 216:

But it is necessary to recognize that it is essential on all applications under R. 18A for counsel to bring an appropriate measure of professional skill to the preparation of both the substance and the form of their material. It is unfair to scoop-shovel volumes of disjointed affidavits and exhibits upon the chambers judge and expect him or her to make an informed judgment ...

[23] While complex cases that are properly prepared and argued can be resolved summarily, the plaintiff is self-represented in the present action, which increases the complexity: Cannaday, at paragraph 53. There are also multiple parties and over 5,000 pages of affidavit evidence. Some of the issues that will need to be addressed include: the adequacy of notice of cancellation; abuse of public office; damages; and mitigation. This case will require the interpretation of Acts, contracts, proposals, licences, tariffs, Orders in Council and exercises of discretion. The purpose of an 18A is to give summary disposition. In order to do that in the present action, all of these issues will need to be addressed, if not resolved, to dispose of this litigation properly and fairly. In light of the volume of materials, a fully informed judgment will be elusive in this case without the benefit of a full trial.

[24] This complexity should also be viewed in light of the course of the proceedings. A trial on these matters is scheduled to proceed in four and a half months' time and therefore the defendants will not be prejudiced by any further unreasonable delay in having these matters resolved. While the defendant disputes the existence of damages, the plaintiff is claiming an amount well over a million dollars. Any prejudice is outweighed by the need to ensure that the parties' positions have been adequately put forward and fully canvassed in the course of the trial.

Subrule 18A(11)(a)(i)

[25] Despite the factual complexity of this case, the defendants argue that complexity of facts alone is not a sufficient basis for the relief sought by the plaintiff. The defendant relies on *Inspiration Management*, at 214, for the proposition that "[i]f the chambers judge can find the facts, then he must give judgment as he would upon a trial unless for any proper judicial reason he has the opinion that it would be unjust to do so." See also *Dahl*.

- [26] Mr. Justice Masuhara, in R.C. Hotel, considered the factors determining suitability for summary trial. He stated, at paragraph 13:
- (a) A court should be reluctant to decide isolated issues in the absence of a full factual matrix and should not decide issues on the basis of assumed facts.
 - (b) While the court may in certain circumstances resolve issues and find facts in the face of conflicting evidence, it should be reluctant to do so where there are direct conflicts in affidavit evidence, the resolution of which will require findings with respect to credibility.
 - (c) A court should be reluctant to resolve factual issues in the absence of admissible evidence where such evidence may well be tendered in admissible form at a subsequent trial...
- [27] Therefore, while McEachern C.J.B.C. encourages granting a judgment in an 18A, even in the face of conflicting affidavits, the chambers judge still must be able to look to other admissible evidence to resolve the conflict.
- [28] I am not satisfied that I am presently in a position to find the facts necessary to determine the issues between the parties. To grant judgment for or against the defendant or the plaintiff might well lead to an unjust result at this point. Specifically, I am not in a position to determine, with respect to damages, what impact, if any, the lack of the licence had on the proposal the plaintiff made to Goleta Water District.
- [29] The plaintiff points to, and I accept, conflicts in the affidavit evidence that cannot be resolved by reference to additional evidence from other sources which either confirms or denies one side of the story. The conflicts which concern me are relevant to the central issue of whether the lack of a licence led to a loss of opportunity for the plaintiff. The affidavit of Robert Paul, formerly General Manager and Chief Engineer of Goleta, conflicts with the affidavits of Katherine Crawford, formerly the president and director of Goleta, and John DeLoreto, also formerly a Goleta director. For example, in paragraph 17 of Robert Paul's affidavit, sworn March 11, 2002, he states:

The reason for shelving of the tankering option was that the rain fell in March which eliminated the emergency which gave rise to considering the tankering option.

This is in conflict with the affidavit of Katherine Crawford, sworn November 12, 1996, which states:

Because of the devastating circumstances, and because I believe that the proposal of Sun Belt Water Inc. (the low bidder for supply of water by tanker to Goleta) would have been disqualified for its failure to comply with the specific terms of reference of the RFP, I believe, that had it not been for the interference of the Province of British Columbia with the issue of the necessary licences to Aquasource Ltd., [Goleta] would have contracted for the supply of water from Aquasource Ltd... [Emphasis added.]

The affidavit of John DeLoreto, sworn April 18, 2003, states:

Because of the devastating circumstances and other reasons, as aforesaid, including the failure of Sun Belt to comply with mandatory terms of reference of the RFP, I believe that, in spite of the rain which fell in Goleta in March 1991, had it not been for British Columbia's interference with [Goleta's] bid process via Order in Council No. 331 of March 18, 1991, and British Columbia's failure to grant the promised water licences, [Goleta] would have contracted for a supply of water from Aquasource... [Emphasis added.]

[30] Furthermore, the affidavit of Robert Paul conflicts with his own signed report "Goleta Water District-The Third Annual Report- Physical Solution- Court Approved Water Plan", dated June 14, 1991, filed as Exhibit 1 with the affidavit of Colin A. Beach, sworn October 19, 2009, which states with respect to imported Canadian water:

... the District Board of Directors conducted a detailed evaluation of this alternative.

It was eventually rejected and no additional effort on this alternative is anticipated for reasons of (a) Canadian government legislation, (b) March 1991 local rainfall and, now (c) June 1991 State Water Project voter approval." [Emphasis added.]

[31] Finally, on this issue, there are also inconsistencies, which I will not canvass here, between the affidavit evidence of William Annett, sworn on May 22, 2002, at paragraph 9 and representations he made to the Crown on December 4, 1991, attached as Exhibit 521, page 1370, to the affidavit of Colin A. Beach, filed April 8, 2008 and a Study Report, dated July 1992, entitled "An Assessment of Bulk Water Reserves and Export Market Potential" prepared by the Natural Resources Corporation of San Pedro California, attached as Exhibit A, pages 1873-1886 of the Affidavit of Colin A. Beach, sworn October 15, 2009.

[32] These inconsistencies represent a real conflict in the evidence on an issue that is central to the question of damages for loss of opportunity. Absent outside proof, a chambers judge cannot simply prefer one story. Instead, a finding of credibility will be necessary and sometimes, that finding will require the judge to see and weigh the totality of the evidence: *Iacobucci v. WIC Radio Ltd.* (1997), 37 C.C.E.L. (2d) 112 (B.C.S.C.) at paragraphs 17-19.

[33] In addition to the conflicts in evidence, the plaintiff is making claims of abuse of public office, which inherently involves allegations of bad faith. "Questions of bad faith are not easily amenable to resolution through affidavit evidence alone": *Iacobucci*, at paragraphs 25 and 31. To resolve such questions the judge should see and hear both evidence-in-chief and cross-examination to get the full picture of the evidence on both sides and be able to observe the witnesses before resolving questions of credibility: *W.I.B. Construction v. Central Okanagan School District No. 23*, 1997 CarswellBC 896 (B.C.S.C.).

[34] The issues here were addressed and summarized in *Simon Fraser*, where at paragraph 30, Mr. Justice Blair states:

- [30] ... The evidentiary conflicts and the bad faith allegations raise questions as to the weight to be given to the affidavit evidence and also to the affiants' credibility. There has been no testing of the affiants' conflicting evidence in any fashion which would assist the trier of fact in assessing their credibility and the weight to be accorded their evidence.
- [35] Given that I am unable to resolve the conflicting evidence and find key facts necessary to resolve these matters on the basis of the affidavits before this Court and given the complexity of the matter, these two impediments taken together are sufficient to render this matter inappropriate for disposition by way of summary trial. There is no need to consider the other impediments raised by the plaintiff.

Validity of the Cancellation of the Foreshore Licence

- [36] The plaintiff, as well as counsel for the defendants, urges the Court to consider the issue of the validity of the cancellation of the plaintiff's foreshore licence on the Rule 18A application. In the light of this submission I intend to address this issue in separate Reasons for Judgment.

Cross-examination of the Affiants

- [37] Having decided that this matter is not suitable for summary trial pursuant to Rule 18A, the application to cross-examine the affiants is moot.

CONCLUSION

- [38] I accept the position of the plaintiff pursuant to Rule 18A(8)(b)(i) that the issues raised in this matter are not suitable for disposition under this Rule, and, pursuant to 18A(11)(a)(i), that based on the whole of the evidence before the Court on this application, I am unable to find the facts necessary to decide the issues.

Therefore, I will grant the plaintiff's application and dismiss the application of the defendants under Rule 18A.

"LEASK J."

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