

CANADA / JUDGMENT

Sam v. British Columbia

2014 BCSC 609

COURT

Supreme Court of British Columbia

DECIDED

9 April 2014

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2014 BCSC 609 Sam v. British Columbia IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Sam v. British Columbia, 2014 BCSC 609 Date: 20140409 Docket: 09-5146 Registry:

Victoria Between: Chief Robert Sam and Councillors Gary Albany, Edward Norman George, Nick Albany, Frank George and Ronald Sam, acting on their own behalf and on behalf of all other members of the Songhees Nation and the said Songhees Nation Plaintiffs And: Her Majesty The Queen in Right of the Province of British Columbia and the Attorney General of Canada as representing Her Majesty the Queen in Right of Canada Defendants

- and - Docket: 12-1561 Registry: Victoria Between: Seenupin (Chief Andrew Thomas) and Councillor Barbara Lecoy, acting on their own behalf and on behalf of all other members of the Esquimalt Nation and the said Esquimalt Nation Plaintiffs And: Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Attorney General of British Columbia, Her Majesty The Queen in Right of Canada as represented by the Attorney General of Canada Defendants Before: The Honourable Mr. Justice Bracken Reasons for Judgment Counsel for the Applicant Attorney General of Canada as representing Her Majesty The Queen in Right of Canada: C. Cameron Counsel for Her Majesty The Queen in Right of the Province of British Columbia: H. Gwillim Counsel for the Plaintiffs: M. Frey Counsel for the Esquimalt Nation: C. Funt Place and Date of Trial/Hearing: Victoria, B.C. February 4, 2014 Place and Date of Judgment: Victoria, B.C. April 9, 2014

[1] Canada applies to settle the terms of a trial phasing order pronounced on May 21, 2013. The actions in this case are for damages arising from an alleged breach of a treaty. Two actions are being heard together. The application which led to the order at issue was made by the plaintiffs as part of a consent order pronounced November 30, 2011. That order created a two-phased trial divided into the issues of liability for the breach of the treaty and then, if necessary, an assessment of damages.

- [2] The consent order of November 30, 2011 provides: AT A CASE PLANNING CONFERENCE conducted on November 30, 2011 by Mr. Justice Bracken in the presence of Mr. B. Rory B. Morahan and Mr. Michael Frey, counsel for the Plaintiffs, Mr. Keith J. Phillips, counsel for Her Majesty the Queen in right of the Province of British Columbia ("B.C."), and Ms. Heather Frankson, counsel for the Attorney General of Canada ("Canada"). THIS COURT ORDERS that the parties comply with the attached case plan.
- [3] The case plan included the following term: 7 Trial - Phase One Concerning Liability (Part 12 of the Supreme Court Civil Rules)
- (a) Estimated length of the trial: 60 days beginning May 6, 2013
- (b) Plaintiffs will file a Notice of Trial in Form 40 to secure the trial date by: To be determined
- [4] The case plan proposal acknowledged an agreement among the then parties to the action that the trial would be divided into two phases. Subsequent to that order, it was agreed that the Esquimalt action would be heard at the same time and Esquimalt accepted the terms of the November 30, 2011 order.
- [5] The phasing order was a consent order. No formal application was made and no reasons were given. The order was based upon the agreement among the parties that the issues of liability should be heard first. The case plan order says only that Phase 1 concerns liability. A separate case plan proposal of the plaintiffs (Songhees) was filed on October 3, 2011. In the Songhees' case plan proposal, some preliminary issues were dealt with and the following comment formed part of the case plan proposal: NOTE: The proposals below relate only to Phase 1 of the trial. The plaintiffs propose that Phase 1 would involve all issues other than damages and potential third party claims between the defendants.
- [6] From that comment it seems clear that the size and possibly the locations of the enclosed fields were to be included in the first phase of the trial. The third party claims referred to potential issues between Canada and British Columbia.
- [7] My reasons for judgment of May 21, 2013 arose from an application to combine the two phases back into one phase and a competing application to divide the trial into three phases rather than two.
- [8] In my reasons for judgment of May 21, 2013, I stated at paras. 18 and 19:
- [18] This trial is by judge alone. The first phase is scheduled to canvass matters related to the alleged breach of the Douglas Treaty. As the defendant Canada summarized them in its submission, the issues in that aspect of the trial will be complex as they will canvass the existence of a treaty obligation to set aside lands for the Chekonein Treaty signatories and their successors of the Songhees Nation and the Esquimalt Nation; and the breach of any duties owed by the defendants to the Songhees Nation. It is my understanding that Esquimalt claims entitlement through Songhees, and if so, then the issue of entitlement for Esquimalt Nation will be at issue as well; and finally, any defences that are open to British

Columbia and Canada, including laches, acquiescence, and any statutory limitations that may apply.

- [19] The issue of damages is a distinct issue and depends on the outcome of the liability phase. Obviously the evidence related to the damages portion of the action will, if that phase is reached, require and depend upon the findings of the court on the liability portion. The two aspects of the trial are distinct and can easily be dealt with separately.
- [9] Appendix A as referenced in para. 31 of my decision included the following questions of fact or law to be determined in Phase 1 of the trial:
- (i) successorship of the Songhees Nation and the Esquimalt Nation to the Chekonein Treaty signatories (ii) existence of a Treaty obligation to set aside lands at Cadboro Bay for the Chekonein Treaty signatories (iii) breach of any duties owed by the Defendant Crowns to the Songhees Nation (iv) limitations' defences, including statutory limitations, laches and acquiescence.
- [10] The plaintiffs do not agree that the determination of the size of the village sites and enclosed fields was intended to be included in Phase 1 of the trial. However, it was my understanding from the plaintiffs in the course of earlier submissions that experts would be called in Phase 1 to prove how much land was required for the production of food for consumption and trade, and to identify areas where suitable lands for production were likely located. Evidence is also to be called by the plaintiffs to identify likely locations of village sites.
- [11] On the basis of the material filed in support of the applications, and the normal understanding of the concept of liability, it is my view that the size of enclosed fields and village sites are to be dealt with in Phase 1 of the trial.
- [12] Canada drafted two forms of proposed order for approval. These are attached to the Affidavit #1 of Sukhvir Bahia. In my view, the form attached as Exhibit A to that affidavit is in a form that is consistent with the terms of the May 21, 2013 order. Therefore, the order will be settled in those terms.
- [13] I suspect that there may be some wish to speak to the "fine tuning" of the questions of fact or law that were set out in Appendix A referred to above. If that is so, counsel may arrange for the matter to be spoken to at a case planning conference. "J. K. Bracken, J." The Honourable Mr. Justice Bracken

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Prepared on 26 October 2026 · Esheria