

CANADA / JUDGMENT

William v. Taseko Mines Limited

2019 BCCA 479

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 479 William v. Taseko Mines Limited

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

William v. Taseko Mines Limited,

2019 BCCA 479

Date: 20191217

Dockets: CA46387; CA46388

Docket: CA46387

Between:

Roger William on his own behalf and on behalf of all other
members of the Xeni Gwet'in First Nations Government and the
Tsilhqot'in Nation

Respondents

(Plaintiffs)

And

Taseko Mines Limited

Appellant

(Defendant)

And

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

The Chief Inspector of Mines, The District Manager, Cariboo-Chilcotin

Natural Resource District

Respondents

(Defendants)

- and -

Docket: CA46388

Between:

Taseko Mines Limited

Appellant

(Plaintiff)

And

Tsilhqot'in National Government, Chief Joe Alphonse,

Chief Russell Myers Ross, Cecil Grinder, John Doe, Jane Doe and

Persons Unknown

Respondents

(Defendants)

Before:

The Honourable Madam Justice Dickson

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated September 6, 2019
(Taseko Mines Limited v. Tsilhqot'in National Government,

2019 BCSC 1507, Vancouver Docket S197557 and Victoria Docket S172734).

Oral Reasons for Judgment

Counsel for the Appellant:

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T. Dickson

J. Harman

Place and Date of Hearing:

Vancouver, British Columbia

November 26, 2019

Place and Date of Judgment:

Vancouver, British Columbia

December 17, 2019

Summary:

The applicant seeks leave to appeal two orders arising out of competing injunction applications, arguing the judge applied the wrong merits threshold and made several errors in principle in assessing the balance of convenience. Held: Application dismissed. There is no arguable case that the judge erred in exercising her discretion to grant an interlocutory injunction in favour of the respondent.

- [1] DICKSON J.A.: These applications for leave to appeal arise out of competing injunction applications brought by Taseko Mines Limited ("Taseko") in one action and the Tsilhqot'in Nation and several of its members in another. Both actions concern an exploratory drilling program that Taseko wishes to conduct in an area near Williams Lake, B.C. where it holds mineral leases and mineral claims under the Mineral Tenure Act, R.S.B.C. 1996, c. 292. The area in question is located within the traditional territory of the Tsilhqot'in, who have established Aboriginal rights in the area. The drilling program was authorized in July 2017 by a permit issued under the Mines Act, R.S.B.C. 1996, c. 293, and related authorizations. The permit expires in July 2020, although it may be extended until July 2022.
- [2] On July 19, 2017, the Tsilhqot'in filed a petition seeking to quash the permit by way of judicial review on the basis of inadequate consultation (the "Consultation Petition"). The same day, they filed an action seeking an order to quash the permit pursuant to s. 35 of the Constitution Act, 1982, on the basis that it infringes their established and asserted Aboriginal rights (the "Infringement Action"). They applied in the Infringement Action to enjoin Taseko from carrying out the drilling program pending determination of the Consultation Petition, but, in August 2017, withdrew the application mid-hearing. They also applied for an injunction in the Consultation Petition, but that application was adjourned based on Taseko's assurance it would not carry out the drilling program pending resolution of a separate proceeding involving the Canadian Environmental Assessment Agency.
- [3] In reasons indexed as 2018 BCSC 1271, Justice Branch dismissed the Consultation Petition. This Court dismissed the Tsilhqot'in's appeal of his decision (2019 BCCA 74) and the Supreme Court of Canada denied the Tsilhqot'in's application for leave to appeal ([2019] S.C.C.A. No. 98). While those matters were being decided, injunctions were granted enjoining Taseko

from carrying out the drilling program. However, on June 13, 2019, when the Supreme Court of Canada denied leave to appeal this Court's decision, the existing injunction expired and Taseko notified the Tsilhqot'in that it would commence work on the drilling program no earlier than July 2, 2019.

- [4] On July 2, 2019, the Tsilhqot'in blocked Taseko from accessing the area where it proposed to commence work on the drilling program. On July 5, 2019, Taseko filed an action in which it sought an injunction restraining the Tsilhqot'in and the blockaders from interfering with its rights under the permit (the "Blockade Action"). The same day, the Tsilhqot'in filed a notice of intention to proceed with the Infringement Action, which proceeding was inactive while the Tsilhqot'in pursued the Consultation Petition. On July 11, 2019, the Tsilhqot'in applied in the Infringement Action for an injunction restraining Taseko from carrying out the drilling program until the Infringement Action is resolved.
- [5] On July 29 to 31, 2019, Justice Matthews heard the two competing injunction applications together. On September 6, 2019, she granted the injunction sought by the Tsilhqot'in in the Infringement Action and held that Taseko's injunction application in the Blockade Action was, therefore, moot.
- [6] Taseko seeks leave to appeal Justice Matthews' orders in both actions and asks that, if leave is granted, the two appeals be heard together on an expedited basis. For the reasons that follow, I decline to grant leave to appeal and dismiss both applications.

Judgment Below: 2019 BCSC 1507

- [7] The salient litigation and program history were described in detail in the judgment below. I will not repeat them. These reasons should be read together with those of Justice Matthews for a description of the full factual context in which the applications are brought.
- [8] At the outset of her reasons, the judge identified the three-part test for an injunction set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311: the merits threshold, irreparable harm, and balance of convenience. After summarizing the background, she turned first to the injunction application brought by the Tsilhqot'in in the Infringement Action. She began by determining which merits threshold to apply to the Tsilhqot'in's claim, noting they contended that they need only meet the normal "serious issue to be tried" threshold but Taseko argued for the more stringent "strong arguable case" threshold. In particular, she stated, according to Taseko granting an interlocutory injunction would effectively grant the relief the Tsilhqot'in sought in the Infringement Action because the permit would expire in July 2020, prior to trial, and, therefore, the "strong arguable case" threshold should be applied.
- [9] The judge concluded that the lower merits threshold was the applicable standard. She reasoned that granting an injunction to the Tsilhqot'in would not be tantamount to granting the relief sought in the main action because Taseko could easily extend the permit to July 2022 under the Permit Regulation, B.C. Reg. 99/2013. In reaching this conclusion, the judge

characterized such an extension as "essentially mechanical". Therefore, she found, if the parties pursued an expedited trial, there would be enough time for Taseko to undertake the contemplated work before the permit expired:

- [37] Taseko argues that the extension is not mechanical as the Tsilhqot'in assert because s. 3 of the Permit Regulation authorizes the Chief Inspector to overturn a deemed authorization in order to protect health, safety, the environment or a cultural heritage resource. However, there is nothing to suggest that the extension would be assessed any differently than the original permit. In my view, the extension is essentially mechanical and I conclude that, effectively, Taseko will have until July 2022 to complete the NOW program.
- [38] Taseko argues that the time to complete trial, allow time for appeals and allow the time to undertake the NOW program cannot be accommodated by an extension to July 2022.
- [39] Without concluding precisely how long will be needed for trial, a one to two month trial in the summer or fall of 2019 will allow adequate time for the NOW program to be undertaken by July 2022 if Taseko is successful at trial.
- [40] Accordingly, I conclude that the injunction, if granted, is not tantamount to granting relief nor is it bound to impose a hardship removing any benefit of trial. The threshold merits test is the serious question to be tried standard.
- [10] Next, the judge assessed whether there was a serious issue to be tried in the Infringement Action. Considering the framework in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, she found the Tsilhqot'in had established a serious issue to be tried with respect to the Tsilhqot'in's established and conceded rights in the area in question, whether the impact of the project will be a meaningful diminution of their established and conceded rights, and whether any infringement of their rights is justified.
- [11] The judge went on to consider irreparable harm and the balance of convenience. In conducting her analysis, she identified the respective harms the Tsilhqot'in and Taseko would face if she granted or denied the injunction sought. In doing so, the judge noted the conclusions of other judges on previous injunction applications that permitting Taseko's work to go forward would result in irreparable harm to the environment where the Tsilhqot'in prefer to exercise their Aboriginal rights, whereas granting an injunction would not permanently deprive Taseko of its ability to pursue the project. In particular, she noted the decisions of Justice Grauer in *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675, Justice Branch in *William v. British Columbia*, 2018 BCSC 1271 and this Court in *William v. British Columbia (Attorney General)*, 2018 September 17, Vancouver CA45557 (Chambers).
- [12] The judge also noted that Taseko was understandably concerned about the expiry of the permit, which, if renewed, would permanently expire by July 2022 if the work was not completed, which could harm Taseko. She noted further that the Tsilhqot'in were not able to provide an undertaking to abide by a future order of damages, which, she found, created a risk of irreparable harm to Taseko:

- [100] Although I have found that it is possible to complete the trial in time for that work to complete if Taseko is successful at trial, it is not a sure thing and there is a material risk that the NOW permit will expire before the work is completed.
- [101] The expiry of the NOW permit constitutes harm to Taseko if the inability to undertake the NOW program adversely affects Taseko's goal of constructing and operating a mine. ... The temporary loss of an ability to collect undefined data for an undefined or only vaguely defined purpose does not amount to significant harm.
- [103] It is clear that the harm asserted by the Tsilhqot'in is not compensable in damages. The courts in Taseko Mines, William #1, William #3, and William #5 have found such damages to be irreparable and I agree.
- [104] Taseko argues that it will suffer irreparable harm given that the Tsilhqot'in have not provided an undertaking as to damages and seek to waive this requirement.
- [110] Having waived the undertaking as to damages, the financial loss or harm that may be suffered by Taseko is considered irreparable given the Tsilhqot'in's position that they do not have the financial resources to pay damages: William #5 at para. 49 citing Snuneymuxw First Nation et al. v. H.M.T.Q. et al., 2004 BCSC 205 at para. 34; Red Chris Development Company Ltd. v. Quock, 2014 BCSC 2399 at paras. 66-69.
- [111] Given the nature of Tsilhqot'in's harm, and the waiver of the undertaking as to damages, there is a material risk of irreparable harm to both parties.
- [13] Citing B.C. (A.G.) v. Wale (1986), 9 B.C.L.R. (2d) 333 (C.A.), aff'd [1991] 1 S.C.R. 62, the judge stated that, where, as here, there is a material risk of irreparable harm to both parties, the Court should favour the status quo. She found that permitting the project to proceed would change the status quo, that the strength of the Tsilhqot'in's case did not shift the balance of convenience and that, while the blockade as a "self-help remedy" was a public interest factor which weighed against the Tsilhqot'in, their delay in proceeding with the Infringement Action did not. She also found that actions regarding rights infringement are an important part of reconciliation and thus of public importance. Overall, she concluded that the Tsilhqot'in would suffer greater irreparable harm if the injunction was not granted, the balance of convenience favoured granting the injunction and, in these circumstances, Taseko's injunction application was rendered moot:
- [118] Even though Taseko is authorized to undertake the NOW program, the status quo is the NOW program area undisturbed by the NOW program. In similar circumstances, Grauer J. concluded in Taseko Mines that the disturbance to the land would change the status quo as opposed to the delay to lawfully permitted work. I conclude that the NOW program will change the status quo.
- [121] ... In my view, the overall strength of the Tsilhqot'in's case is such that the merits do not shift the balance of convenience.

- [122] Taseko also alleges that the Tsilhqot'in have unreasonably delayed in proceeding with this infringement action and the public benefit is harmed by such applications being brought after such delay. Taseko also argues that the Tsilhqot'in unreasonably delayed in bringing this injunction application and because the Tsilhqot'in established a blockade first, the Tsilhqot'in do not come to court with clean hands and the court should not grant the equitable relief sought.
- [125] In my view, the Tsilhqot'in's approach has been reasonable and the public interest has not been detrimentally affected by [the delay in prosecuting the Infringement Action].
- [126] However, with regard to the blockade, I have no hesitation in saying the Tsilhqot'in ought not to have responded to Taseko's notice that it would start work on the NOW program with a blockade. I agree that the blockade as a self-help remedy is a public interest factor weighing against the Tsilhqot'in's injunction application both in terms of the public interest and as a matter of the Tsilhqot'in seeking equitable relief
- [128] On the other hand, actions regarding rights infringements are an important part of the reconciliation process and so of general public importance...
- [129] Overall, the Tsilhqot'in stand to suffer greater irreparable harm if the injunction is not granted than Taseko will if it is. The status of Taseko's goal to operate a gold and copper mine is uncertain with many difficult hurdles to overcome. Taseko's harm is to lose the chance to proceed with the NOW program. However, the primary objective of this permit, to substantially start the overall mine project by January 2020 is no longer achievable and the harms suffered by the loss of the collateral objectives, gathering data for the purposes of further applications, permits, or mine redesign, is not well explained and is not as certain, as imminent or as tangible as that of the harm that the Tsilhqot'in will suffer.
- [130] Taseko's economic interests are important but the evidence that the NOW program will facilitate Taseko's plans to construct and operate a mine is not concrete or compelling. The NOW program will significantly disturb the NOW program area interfering with established, conceded, and asserted Aboriginal rights with the only tangible benefit being to provide jobs over a few months.
- [131] While there are important public interest issues on both sides, the imperative of reconciliation, an element of which is the ability to pursue infringement actions, is such that the balance of convenience is in the Tsilhqot'in's favour.
- [134] Taseko's application for an injunction prohibiting the Tsilhqot'in's blockade is moot and dismissed for that reason.

Law

Leave to Appeal

- [14] Pursuant to s. 7(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, a "limited appeal order" cannot be appealed without leave of a justice. Rule 2.1 of the Court of Appeal Rules provides that orders made under Part 10 of the Supreme Court Civil Rules, which includes interim injunctions orders, are limited appeal orders. Accordingly, the orders at issue are limited appeal orders and Taseko cannot appeal them without leave.
- [15] In *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10, Justice Saunders set out the following criteria for consideration on an application for leave to appeal:
- [1] whether the point on appeal is of significance to the practice;
 - [2] whether the point raised is of significance to the action itself;
 - [3] whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
 - [4] whether the appeal will unduly hinder the progress of the action.
- [16] These criteria are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10.
- [17] The merits threshold on an application for leave to appeal is generally low. Applicants are required only to show an arguable case: *Bartram v. Glaxosmithkline Inc.*, 2011 BCCA 539 at para. 16; *A.L.J. v. S.J.M.* (1994), 46 B.C.A.C. 158 at para. 10. Nevertheless, this Court is reluctant to grant leave to appeal from discretionary orders. In the case of a discretionary order, leave will only be granted where the applicant shows an arguable case that the order is clearly wrong, a serious injustice will occur, or the discretion was exercised on a wrong principle or not judicially: *Independent Contractors and Businesses Association v. British Columbia*, 2018 BCCA 429 at paras. 35-36; *V.F. v. E.B.*, 2011 BCCA 238 at paras. 22-23.
- [18] The decision to grant or refuse injunctive relief is discretionary: *Hagwilneghi v. Canadian Forest Products Ltd.*, 2011 BCCA 478 at para. 31. Appeals of applications for injunctive relief are exceptional because the law is well-settled and the nature of the appeal typically turns on the facts of the case: *Independent Contractors* at paras. 51, 53.

Positions of the Parties

Taseko

- [19] Taseko submits that the issues it seeks to raise in the appeals are important to the litigation and to the practice of law generally. It describes these issues as:
- a) how does a failed challenge to government action on the basis of consultation/accommodation affect a subsequent application seeking injunctive relief in an action challenging the same government action on the basis of infringement;

- b) how should engagement in an illegal blockade affect an Aboriginal litigant's entitlement to an interlocutory injunction preventing the same authorized activity that the blockade sought to interfere with;
 - c) what is the status quo when a litigant has engaged in an illegal blockade, thereby preventing the same activity it seeks to enjoin;
 - d) what duty does an Aboriginal litigant have to move an infringement action forward while a consultation/accommodation challenge is ongoing;
 - e) should the delay of an Aboriginal litigant in pursuing an infringement action and seeking an interlocutory injunction be assessed on the basis of either the applicant's motives or prejudice to the responding party; and
 - f) is the judicial restraint ordinarily applied under RJR-MacDonald relaxed when an Aboriginal party seeks injunctive relief pending resolution of challenges to government action on the basis of consultation/accommodation and/or infringement?
- [20] Emphasizing the low merits threshold that applies, Taseko submits the judge erred by applying the wrong merits threshold to the Infringement Action. According to Taseko, the applicable threshold was a strong arguable case, not a serious issue to be tried. In support of this position, Taseko contends the judge erred in finding that obtaining an extension of the permit would be "essentially mechanical" and failed to consider that the chief inspector has discretion under s. 3(1) of the Permit Regulation to order a deemed extension does not apply where it is "necessary to protect health, safety, the environment or a cultural heritage resource". In addition, Taseko contends, even if the permit can be extended until July 2022, there is still a material risk that it will expire before the project completes. Therefore, it says, granting the injunction was tantamount to granting the relief the Tsilhqot'in sought in the Infringement Action.
- [21] Taseko submits further that there is an arguable question as to whether the judge erred in principle in finding in favour of the Tsilhqot'in on the issues of status quo, delay, and clean hands when assessing the balance of convenience. With respect to delay, Taseko argues the Tsilhqot'in delayed almost two years in pursuing the Infringement Action and contends the judge ought to have considered the unjust effect of this delay on Taseko, not whether the Tsilhqot'in's reasons for delay were reasonable. It also argues the judge erred in principle when she minimized the significance of the blockade by balancing it against her general finding that actions regarding rights infringements are important to reconciliation. In support of these arguments, Taseko emphasizes the Tsilhqot'in had already unsuccessfully challenged the permit and they deliberately prevented Taseko from exercising its permits rights by way of the blockade, which repudiated their own obligations of good faith and reconciliation.

- [22] As to the status quo, Taseko contends that it should be assessed in favour of existing rights when the claim is brought and submits the judge erred in referring only to whether work on the project had physically commenced in considering the status quo issue. In support of this submission, it argues the fact that work had not commenced was due at least in part to the illegal blockade and it emphasizes the permit was validly granted two years earlier. It also emphasizes the Infringement Action was dormant for almost two years and its result is presently unknown. Finally, Taseko says, there is no possibility that an appeal will hinder the Infringement Action as the parties have secured trial dates in 2021.

The Tsilhqot'in

- [23] The Tsilhqot'in submit that Taseko has not met the test for leave to appeal on either application.
- [24] With respect to the Infringement Action, the Tsilhqot'in emphasize the judge's decision to grant the injunction was discretionary and, as such, it is entitled to a high degree of deference. Bearing this standard in mind, they say Taseko's proposed appeal is not arguable and, therefore, it has no reasonable prospect of success. In their submission, the judge correctly employed the "serious issue to be tried" standard in assessing the merits of their claim and she did not overlook the chief inspector's discretion to overturn the deemed authorization to extend the permit. On the contrary, they note, the judge specifically referred to the chief inspector's discretion at para. 37 of her reasons for judgment.
- [25] In support of their submission, the Tsilhqot'in emphasize that they agreed to consent to a deemed extension if the injunction was granted in the Infringement Action. They also challenge Taseko's argument that the judge should have applied the "strong arguable case" merits standard because, even with the two-year extension, there is a material risk the permit will expire before the program can be concluded. In response to that argument, the Tsilhqot'in submit the higher "strong arguable case" threshold does not encompass a mere material risk that interlocutory relief will amount to final relief. Rather, they say, it is limited to cases where interlocutory relief "will in effect" do so. According to the Tsilhqot'in, the judge properly considered the material risk at issue as part of the balance of convenience at para. 100 of her reasons.
- [26] As to the balance of convenience, the Tsilhqot'in note this Court has held it would be exceptional to grant leave in a case which turns upon the balance of convenience, citing, among other authorities, *Drader v. Abbotsford (City)* (1997), 40 B.C.L.R. (3d) 16 and *Maple Ridge (City) v. Copperthwaite*, 2019 BCCA 99. In their submission, that is precisely what happened in this case.
- [27] According to the Tsilhqot'in, Taseko's proposed grounds of appeal do not concern errors in principle or a failure to weigh relevant considerations. Rather, they say, Taseko's arguments go to the weight it asserts the judge should have given to each factor and, as such, they have no reasonable prospect of success on appeal. Specifically, regarding the delay in pursuing the Infringement Action, the Tsilhqot'in submit the judge considered this factor and

concluded on all the evidence that Taseko had not been placed in an unjust or unreasonable position. Similarly, she considered the effect of the blockade on the public interest and found it should be addressed through costs rather than by denying the injunction. Further, they say, it was open to the judge to find granting the injunction would preserve the status quo, particularly given that the same approach was taken three times on injunctions granted in the Consultation Petition, including twice by this Court.

- [28] As to the other elements of the test for leave to appeal, the Tsilhqot'in submit the issues Taseko raises are not sufficiently important to merit leave and that the proposed appeal could hinder the Infringement Action. In support of this submission, they note the relationship between consultation and the justification of infringement is well-settled and the Consultation Petition did not address the substantive requirements for justification. Finally, they submit Taseko has no arguable appeal in the Blockade Action and emphasize the blockade occurred on one day only and the judge provided no reasons which could provide a basis for appellate review. Accordingly, they say this Court would need to remit the matter back to the court below if leave is granted, which would cause further delay, is not in the interests of justice, and would serve no useful purpose given that the underlying facts are now stale.

Analysis

- [29] The judge presided over an evidence-intensive three-day hearing and reserved her decision when it concluded. A few weeks later, she gave thorough, thoughtful reasons and exercised her discretion in favour of granting the interlocutory injunction sought by the Tsilhqot'in. In doing so, the judge recognized that the "strong arguable case" merits threshold applies whenever granting an interlocutory injunction is tantamount to granting the relief sought in the main action, considered the Regulation in finding that granting the injunction would not be tantamount to granting the relief sought in the Infringement Action and, therefore, applied the "serious issue to be tried" merits threshold. In other words, the judge did not err by failing to take the chief inspector's discretion to overturn the deemed authorization into account when she exercised her discretion in favour of granting the injunction. Her conclusion that a permit extension was "essentially mechanical" was available on the evidence. Accordingly, I agree with the Tsilhqot'in that there is no arguable question as to whether the judge erred by applying the wrong merits threshold to the Infringement Action. I also agree that the judge did not err in considering the material risk the permit would expire when she assessed the balance of convenience.
- [30] As to irreparable harm and the balance of convenience, I see no arguable error in the judge's analysis. In my view, as the Tsilhqot'in submit, the real thrust of the proposed grounds of appeal is that she incorrectly determined the weight to be given to each of the factors Taseko identifies. Again, I agree with the Tsilhqot'in's submissions on the alleged errors Taseko contends the judge made on these factors, as I have just described them, and I conclude that none raise an arguable ground of appeal.

[31] The reality of the situation faced by the judge was that the Infringement Action would be rendered essentially pointless unless she granted the interlocutory injunction sought by the Tsilhqot'in. She recognized that reality and, in my view, the proposed appeal of her discretionary determination to grant the injunction has no reasonable prospect of success. Her decision to grant the injunction was heavily fact-dependent, it involved the application of well-settled legal tests and the proposed grounds of appeal do not raise issues of general importance. For all of these reasons, with thanks to counsel for their thorough and helpful arguments, I dismiss both applications for leave to appeal.

"The Honourable Madam Justice Dickson"

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