COURT FILE NO.: 00-CV-189329
DATE: 20040513

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WALPOLE ISLAND FIRST NATION, BKEJWANONG TERRITORY

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

AND B E T W E E N: **COURT FILE NO.:** 03-CV-261134CM1

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION AND
SAUGEEN FIRST NATION

Plaintiffs

- and –

THE ATTORNEY GENERAL OF CANADA and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

BEFORE: Mr. Justice Carnwath

COUNSEL: *H.W. Roger Townshend* and *Lorraine Land,* for the plaintiffs

Charlotte A. Bell, Q.C. and *Owen Young*, for the defendant, Attorney General of Canada

Michael Stephenson and *E. Ria Tzimas*, for the defendant, Her Majesty The Queen in Right of Ontario

HEARD: **May 10 & 11, 2004**

E N D O R S E M E N T

[1] The plaintiffs in these two actions seek a declaration they hold aboriginal title to the lake bed under large portions of Lake Erie and Georgian Bay. The defendants, Canada and Ontario, move to strike those portions of the Statements of Claim claiming aboriginal title to the lake bed.

[2] The issue to be decided is whether it is plain and obvious that the plaintiffs have no chance of success regarding aboriginal title to the lake bed.

[3] The motions are dismissed. Costs to the plaintiffs of $30,000, plus disbursements and G.S.T., the costs to be borne equally by Canada and Ontario. They are payable within 30 days.

BACKGROUND

[4] Aboriginal title in Canada is defined as follows:

> Although the courts have been less than forthcoming, I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land. For the sake of clarity, I will discuss each of the proportions separately.

Delgamuukw v. B.C., [1997] 3 S.C.R. 1010, para. 117, Lamer C.J.

[5] The plaintiffs confirmed, through their counsel, that they seek a declaration of aboriginal title to the lake bed as described in Schedules attached to the two Statements of Claim and as shown on Schedule "B" to the plaintiffs' factum. Both sides appear to agree that ownership of the lake bed carries with it certain rights.

[6] These rights have been described by one learned author, as follows:

> The owner of the bed of a stream, lake, or other body of water has, in general, the same rights of property and is entitled to use it in the same manner as any other landowner. He owns everything forming part of the land such as sand and gravel. He also owns everything above or below the land, except game and fish (which must first be appropriated) and water, which at common law does not form the subject of ownership, being a common resource.

Gerard V. LaForest and Associates, *Water Law in Canada – The Atlantic Provinces* (Ottawa: Department of Regional Economic Expansion, 1973), p. 234

[7] In addition, the aboriginal title to the lake bed carries with it the following rights:

> …The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right.
>
> *Delgamuukw*, para. 155

The Position of the Parties

[8] Canada submits that the ability to exclude, which goes with aboriginal title, would give the plaintiffs the power to prevent the exercise of right of public navigation over the waters above the lake bed in question. Canada says this runs contrary to the ancient and fundamental common law right of public navigation and, therefore, absolute title to the lake bed is not "cognizable" to the common law, or not compatible with it. Ontario joins in this submission.

[9] Ontario submits that title to the Great Lakes and navigable rivers is vested in the sovereign for the benefit of the public and the public is recognized to enjoy rights of navigation. The Crown holds title in trust for the public. Further, the public trust is connected to the exercise of sovereignty, as for example, in providing for the defence of the realm and protection of the public. Ontario therefore submits the plaintiffs' claim to aboriginal title over navigable waterways is incompatible with the Crown's assertion of sovereignty over those same waterways.

[10] The plaintiffs submit that aboriginal title, while not the same as a title in fee simple, is similar in the sense that it has the attributes of ownership and that the concept of "exclusivity" must be viewed from this perspective and not confused with sovereignty or the right to interfere with navigation. The plaintiffs point to examples of private ownership of river beds of navigable waters where the property right co-exists with the navigation rights. Any conflict that might arise can be resolved under s. 35 of the *Charter* in the manner detailed in *Regina* v. *Sparrow*, [1990] 1 S.C.R. 1075 and *Delgamuukw*, *supra*.

[11] In response to Ontario's submission that aboriginal title is incompatible with Crown sovereignty, the plaintiffs submit this issue remains open for argument, given the result in *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911. McLachlin, C.J. (Gonthier, Iacobucci, Arbour, and LeBel JJ. concurring) is reported as follows, at para. 64:

> I would prefer to refrain from comment on the extent, if any, to which colonial laws of sovereign succession are relevant to the definition of aboriginal rights under s. 35(1) until such time as it is necessary for the Court to resolve this issue.

[12] Only Binnie J. (Major J. concurring) was prepared to go further, at para. 154:

> In my opinion, sovereign incompatibility continues to be an element in the s. 35(1) analysis, albeit a limitation that will be sparingly applied. For the most part, the protection of practices, traditions and customs that are distinctive to aboriginal cultures in Canada do not raise legitimate sovereignty issues at the definitional stage.

The Test to be Applied

[13] In *Hunt* v. *Carey Canada Inc.*, [1990] 2 S.C.R. 959, Wilson J. reviewed the test to be applied to motions to strike pleadings at p. 979, *et seq.*:

> I had occasion to affirm this proposition in *Operation Dismantle Inc.* v. *The Queen*, [1985] 1 S.C.R. 441. At pages 486-87 I provided the following summary of the law in this area (with which the rest of the Court concurred):
>
> > The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action 'with some chance of success' (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dawson v. Government of Canada* (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it 'plain and obvious that the action cannot succeed?'
>
> And at p. 477 I observed:
>
> > It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs. [Emphasis added.]
>
> Most recently, in *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279, I made clear at p. 280 that it was my view that the test set out in *Inuit Tapirisat* was the correct test. The test remained whether the outcome of the case was 'plain and obvious' or 'beyond reasonable doubt'.
>
> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential

> for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

[14] On the question of "the novelty of the cause of action" as it relates to aboriginal claims, I find it useful to note the words of Hugessen J. in *Shubenacadia Indian Band* v. *Canada (Minister of Fisheries and Oceans*), [2001] F.C.J. 347, aff'd [2002] F.C.J. 880 (F.C.A.):

> Furthermore, the Statement of Claim is to be read generously and with an open mind and it is only in the very clearest of cases that the Court should strike out the Statement of Claim. This, in my view, is especially the case in this field, that is the field of aboriginal law, which in recent years in Canada has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted.

[15] I cite Hugessen J., not to suggest that the test is higher in cases of aboriginal claims, but rather, to stress that the novelty of the claim should not militate against the plaintiffs.

Analysis

[16] Canada's argument that aboriginal title creates a fundamental inconsistency with the common law is powerful and persuasive. Nevertheless, I am not persuaded that it is plain and obvious that the plaintiffs will fail, nor am I satisfied beyond a reasonable doubt that the plaintiffs will fail. They should have the right to develop their position in a trial.

[17] Ontario's argument on sovereign incompatibility I find to be less persuasive, but persuasive nevertheless. However, when viewed in the light of the above test, I cannot say it is plain and obvious the plaintiffs will fail. On this point as well, they are entitled to make their case at trial.

Conclusion

[18] The motions are dismissed. Counsel for Canada and Ontario, in the event of success, were not seeking costs. Counsel for the plaintiffs suggested the figure of $30,000, plus disbursements and G.S.T. were the plaintiffs to be successful. Canada and Ontario agreed that the sum suggested by the plaintiffs was reasonable and further agreed they should each bear one-half the costs so awarded. I have so ordered.

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CARNWATH J.

DATE: 20040513