

CANADA / JUDGMENT

Teal Cedar Products Ltd. v. British Columbia

2018 BCSC 1850

COURT

Supreme Court of British Columbia

DECIDED

25 October 2018

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2018 BCSC 1850 Teal Cedar Products Ltd. v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Teal Cedar Products Ltd. v. British Columbia,

2018 BCSC 1850

Date: 20181025

Docket: S169119

Registry: Vancouver

Between:

Teal Cedar Products Ltd.

Plaintiff

And

Her Majesty the Queen in Right of the Province of British Columbia, the Haida Gwaii
Management Council, and the Haida Nation, as represented by the Council of the Haida Nation

Defendants

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiff:

M.S. Oulton

A. Calvert

Counsel for the Defendant, Her Majesty the Queen in Right of the Province of British Columbia:

G.J. Underwood

K. Hamm

Place and Date of Hearing:

Vancouver, B.C.

September 7, 2018

Place and Date of Judgment:

Vancouver, B.C.

October 25, 2018

- [1] The defendant, Her Majesty the Queen in Right of the Province of British Columbia ("Province") applies to strike the plaintiff's claim against one of the other defendants-the Haida Gwaii Management Council ("HGMC"). The Province argues that the HGMC is not a legal entity that can be sued.
- [2] The HGMC is a five-member body that was created under the Haida Gwaii Reconciliation Act, S.B.C. 2010, c. 17 [HGRA]. Its members are appointed by the Lieutenant Governor in Council and the Haida Nation. Among the powers that the HGMC assumed under the HGRA was the power to set the allowable annual cut ("AAC") from forests on Haida Gwaii.
- [3] The plaintiff Teal Cedar Products Ltd. ("Teal") held a Tree Farm License ("TFL") on Haida Gwaii. That gave it the exclusive right to harvest timber within a specified area of provincial land, subject to the Forest Act, R.S.B.C. 1996, c. 157, the Land Act, R.S.B.C. 1996, c. 245, and the regulations made under those statutes. Prior to the HGRA coming into force, Teal was subject to an AAC set by the provincial chief forester under the Forest Act.
- [4] In 2012, the HGMC exercised its newly acquired authority to set an overall AAC for Haida Gwaii that reduced previous authorized harvesting levels. That resulted in reduced AACs for all individual licences on Haida Gwaii, including Teal's.
- [5] Teal says that when the HGMC assumed discretionary power previously exercised by the Province, it also assumed the Province's contractual obligations under the TFL, including the contractual duty of honesty and good faith. It alleges that the HGMC breached those obligations when it reduced the AAC.
- [6] Although Teal says the HGMC is an entity that can be sued, it says that issue should not be decided on this application. It says the Court cannot properly apply the legal test for making that determination without adjudicating the merits of the ultimate issue between it and the HGMC at trial.

- [7] The Province says that the TFL was subject to all applicable legislation and any claims should be made against the Province only. It is not clear what that means in this context. Is the Province suggesting that it is subject to claim based on the HGMC being an agent of the Province, on the Province continuing to be bound by the contract in the TFL despite the role assumed by the HGMC, or an a possible interpretation of the HGRA or other legislation?
- [8] In its response to the amended notice of civil claim, the Province admits that it is responsible for any damages or costs flowing from a finding of liability against "any of the defendants". That is not a complete answer to Teal's position because if this application is allowed the HGMC will, by definition, no longer be a defendant and no finding of liability against it will be possible. If the Province intends to admit responsibility for any and all actions of the HGMC regardless of the HGMC's status in the litigation, that intention is not clear on the pleadings.
- [9] This application is brought under R. 6-2(7)(a) of the Supreme Court Civil Rules, which provides that:
- (7) At any stage of a proceeding, the court, on application by any person, may, ...,
- (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
- ...
- [10] The plaintiff argues that R. 6-2(7)(a) is discretionary, so that even if the Court accepts the Crown's position that the HGMC is not an entity that can be sued, the Court should decline to exercise its discretion and permit the action to proceed against it.
- [11] That submission fails to recognize the distinction between issues of capacity and issues of standing. The difference is explained in a statement adopted by the Court of Appeal in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 [Kwicksutaineuk], at para. 62:
- [62] ...

The distinction between capacity and standing is that capacity generally depends on the personal characteristics of the party divorced from the merits of the proceeding or the nature of the question in issue in it. It concerns the right to initiate or defend legal proceedings generally. Standing is concerned with the appropriateness of the court's dealing with the particular issue presented at the instance of the particular plaintiff. It is more concerned with the nature of the issue and the context in which it is raised than with the personal characteristics such as age, mental capacity, etc., of the plaintiff. A party may have capacity to sue but lack standing

- [12] Whether one is referring to a plaintiff or a defendant, the discretionary aspect of R. 6-2(7)(a) must relate to a question of standing--whether it is proper or necessary that a party be before the Court in order to resolve the issues raised in the litigation. But legal capacity is fundamental to the ability to bring an action or the need to defend one. I fail to see how the Court could have discretion to allow an action to be continued by a plaintiff or against a defendant that lacks the basic legal capacity to be a party to litigation.
- [13] The question then is whether the evidence on this application clearly shows that the HGMC lacks that capacity.
- [14] In order to sue or be sued, a party must be a natural person, corporation or a body given such capacity through legislation: *Kwicksutaineuk* at para. 64. Whether a body created by statute is subject to civil liability depends on "the true interpretation of the statute": *Northern Pipeline Agency v. Perehinec*, [1983] 2 S.C.R. 513 at p. 526.
- [15] In *Westlake v. R.* (1971), 21 D.L.R. (3d) 129 (Ont. H.C.J.), aff'd 26 D.L.R. (3d) 273 (Ont. C.A.), aff'd [1973] S.C.R. vii, the Court identified six categories of statutory bodies for this purpose. They are summarized as:
1. Corporations incorporated under statute which have the power to sue and be sued pursuant to provincial interpretation acts (e.g., s. 17 of the Interpretation Act, R.S.B.C.1996, c. 238);
 2. Bodies corporate expressly declared to be suable;
 3. Bodies corporate expressly declared not to be suable;
 4. Legislatively created unincorporated bodies which by terms of the creating statute, are expressly liable to suit;
 5. Legislatively created unincorporated bodies which are not expressly liable to suit by terms of their creating statute, but which are, by necessary implication due to the nature of their commercial activity, liable to be sued in an action for damages; and
 6. Legislatively created unincorporated bodies which are not by terms of their creating statute or by necessary implication liable to be sued civilly but which are a legal entity in that their actions may be reviewed in proceedings by way of the remedies of certiorari, mandamus and prohibition.
- [Emphasis added.]
- [16] The HGRA is silent on the question of whether or not the HGMC can sue or be sued. The parties agree that the issue is whether the HGMC, by necessary implication, falls in the fifth or in the sixth *Westlake* category.

- [17] The Province points out that the HGMC does not carry on any business. It has neither a bank account nor the power to borrow or raise money. All contracts that are necessary for its operation are entered into by the defendant, Council of the Haida Nation ("CHN"), which also pays the expenses of the HGMC from funds provided by the Province. A CHN employee provides administrative support on a part-time basis to the HGMC, which has no employees of its own.
- [18] Where a body's statutory powers include the ability to carry on business, hold property, enter contracts or borrow money, those powers would support a conclusion that the legislature intended it to have the capacity to sue or be sued, while the absence of those powers strongly favours the opposite conclusion: *Gratton-Masuy Environmental Technologies Inc. v. Ontario*, 2010 ONCA 501 at para. 45.
- [19] However, I agree with counsel for the plaintiff that those factors are not necessarily a closed list and that a governing statute must always be considered according to the basic approach to statutory interpretation referred to in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26:

[26]

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[20] The relevant portion of the HGRA reads:

5 (1) In this section, "allowable annual cut" and "chief forester" have the same meanings as in section 1 (1) of the Forest Act.

- (2) The council must determine the allowable annual cut for the management area at least once in every 10 years after the date of the last determination.
- (3) For the purposes of subsection (2), on request of the council, the chief forester must provide to the council all information that the chief forester would consider under section 8 (1) of the Forest Act if the chief forester were making the determination under subsection (2) of this section, including, without limitation, information respecting the matters, as they relate to the management area, set out in section 8 (8) of the Forest Act.

[21] The sections of the Forest Act referred to read:

8 (1) The chief forester must determine an allowable annual cut at least once every 10 years after the date of the last determination, for

- (a) the Crown land in each timber supply area, excluding the Crown land in the following areas:
- (i) tree farm licence areas;
- (ii) community forest agreement areas;

- (iii) first nations woodland licence areas;
- (iv) woodlot licence areas, and
- (b) each tree farm licence area.
- (8) In determining an allowable annual cut under subsection (1) the chief forester, despite anything to the contrary in an agreement listed in section 12, must consider
 - (a) the rate of timber production that may be sustained on the area, taking into account
 - (i) the composition of the forest and its expected rate of growth on the area,
 - (ii) the expected time that it will take the forest to become re-established on the area following denudation,
 - (iii) silviculture treatments to be applied to the area,
 - (iv) the standard of timber utilization and the allowance for decay, waste and breakage expected to be applied with respect to timber harvesting on the area,
 - (v) the constraints on the amount of timber produced from the area that reasonably can be expected by use of the area for purposes other than timber production, and
 - (vi) any other information that, in the chief forester's opinion, relates to the capability of the area to produce timber,
 - (b) the short and long term implications to British Columbia of alternative rates of timber harvesting from the area,
 - (c) [Repealed 2003-31-2.]
 - (d) the economic and social objectives of the government, as expressed by the minister, for the area, for the general region and for British Columbia, and
 - (e) abnormal infestations in and devastations of, and major salvage programs planned for, timber on the area.

[22] It is therefore clear that the legislature intended the HGMC to assume power to set the AAC that would otherwise be exercised by the chief forester under the Forest Act. However, it is not required to exercise those powers in exactly the same way. For example, the chief forester is required to consider the matters listed in s. 8(8) of the Forest Act. That mandatory consideration is missing from s. 5(3) of the HGRA, which merely permits the HGMC to obtain the relevant information from the chief forester. The HGMC presumably may consider additional matters of specific concern to the Haida Nation.

- [23] The fact that the HGMC may exercise its power in a different manner than the chief forester probably means that the nature and content of any duties it assumed with that power are also different, but that does not negate the plaintiff's contention that it assumed some duties. The Court is not asked to define those duties on this application.
- [24] The question is whether the legislature intended the HGMC to be a body that can sue or be sued. The context in which the statute must be interpreted includes the status of the chief forester whose power was transferred to the HGMC. If decisions of the chief forester can give rise to a civil claim, the legislature must have intended, in the absence of clear language to the contrary, that the same remedy will be available in respect of decisions by the HGMC. However, I have been given no authority or evidence as to whether decisions of the chief forester may give rise to civil liability or whether they are matters that only come within the Court's judicial review jurisdiction.
- [25] The chief forester is a Crown employee, so would not necessarily have to be a party to an action arising from his or her decision. A plaintiff could bring an action against the Crown as the only defendant, relying on its vicarious liability for the actions of its employees. But the plaintiff would not be precluded from also naming the chief forester as a defendant. A plaintiff may name an individual Crown servant as a defendant in a case where the Crown is also a defendant for various reasons, including the ability to conduct proper examinations for discovery: *Edwards v. Her Majesty the Queen in Right of the Province of British Columbia et al*, 2006 BCSC 710 at paras. 17 and 18.
- [26] The status of the HGMC in relation to the Crown is less clear than that of the chief forester. Nothing in the HGRA suggests that the five members of the HGMC act in that capacity as employees of the Province. The HGMC may arguably be an agent of the Crown, in which case the Crown would be liable for its actions. But it may also be characterized as an independent body that, although it may be the Crown's assignee or successor, has a mandate to exercise its function in different ways and on the basis of different considerations. In those circumstances, the Province could potentially disclaim responsibility.
- [27] The evidence and authorities put forward on this application do not clearly demonstrate that the HGMC is incapable of being sued and are not sufficient for a determination of whether it is a necessary or proper party.
- [28] That is not to say the question of HGMC's status can only be decided at trial. As the matter proceeds, evidence or admissions may be obtained that permit the Court to make that determination on a renewed application of this kind, on a summary trial, or on another form of pre-trial application. But for present purposes, the application must be dismissed, with costs in the cause.

"N. Smith J."

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