

CANADA / JUDGMENT

Tacan v. Canada

2003 FC 915

COURT

Federal Court

DECIDED

24 July 2003

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Tacan v. Canada Court (s) Database Federal Court Decisions Date 2003-07-24 Neutral citation 2003 FC 915 File numbers T-1756-01 Notes Digest Decision Content Date: 20030724 Docket: T-1756-01 Citation: 2003 FC 915 OTTAWA, ONTARIO, THURSDAY, THIS 24TH DAY OF JULY, 2003 PRESENT: THE HONOURABLE MADAM JUSTICE SNIDER BETWEEN: ALFRED TACAN, SOLOMON HALL, and STAN McKAY Plaintiffs

- and - HER MAJESTY THE QUEEN, in Right of Canada Defendant REASONS FOR ORDER AND ORDER SNIDER J.

[1] In October 2001, Alfred Tacan, Solomon Hall and Stan McKay (the "Plaintiffs") commenced an action against Her Majesty the Queen (the "Defendant"). Each of the Plaintiffs is a registered Band Member of the Sioux Valley First Nation and a World War II veteran. Mr. Hall is also a veteran of the Korean War. The Plaintiffs allege that they suffered damages as a consequence of the post-war actions of officials of the Department of Indian Affairs and the Department of Veterans Affairs in respect of the Veterans' Land Act, R.S., 1970, c. V-4. The Plaintiffs are now very elderly and, in their submission, in frail health. In this motion, they seek an Order that their interests in this proceeding be assigned to the Sioux Valley First Nation, Band No. 290 (the "Band"), of the Province of Manitoba, represented by Chief Katherine Whitecloud. The Defendant opposes the motion. The motion was dealt with in writing pursuant to Rule 369 of Federal Court Rules, 1998 .

ISSUES

The issue that is raised by this motion is whether the Plaintiffs should be permitted to assign their interest in the underlying proceedings to the Band. In order to undertake an analysis of this issue, I must consider the following four sub-issues:

1. Whether the assignment is permitted pursuant to Rule 117 of the Federal Court Rules, 1998;
2. Whether the assignment is prohibited because it would run afoul of the laws pertaining to maintenance and champerty;

3. Whether section 67 of the Financial Administration Act, R.S.C. 1985, c. F-11 (the "Act") expressly restricts the assignment of the claims brought by the Plaintiffs against the Defendant;
4. Whether this motion should be considered on its merits despite the Plaintiffs' failure to comply with Rule 117(2), which requires that this motion be brought by the Band, and not the Plaintiffs.

ANALYSIS

Use of Rule 117 The Plaintiffs submit that nothing in Rule 117 or in the Federal Court Rules, 1998 prevents the assignment of their interest in the proceedings to the Band. This assignment will likely expedite the matter, which is likely to be prolonged and litigious. Rule 117 of the Federal Court Rules, 1998 provides that "where an interest of a party in, or the liability of a party under, a proceeding is assigned or transmitted to, or devolves upon another person, the other person may, after serving and filing a notice and affidavit setting out the basis for the assignment, transmission or devolution, carry on the proceeding." In my view, this Rule does not provide for the authority to assign an interest in litigation; it merely addresses the procedural requirements for dealing with an assignment that is otherwise legally undertaken. In fact, there are no Rules that would assist me in this case. Thus, to determine whether the assignment is permissible, I must look to other relevant law - be it common law or statutory provision.

Maintenance and Champerty The Defendant submits that the Plaintiffs cannot assign a bare right to litigate, because to do so runs afoul of the laws pertaining to maintenance and champerty (*Trendtex Trading Corp. v. Credit Suisse*, [1982] A.C. 679 (H.L.); *R. v. Goodman*, [1939] S.C.R. 446; *Tacan v. Canada*, 2001 FCT 574, [2001] F.C.J. No. 863 (QL)). In response, the Plaintiffs submit that this assignment does not constitute champerty because there is no evidence that the Band has bargained to share in the profits of the litigation. Champerty is a form of maintenance that involves the assignee sharing in the proceeds of the contemplated litigation (*Morrison v. Mills and Mills* (1963), 38 D.L.R. (2d) 489 (Alta. S.C.)). There is no evidence in this case as to how the proceeds of the litigation will be dealt with. As a result, I agree with the Plaintiffs that the proposed assignment does not appear to violate the prohibition against champerty. The Plaintiffs also submit that this assignment does not constitute maintenance because the Band is not engaged in conduct which involves officious or improper interference with the case and has not attempted to stir up strife or litigation (*Carlson v. Chambers*, [1947] 2 D.L.R. 667 (Sask. K.B.)). In my view, the proposed assignment has a number of characteristics of maintenance. Maintenance has been defined as the "giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by law as justifying his interference" (*Carlson*, *supra*, quoting from *Halsbury's Laws of England*, vol. 1, 2nd ed., (London: Butterworth, 1931) at 69). In order for a person to be liable of maintenance, that person must have intervened officiously or improperly. One example of this is the introduction of parties to enforce rights which others are not disposed to enforce (*Goodman*, *supra*). Another example is the assignment of a bare right to litigate (*Trendtex*, *supra*). The Plaintiffs would like to assign their claim for damages, or their bare right to litigate, against the Crown to the Band.

According to *Trendtex*, *supra*, this constitutes maintenance, unless the Band has an interest, commercial or otherwise, in the action. Although the Plaintiffs are registered members of the Band, this appears to be the extent of the Band's interest in the action. In my view, this is not sufficient. According to the Affidavit of Chief Katherine Whitecloud, the motive behind the transfer is the advanced age and frail health conditions of the Plaintiffs. This suggests that the Plaintiffs would no longer be disposed to enforce their rights against the Crown, without the intervention and assistance of a third party, the Band. This clearly constitutes maintenance (*Carlson*, *supra*; *Trendtex*, *supra*) and is improper. I also note that, unlike in *Carlson*, *supra*, there is no suggestion on the facts that the Plaintiffs would be unable, for financial reasons, to continue with this action if the Band did not come to their assistance. Therefore, this motion should be dismissed on the grounds that the proposed assignment closely resembles maintenance. Financial Administration Act The Defendant submits that section 67 of the Financial Administration Act, R.S.C. 1985, c. F-11 (the "Act") expressly restricts the assignment of a Crown debt, which includes a chose in action, such as the present claims brought by the Plaintiffs against the Defendant (Act, s. 66). In reply, the Plaintiffs submit that the Act does not prohibit absolutely the assignment of a Crown debt. It is open to the Plaintiffs to strictly follow the provisions of the Act so as to permit a valid assignment of a Crown debt. In my view, the Act prohibits the assignment of this Crown debt to the Band. Section 67 of the Act contains a general prohibition on the assignment of a Crown debt:

67. Except as provided in this Act or any other Act of Parliament,

- (a) a Crown debt is not assignable; and
- (b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on that debt. any person any rights or remedies in respect of that debt.

67. Sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale:

- a) les créances sur Sa Majesté sont incessibles;
- b) aucune opération censée constituer une cession de créances sur Sa Majesté n'a pour effet de conférer à quiconque un droit ou un recours à leur égard. Subsection 68(1) of the Act permits the assignment of specific Crown debts:

68. (1) Subject to this section, an assignment may be made of

- (a) a Crown debt that is an amount due or becoming due under a contract; and
- (b) any other Crown debt of a prescribed class.

68. (1) Sous réserve des autres dispositions du présent article, les créances suivantes sont cessibles:

- a) celles qui correspondent à un montant échu ou à échoir aux termes d'un marché;

b) celles qui appartiennent à une catégorie déterminée par règlement. Since the underlying action in this case is based on alleged torts committed by servants or agents of the Crown, the amount allegedly owed to the Plaintiffs by the Crown is not an "amount due or becoming due under a contract" and consequently does not fall within the scope of the exception in paragraph 68(1)(a) of the Act. The Assignment of Crown Debt Regulations, C.R.C., c. 675 list Crown debts of a prescribed class. A review of the relevant provisions of these regulations satisfies me that the alleged Crown debt in these proceedings is not a "Crown debt of a prescribed class" and consequently does not fall within the exception contained in paragraph 68(1)(b) of the Act. Since the assignment of this debt from the Plaintiffs to the Band is prohibited by the Act, the Plaintiffs' assurances that they will follow the strict requirements of the Act are not sufficient to permit the assignment of this debt. Procedural Defect The Defendant submits that the Plaintiffs have failed to comply with Rule 117(2) of the Federal Court Rules, 1998, which clearly requires that this motion be brought by the Band, and not the Plaintiffs. The Plaintiffs acknowledge this in their Reply to the Motion Record of the Defendant. It does not make sense to require the Plaintiffs to withdraw this motion and re-file the motion in the name of the Band, when the motion would ultimately be dismissed in any case. As a result, I have decided the motion on its merits notwithstanding the procedural defect. ORDER THIS COURT ORDERS THAT:

1. The motion is dismissed;
2. Costs are awarded to the Defendant. "Judith A. Snider"

J.F.C.C. FEDERAL COURT NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD COURT
FILE NO.: T-1756-01 STYLE OF CAUSE: ALFRED TACAN et al v. HER MAJESTY THE QUEEN, in
right of Canada MOTION IN WRITING PURSUANT TO RULE 369 REASONS FOR ORDER AND
ORDER OF THE HONOURABLE MADAM JUSTICE SNIDER DATED: July 24, 2003 WRITTEN
SUBMISSIONS BY: Mr. Douglas A.S. Paterson, Q.C. FOR PLAINTIFFS and Mr. Robert L. Patterson
Mr. Randal T. Smith, Q.C. FOR DEFENDANT CROWN SOLICITORS ON THE RECORD: Douglas A.S.
Paterson, Q.C. and Robert L. Patterson Paterson, Patterson, Wyman & Abel Barristers and
Solicitors Brandon, Manitoba FOR PLAINTIFFS Mr. Morris Rosenberg Deputy Attorney General
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