

Federal Court



Cour fédérale

Date: 20170328

**Dockets: T-2153-00
T-2155-00**

Citation: 2017 FC 322

Ottawa, Ontario, March 28, 2017

PRESENT: The Honourable Mr. Justice Fothergill

Docket: T-2153-00

BETWEEN:

**PETER WATSON, SHARON BEAR,
CHARLIE BEAR, WINSTON BEAR AND
SHELDON WATSON, BEING THE HEADS
OF FAMILY OF THE DIRECT DESCENDANTS OF
THE CHACACHAS INDIAN BAND,
REPRESENTING THEMSELVES AND
ALL OTHER MEMBERS OF
THE CHACACHAS INDIAN BAND**

Plaintiffs

and

**HER MAJESTY THE QUEEN
IN RIGHT OF CANADA,
AS REPRESENTED BY
THE MINISTER OF INDIAN
AND NORTHERN AFFAIRS CANADA
AND THE OCHAPOWACE FIRST NATION**

Defendants

Docket: T-2155-00

AND BETWEEN:

**WESLEY BEAR, FREIDA SPARVIER,
JANET HENRY, FREDA ALLARY,
ROBERT GEORGE, AUDREY ISAAC,
SHIRLEY FLAMONT, KELLY MANHAS,
MAVIS BEAR AND MICHAEL KENNY,
ON THEIR OWN BEHALF AND ON BEHALF
OF ALL OTHER MEMBERS OF
THE KAKISIWEW INDIAN BAND**

Plaintiffs

And

**HER MAJESTY THE QUEEN
IN RIGHT OF CANADA,
AS REPRESENTED BY
THE MINISTER OF INDIAN
AND NORTHERN AFFAIRS AND
OCHAPOWACE INDIAN BAND NO. 71**

Respondents

ORDER AND REASONS

UPON the motions brought in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 on behalf of the Plaintiffs for:

- (a) an order pursuant to Rule 75 and Rule 385 granting leave to amend the Plaintiffs' Statements of Claim in the form of the Second Amended Statement of Claim attached as Schedule A to their respective Notices of Motion;

- (b) an order granting the Defendants 15 days to file Amended Statements of Defence to the Second Amended Statements of Claim, if necessary, and granting the Plaintiffs a period of 15 days to file a Reply to the Amended Statements of Defence, if necessary; and
- (c) no order as to costs;

AND UPON reading the Order of Prothonotary Lafrenière, case management judge, dated August 12, 2016, referring the present motions to the judge assigned to hear the Crown's motions for summary judgment on November 8 and 9, 2016 in Regina;

AND UPON reading the motion records filed on behalf of the parties;

AND CONSIDERING the following:

[1] In his Order dated August 12, 2016, Prothonotary Lafrenière provided the following context for the Plaintiffs' motions for leave to amend their respective Statements of Claim:

To situate the Plaintiffs' motion for leave to amend in proper context, a brief outline of the procedural history in Court File Nos. T-2153-00 and T-2155-00 is in order.

The two proceedings have been case managed ever since they were instituted in November 2000. Mr. Justice James Hugessen was designated case management judge by Order of then Associate Chief Justice Allan Lutfy dated November 20, 2000, and I was assigned to assist Justice Hugessen in the management of the proceedings.

For many reasons, the litigation has been long and protracted. In June 2008, I assumed sole responsibility for the two files. In order to bring order to the proceedings and impose some discipline on the parties, I instructed the Registry on June 12, 2008 that no

documents were to be filed without leave of the Court or first seeking directions from me. The proceedings moved along by fits and bounds over the next 7 years.

On January 15, 2016, a case management conference was held by teleconference with counsel for the parties. During the teleconference, counsel for the parties identified only five matters that needed to be addressed before dates for the trial of the phase one issues (as ordered by Mr. Justice James Hugessen on March 13, 2008) could be requisitioned. The outstanding matters were: (a) elder's evidence and the possibility of supplementing their will-say statements; (b) the use to be made at trial of discovery transcripts and evidence of deceased elders; (c) expert evidence to be called by the parties; (d) production of additional documents by the Plaintiffs; and (e) the possibility of the Defendant, Her Majesty the Queen in right of Canada as represented by the Minister of Indian and Northern Affairs Canada (Crown) bringing a motion for summary judgment.

At no point during the teleconference did Plaintiffs' counsel indicate that pleading amendments were being contemplated. The parties ultimately agreed that Crown counsel would have until February 29, 2016 to obtain instructions and advise whether the Crown would be moving for summary judgment.

By letter dated February 29, 2016, Crown counsel gave notice of the Crown's intention to bring a motion for summary judgment. During a case management conference held on March 2, 2016, Crown counsel advised that the grounds for the motion were the lack of standing of the Plaintiffs to bring an action for collective claims, the expiration of limitation periods, and estoppel based on settlement agreements reached with the Ochapowace Indian Band. Once again, there was no mention that the Plaintiffs would be seeking to amend their pleadings.

[...]

On July 5, 2016, the Plaintiffs in T-2153-00 tendered a motion in writing for an order granting leave to amend their Statement of Claim. The Plaintiffs in T-2155-00 followed suit with a similar motion on July 7, 2016. Neither party sought leave of the Court to bring their motions.

[...]

Despite the Court's best efforts, the proceedings have once again devolved into a procedural quagmire. The Plaintiffs insist that their

motion should take priority over the Crown's motion. They maintain that this is necessary so as to avoid any issue as to the use that the Plaintiffs can make of the material which is the subject of the motion to amend. I disagree.

The Crown's right to bring a motion for summary judgment based on the pleadings as they stood was crystallized by the Directions dated March 2, 2016. [...] Absent new or unforeseen circumstances, a moving party's motion should not be defeated, frustrated or delayed by a subsequent step taken by a responding party that could affect the rights of the moving party: *Bruce v John Northway & Sons Ltd*, [1962] OWN 150. No such circumstances have been established by the Plaintiffs in this case.

The Plaintiffs have failed to establish that the proposed amendments relate to any issue to be determined in conjunction with the Crown's summary judgment motion. In addition, the amendments, if allowed, would complicate the proceedings and completely derail the schedule leading to the summary judgment hearing.

For the above reasons, I conclude that the Crown is entitled to have its motion heard before dealing with the Plaintiffs' motion to amend. The Plaintiffs' motions shall accordingly be adjourned to the special sitting commencing on November 8, 2016. The motions judge can decide whether the Plaintiffs' motions should be heard immediately after hearing the Crown's motion or following disposition of the Crown's motion.

[2] The Plaintiffs jointly retained an expert who produced a report titled *Historical Narrative of the Chadachas and Kakisiwew Bands, prepared in relation to FC Action T-2155-00 and FC Action T-2153-00*. The Plaintiffs say that this report contains additional historical facts and information that are "relevant and necessary" to their claims. They maintain that the proposed amendments do not raise new issues because the conduct of the Crown's agents and employees has always been implicated in these actions. They argue that the new facts will better inform the Court of the historical circumstances associated with the Chacachas Band and the Kakisiwew Band, and will help to shed light on the activities of the Crown's agents and employees during the relevant time.

[3] By separate Order and Reasons issued together with this Order and Reasons, the Crown's motion for summary judgment is granted in part. The Plaintiffs are estopped from advancing claims for land or other compensation with respect to the factual and legal matters that are addressed in the Treaty Land Entitlement [TLE] Settlement Agreement and the 1919 Surrender Settlement Agreement, as described in the separate Order and Reasons.

[4] As explained in paragraph 17 of the separate Order and Reasons :

The test on a motion under Rule 75 is whether it is in the interests of justice to permit the amendment (*Janssen Inc v Abbvie Corp*, 2014 FCA 242 at para 3 [*Janssen*]). The following factors must be considered: (a) the timeliness of the motion; (b) the extent to which the proposed amendments would delay the expeditious trial of the matter; (c) the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter; and (d) whether the amendments sought will facilitate the court's consideration of the substance of the dispute on its merits (*Janssen* at para 3; see also *Continental Bank Leasing Corp v R*, [1993] TCJ No 18 at para 23 (TCC)). A further question is whether the amendment raises a triable issue (*Merck & Co Inc v Apotex Inc*, 2003 FCA 488 at para 39). The purpose of weighing these factors is to ensure fairness and justice. No single factor is determinative.

[5] The Plaintiffs in T-2153-00 [Watson Plaintiffs] say that the amendments they seek are consistent with documents located in the course of historical research and previously provided to the Crown. They maintain that their proposed Second Amended Statement of Claim does not raise new issues in the actions and should not cause prejudice to other parties.

[6] The Watson Plaintiffs also say that the amendments they seek address legal principles that have been more clearly articulated by the courts in recent years. They argue that the amendments will assist the Court in understanding the substance of their claim (citing *Canderel*

Ltd v Canada, [1994] 1 FC 3 (CA) at para 10). According to the Watson Plaintiffs, even if the amendments raise a new cause of action, they should nevertheless be allowed because the new cause of action arises out of substantially the same facts, and it is in the interests of justice to permit them (citing *Khadr v Canada*, 2014 FC 1001 at para 6).

[7] The Plaintiffs in T-2155-00 [Bear Plaintiffs] largely agree with and adopt the arguments advanced by the Watson Plaintiffs. They maintain that there has been no delay in seeking leave to introduce the amendments, and they have moved expeditiously following receipt of the expert report. They assert that the pleadings are not yet closed, and the action remains at the pre-trial stage.

[8] The Crown says that the amendments should be refused because they fail to disclose a reasonable cause of action. The amendments allege a private tortious scheme by government employees for their own economic gain in violation of law and policy resulting in damage to the Plaintiffs, and assert that the Crown is liable for the private scheme. The Crown argues that prior to the enactment of the *Crown Liability Act*, SC 1952-53, c 30, the Crown was immune at common law from responsibility for the intentional torts of its servants. The Crown maintains that the Plaintiffs have alleged insufficient material facts to ground liability in the Crown.

[9] The Bear Plaintiffs respond as follows:

It is evident from the Second Amended Statement of Claim of the plaintiffs that the honour of the Crown has been in dispute. Clearly, the Crown is attempting to reframe its focus on something that is not at issue in this case, that being the intentional torts position. The proposed amended pleadings indicate that the Syndicate's members' activities were illegal. The failure of the

Crown to supervise its servants and how those servants dealt with the Original Reserve lands is at play. This raises the question as to whether those servants acted in a manner which allowed them to profit from their intimate knowledge of land in the North West Territories. It may even be argued that the conduct of Indian Agent McDonald and Surveyor Nelson may appear as a form of sharp dealing. The issue at play in the proposed amendments is the Crown's conduct, and viewed as a whole and in context, did it meet the standard of the honour of the Crown.

[10] The Defendant Ochapowace Band does not oppose the proposed amendments to the Plaintiffs' Statements of Claim.

[11] As noted above, pursuant to the Court's separate Order and Reasons granting the Crown's motion for summary judgment in part, the Plaintiffs are estopped from advancing claims for land or other compensation with respect to the factual and legal matters that are addressed in the TLE Settlement Agreement and the 1919 Surrender Settlement Agreement. However, the Court has also found that there is a triable issue with respect to whether the Plaintiffs have standing to seek declarations regarding the legal status of the Chacachas Band, the Kakisiwew Band, the Ochapowace Band and their respective memberships. There are also a number of outstanding factual and legal disputes between the parties respecting the Crown's defences of limitations, laches and acquiescence.

[12] I am satisfied that the proposed amendments to the Plaintiffs' Statements of Claim are potentially relevant to the remaining issues in the actions. They may help to inform the Court of the historical circumstances associated with the Chacachas Band, the Kakisiwew Band, the Ochapowace Band and their respective memberships, and may shed light on the activities of the Crown's agents and employees during the relevant time. It is not plain and obvious that the

amendments fail to raise triable issues. It is therefore in the interests of justice that the Plaintiffs' motions for leave to amend their respective Statements of Claim be granted.

[13] The risk of prejudice has been attenuated by the Court's determination of the Crown's motions for summary judgment. By virtue of that determination, any amendment of the Plaintiffs' Statements of Claim may not advance claims for land or other compensation with respect to the factual and legal matters that are addressed in the TLE Settlement Agreement and the 1919 Surrender Settlement Agreement.

ORDER

THIS COURT ORDERS that:

1. The Plaintiffs' motions for orders pursuant to Rule 75 and Rule 385 to amend their respective Statements of Claim is granted, except to the extent that the proposed amendments are inconsistent with this Court's separate Order and Reasons determining the Crown's motions for summary judgment;
2. The Defendants shall file Amended Statements of Defence to the Second Amended Statements of Claim, if necessary, within 15 days, and the Plaintiffs shall file a Reply to the Amended Statements of Defence, if necessary, within a further 15 days; and
3. Costs of the motions shall be in the cause.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS: T-2153-00 AND T-2155-00
DOCKET: T-2153-00

STYLE OF CAUSE: PETER WATSON, SHARON BEAR, CHARLIE BEAR, WINSTON BEAR AND, SHELDON WATSON, BEING THE HEADS, OF FAMILY OF THE DIRECT DESCENDANTS OF, THE CHACACHAS INDIAN BAND, REPRESENTING THEMSELVES AND, ALL OTHER MEMBERS OF, THE CHACACHAS INDIAN BAND v HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF INDIAN, AND NORTHERN AFFAIRS CANADA, AND THE OCHAPOWACE FIRST NATION

AND DOCKET: T-2155-00

STYLE OF CAUSE: WESLEY BEAR, FREIDA SPARVIER, JANET HENRY, FRED A ALLARY, ROBERT GEORGE, AUDREY ISAAC, SHIRLEY FLAMONT, KELLY MANHAS, MAVIS BEAR AND MICHAEL KENNY, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE KAKISIWEW INDIAN BAND v HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF INDIAN, AND NORTHERN AFFAIRS AND OCHAPOWACE INDIAN BAND NO. 71

PLACE OF HEARING: REGINA, SASKATCHEWAN

DATE OF HEARING: NOVEMBER 8, 2016

ORDER AND REASONS: FOTHERGILL J.

DATED: MARCH 28, 2017

APPEARANCES:

Thomas Waller

FOR THE PLAINTIFFS
PETER WATSON ET AL

J. R. Norman Boudreau
Earl Stevenson

FOR THE PLAINTIFFS
WESLEY BEAR ET AL

Thor Kristiansen
Karen Jones

FOR THE DEFENDENTS
HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY THE MINISTER OF INDIAN
AND NORTHERN AFFAIRS CANADA

Mervin Phillips
Leanne Phillips

FOR THE DEFENDANTS
THE OCHAPOWACE FIRST NATION
OCHAPOWACE INDIAN BAND NO. 71

SOLICITORS OF RECORD:

Olive Waller Zinkhan & Waller
LLP
Barristers and Solicitors
Regina, Saskatchewan

FOR THE PLAINTIFFS
PETER WATSON ET AL

Boudreau Law
Barristers and Solicitors
Winnipeg, Manitoba

FOR THE PLAINTIFFS
WESLEY BEAR ET AL

William F. Pentney, Q.C.
Deputy Attorney General of Canada
Ottawa, Ontario

FOR THE DEFENDENTS
HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY THE MINISTER OF INDIAN
AND NORTHERN AFFAIRS CANADA

Phillips & Co.
Barristers and Solicitors
Regina, Saskatchewan

FOR THE DEFENDANTS
THE OCHAPOWACE FIRST NATION
AND OCHAPOWACE INDIAN BAND NO. 71