Federal Court  Cour fédérale

Date: 20120829

Docket: T-1963-10

Citation: 2012 FC 1024

Ottawa, Ontario, August 29, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

BURNS BOG CONSERVATION SOCIETY

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA;
THE MINISTER OF TRANSPORT AND INFRASTRUCTURE;
THE MINISTER OF ENVIRONMENT;
THE MINISTER OF FISHERIES and
THE QUEEN IN RIGHT OF CANADA

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is a motion by the Defendants under section 215 of the *Federal Courts Rules* SOR/98-106 for summary judgment on the ground that there is no legal basis for the Plaintiff's claim.

BACKGROUND

[2] Burns Bog, which is situated between the South Arm of the Fraser River and Boundary Bay, is one of the largest raised peat bogs in the world (Burns Bog or the Bog). The Burns Bog Conservation Society is a non-profit society registered in British Colombia under the *Society Act* RSBC 1996, c 433 and dedicated to preserving the Bog and raising public awareness of its ecological significance.

[3] The Defendants are ministers of the Federal Crown associated with the Pacific Gateway Strategy, an infrastructure program intended to improve Canada's maritime access to markets around the Pacific and Indian Oceans.

[4] The Corporation of Delta (Delta), the Greater Vancouver Regional District (Vancouver), and the Province of British Columbia (together, Bog Owners) purchased six parcels of the Bog for conservation purposes in 2004. On 12 March 2004, the Federal Minister of the Environment agreed to contribute $28 million to the purchase (Contribution Agreement). However, the Federal Government did not take title to any part of the Bog. The Contribution Agreement required the Bog Owners to develop a management plan within two years so that at least 5000 acres of Burns Bog would be managed as protected conservation land.

[5] In March 2004, the Bog Owners granted the Federal Crown a conservation covenant (Covenant) over the Bog under section 219 of the BC *Land Titles Act* RSBC 1996 c 250. The Covenant requires the Bog Owners to refrain from taking any action "that could reasonably be expected to destroy, impair, negatively affect, or alter" the Bog.

[6] The Federal Government and the Bog Owners entered into the Burns Bog Management Agreement (Management Agreement) on 23 March 2004. The Management Agreement laid out the process by which the parties would develop a long-term management plan for the Bog in accordance with the Contribution Agreement. The Bog Owners collaborated with the Federal Government and, on 25 May 2007, they finalized the Burns Bog Ecological Conservancy Area Management Plan (Management Plan), which sets out policy direction and recommended actions to maintain the Bog's ecological integrity.

The South Fraser Perimeter Road

[7] The South Fraser Perimeter Road (SFPR) is a component of the British Colombia Gateway Program, an effort by the government of British Colombia (Province) to improve bridge and road infrastructure throughout the Greater Vancouver area. Although no part of the SFPR will pass through Burns Bog itself, a stretch of it will run adjacent to the Bog.

[8] On 3 September 2008, the Federal Government and the Province entered into an arrangement to fund the SFPR project. In total, the Federal government agreed to contribute $363 million to road construction. Notwithstanding its financial contribution, Canada did not assume any responsibility for construction or operation of the SFPR, which remains the Province's responsibility.

[9] The Federal Government's monetary contribution, and the fact that the construction required permits under the *Fisheries Act* RSC 1985 c F-14 (Fisheries Act) and the *Navigable Waters Protection Act* RSC 1985 c N-22, triggered an environmental assessment under the *Canadian Environmental Assessment Act* SC 1992 c 37. The environmental assessment began on

11 December 2006. Environment Canada provided expert advice to Transport Canada (TC) and the Department of Fisheries and Oceans (DFO), who were responsible for completing the assessment. On 28 July 2008, TC and the DFO concluded that the SFPR was not likely to cause significant adverse environmental effects if certain mitigation measures were followed. These mitigation measures included the creation of a hydrology work plan and air quality work plan.

Conservation Covenant

[10] The Covenant restricts what the Bog Owners can do on the Bog, as follows:

> **4.1** Except as expressly permitted in section 6 of this agreement, the Province, Delta, and the GVRD shall not do anything, or allow anything to be done, that does or could reasonably be expected to destroy, impair, diminish, negatively affect, or alter the Bog or the Amenities from the condition thereof described in the Report.

[11] The Covenant also provides that the obligations it creates are contractual only:

> **9.1** The parties agree that this Agreement creates only contractual obligations and obligations arising out of the nature of this Agreement as a Covenant under seal. Without limiting the generality of the foregoing, the parties agree that no tort or fiduciary obligations or liabilities of any kind are created or exist between the parties in respect of this Agreement and nothing in this Agreement creates any duty of care or other duty on any of the parties to anyone else.

[12] The Covenant also includes an "entire agreement" clause:

> **16**. None of the parties hereto have made any representation, Covenants, warranties, guarantees, promises or agreements (oral or otherwise) with any other party than those contained in this Agreement or in any other agreement that is reduced to writing and executed by all parties to it. This agreement may only be changed by a written instrument signed by all the parties.

Burns Bog Management Agreement

[13] The Management Agreement provides for the development of a long-term Management Plan for the Bog and contains, *inter alia*, the following provisions:

> **2.01** Except as expressly permitted in section 6 of the Conservation Covenant, the Province, Delta, and the GVRD shall not do anything, or allow anything to be done, that does or could reasonably be expected to destroy, impair, diminish, negatively affect, or alter the Land, including all natural, scientific, environmental, wildlife or plant life values or attributes relating to it, from the condition thereof described in this Report.
>
> **2.04** Prior to completion of the Management Plan, GVRD will […] manage the Land in accordance with the Conservation Covenant […]
>
> **2.08** In the event of any conflict, the terms of the Conservation Covenant shall prevail over this Management Agreement, the Management Plan, the Provincial Land Operating Agreement and the Local Government Land Operating Agreement.

Statement of Claim

[14] The Plaintiff filed a Statement of Claim on 24 November 2010 by which it sought to compel the Defendants to protect Burns Bog. The Plaintiff claims the construction of the SFPR will negatively impact the hydrology of Burns Bog and says the Defendants owe the Canadian public a trust, fiduciary, or other legal duty to protect the Bog. The Plaintiff also claims that the Defendants are bound to protect Burns Bog under the Fisheries Act, the *Migratory Birds Convention Act* SC 1994 c 22 (MBCA), the *Canadian Environmental Protection Act* SC 1999 c 33 (CEPA) and the *Species at Risk Act* SC 2002 c 29 (SARA).

[15] The Plaintiff also says that the Burns Bog Agreements created a duty on the Defendants to protect Burns Bog and asks the Court for an injunction halting construction of the SFPR or an order to reconsider the SFPR to protect the Bog. The Plaintiff also asks for a declaration that the Defendants are bound by the Burns Bog Agreements and a declaration that Burns Bog is subject to a public trust.

Statement of Defence

[16] The Defendants filed their statement of Defence on 21 June 2011. They say the claim should be struck because the Plaintiff has failed to plead the necessary facts to show it has standing to bring the claim. The Defendants also say they do not owe the Plaintiff any duty to protect Burns Bog and deny the existence of an environmental, public, or any other kind of trust or fiduciary obligation. If any of these obligations exists, none of the Defendants has breached any of them and all have met their obligations. The Defendants met any duty to protect Burns Bog by conducting the environmental assessment and by taking mitigation measures.

[17] In the alternative, the Defendants say the essence of the Plaintiff's claim is a challenge to decisions by Transport Canada and the Department of Fisheries and Oceans to approve the environmental screening of the SFPR. The appropriate way to challenge those decisions was an application for judicial review under section 18.1 of the *Federal Courts Act* RSC 1985 c F-7. The Plaintiff's claim is simply a collateral attack on those decisions.

[18] The Defendants also note they do not own Burns Bog. They deny the existence of a general duty to protect the Bog. Further, there is no statutory duty to protect the Bog. The Covenant only creates contractual obligations between, Delta, Vancouver, and the Province. The Management

Agreement is only enforceable between the parties and cannot create a duty to protect the Bog. The Management Plan does not place any obligations on the Defendants to protect the Bog.

[19] The Plaintiff claims that the Defendants have breached the Burns Bog Agreements, but the SFPR is not located on Burns Bog, so the agreements have no application.

[20] Section 22 of the *Crown Liability and Proceedings Act* RSC 1985 c C-50 prevents the Court from granting the Plaintiff injunctive relief.

ISSUES

[21] The Defendants raise the following issues on this motion:

a. Whether the Statement of Claim discloses a genuine issue for trial;

b. Whether summary judgment is appropriate.

STATUTORY PROVISIONS

[22] The following provisions of the Rules are applicable in this proceeding:

213. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.	**213**. (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.

[…]	[…]
215. (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.	**215.** (1) Si, par suite d'une requête enjugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

[23] The following provision of the British Colombia *Land Titles Act* RSBC 1996 c 250 (BC Land Titles Act) is also applicable in this proceeding:

> **219** (1) a Covenant as described in subsection (2) in favour of the Crown […] may be registered against the title to the land subject to the Covenant and is enforceable against the Covenantor and the successors in title of the Covenantor even if the Covenant is not annexed to land owned by the Covenantee.
>
> (2) A Covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:
>
> (a) provisions in respect of
>
> (i) the use of land, or
>
> (ii) the use of a building on or to be erected on land;
>
> (b) that land
>
> (i) is to be built on in accordance with the Covenant,
>
> (ii) is not to be built on except in accordance with the Covenant, or
>
> (iii) is not to be built on;
>
> […]
>
> (9) A Covenant registrable under this section may be

> (a) modified by the holder of the charge and the owner of the land charged, or
>
> (b) discharged by the holder of the charge
>
> by an agreement or instrument in writing the execution of which is witnessed or proved in accordance with this Act.

ARGUMENT

The Defendants

[24] The Defendants argue that the Plaintiff's claim is bound to fail because there is no legal or equitable basis for the duty the Plaintiff alleges.

Test for Summary Judgment

[25] On a motion for summary judgment the Court must ask whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial. See *TPG Technology Consulting Ltd. v Canada* 2011 FC 1054 at paragraph 20. The Court is not to ask whether the Plaintiff could possibly succeed at trial.

Burden on Summary Judgment

[26] The Plaintiff bears the evidentiary burden of establishing that there is a genuine issue for trial. The Defendant bears the legal burden of establishing the facts necessary to obtain summary judgment. See *TPG Technology*, above, at paragraph 21.

Summary Judgment Should be Granted

[27] There are no contested facts which must be resolved in order to determine that the Plaintiff's claim has no chance of success. The Defendants owe no duty to the Plaintiff or to the general public to protect Burns Bog. The Statement of Claim identifies four possible sources of such a duty, but none of these actually create the duty the Plaintiff alleges.

Burns Bog Agreements

[28] First, none of the agreements between the Federal Government and the Bog Owners require the Defendants to take any action to preserve the Bog's ecological integrity.

Conservation Covenant

[29] The Covenant's restrictions apply to the Bog Owners, not to the Defendants. None of the Defendants committed to protect the Bog or to prevent activities that may damage it. The only obligation they assumed was to collaborate with the Bog Owners in the preparation of the Management Plan.

[30] The Federal Crown is the beneficiary of the Covenant and has the power to enforce it against the Bog Owners. However, the Covenant does not require the Defendants to take steps to remedy breaches. The Covenant specifically permits Canada to waive breaches of the agreement.

[31] The Covenant also applies only in respect of the lands it charges. The SFPR is to be situated entirely outside the Bog, so it follows that the Covenant cannot apply to the construction of the SFPR. Subsection 219(1) of the BC Land Titles Act provides that covenants are only enforceable

against the original covenantor or a successor in title to lands in respect of which they are registered. It follows that the Covenant can only apply to the land against which it is registered. The Covenant runs with the title to the Bog and other land is not affected.

The Management Agreement

[32] The Management Agreement provided for the management of the Bog while Canada and the Bog Owners worked toward a long-term Management Plan. There are no provisions in the Management Agreement which require the Defendants to take steps to protect the Bog.

Management Plan

[33] The Management Plan sets out policy directions and actions necessary to maintain the Bog's ecological integrity. It does not oblige the Defendants to protect the Bog's ecological integrity. In any case, it is a policy document and not a contract.

Trust Obligations

[34] Second, the Plaintiff relies on a public or environmental trust for the duty on the Defendants to protect the Bog. There is no trust with respect to Burns Bog, so this cannot ground a duty on the Defendants to protect it.

General Trust Principles

[35] A trust is a fiduciary relationship which requires the legal owner of property to deal with it in a manner that gives effect to the equitable rights of another person. An express trust can only arise in the presence of the three certainties:

a. *Certainty of Intention*: the trustee must have a specific obligation to hold property to the benefit of anther person. A moral obligation is insufficient to give rise to a trust relationship;
b. *Certainty of Subject Matter*: the property subject to the trust obligation must, from the outset of the asserted trust, be clearly described or definitively ascertainable;
c. *Certainty of Objects*: there can be no uncertainty as to whether any given person is a beneficiary of the trust.

See *Scrimes v Nickle*, [1980] AJ No 514 (QL). None of the three certainties are present in this case, so there can be no trust.

[36] A trust does not arise until trust property vests in the trustee. The Statement of Claim does not identify any specific trust property. The Plaintiff says only that the Defendants stand in a "trust and/or fiduciary and/or legal relationship with respect to the protection of the ecological balance of Burns Bog" However, the Defendants cannot be trustees of the Bog because they do not own it.

Public, Equitable, or Environmental Trust

[37] The Plaintiff has said the Defendants are bound by a public or environmental trust which was created by the Burns Bog Agreements, by statute, or by the doctrine of environmental trust. None of these is a valid basis for any obligation on the Defendants to protect Burns Bog.

Burns Bog Agreements

The Covenant cannot create a trust because it gives neither title nor ownership of the Bog to the Defendants. It also expressly excludes any fiduciary obligations between the parties or to anyone else. *Zeitler v Zeitler Estate* 2008 BCSC 775, at paragraph 70, teaches that where there is a contractual relationship, the Court must not distort facts to impose a trust where none was intended. To interpret the Covenant as imposing a trust duty on the Defendants would be to inappropriately distort its terms.

[38] Under section 219(9) of the *BC Land Titles Act*, the Defendants can unilaterally discharge their obligations under the Covenant. This is inconsistent with the existence of a trust relationship. Further, *Green v Ontario*, [1973] 2 OR 396 establishes that a trust obligation includes an obligation to hold trust property. See pages 407 and 408. The Defendants' right to unilaterally discharge the Covenant shows they do not have an obligation to hold the Covenant, which is the only property which could be subject to a trust obligation. The Defendants have no obligation to hold the purported trust property, so they cannot be subject to a trust obligation. Neither the Management Agreement nor the Management Plan eliminates the Defendants' right to unilaterally discharge the Covenant.

No Public Trust

[39] The Defendants cannot be subject to obligations under a public trust because no such trust exists in Canadian law. The Plaintiff says this kind of trust is created by operation of Canadian environmental law, but no court in Canada has recognized a public trust which requires the Crown to protect the environment. The Supreme Court of Canada considered the possibility of a public trust in *British Colombia v Canadian Forest Products Ltd* 2004 SCC 38, [*Canfor*] but found it could not decide the issue because it was not addressed in the courts below.

[40] The public trust doctrine exists in the United States of America (USA) and recognizes that state lands may be held in trust for the public. In *Canfor,* above, British Colombia sought a valuation of tort damages for publicly owned resources. Here, the Defendants do not own Burns Bog, so they cannot owe a trust obligation even if a public trust can exist under Canadian law. There is no basis in law to impose a trust obligation on the Defendants with respect to property owned by the Bog Owners.

Fiduciary Duty

[41] The third source the Plaintiff identifies for the Defendants' obligation to protect Burns Bog is a fiduciary duty owed to the Bog, the Canadian public and the Plaintiff. However, *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24 at paragraph 48 establishes that the Crown does not owe a fiduciary duty to the public at large. The Defendants cannot owe a fiduciary obligation to the Bog itself because a fiduciary duty can only be owed to persons or classes of persons. Further, the Plaintiff has not established that its relationship with the Defendants falls into any of the recognized categories of fiduciary relationship. *Elder Advocates* shows that "the special characteristics of

governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances." See paragraph 37.

[42] To make out its claim based on fiduciary obligation, the Plaintiff must show that an *ad hoc* fiduciary relationship exists between it and the Defendants. Accordingly, it must show that:

a. The Defendants gave an undertaking of responsibility to act in the Plaintiff's best interests;

b. The Plaintiff is vulnerable to the Defendants, in the sense that the Defendants have discretionary power over the Plaintiff;

c. The Defendants' power may affect the Plaintiff's legal or substantial practical interests.

See *Elder Advocates*, above, at paragraph 30 to 34.

[43] The Defendants have not undertaken to act in the Plaintiff's best interests. As the Supreme Court of Canada said in *Elder Advocates*, above, at paragraph 44:

> Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178.

[44] The Covenant expressly says it creates no duty to outside parties, which precludes an undertaking to act in the Plaintiff's best interests. The Plaintiff's failure to show an undertaking is enough to defeat their claim of a fiduciary obligation on the Crown to protect the Bog.

[45] The Plaintiff also fails to establish a fiduciary obligation on the second and third branches of the *Elder Advocates* test. The government may validly make distinctions between different groups of people. A fiduciary duty arises only where the purported fiduciary has deliberately given up interests of others in favour of the beneficiary. The Plaintiff's members are only distinguished by voluntary association with it and are otherwise indistinguishable from the rest of the Canadian public.

[46] The Plaintiff also has no practical or legal interest in Burns Bog that is different from any other member of the public. *Elder Advocates* requires a specific private law interest to which the purported beneficiary has a distinct and complete legal interest. The interest the Plaintiff has in preserving Burns Bog is identical to that of all Canadians so there can be no fiduciary relationship between the Plaintiff and the Defendants.

Statutory Obligations

[47] None of the *Fisheries Act*, the MBCA, the CEPA, or the SARA grounds a duty on the Defendants to protect Burns Bog. The Plaintiff has not pointed to any provision in these acts which establishes a fiduciary, trust, or legal relationship between the Defendants and the Plaintiff or Burns Bog. As the Supreme Court of Canada held in *Elder Advocates*, above, at paragraph 45,

> If the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it: *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 40; *Authorson v. Canada*

> *(Attorney General)* (2000), 53 O.R. (3d) 221 (S.C.J.), at para. 28, aff'd (2002), 58 O.R. (3d) 417 (C.A.), at para. 73, rev'd on other grounds, 2003 SCC 39, [2003] 2 S.C.R. 40. The mere grant to a public authority of discretionary power to affect a person's interest does not suffice.

Conclusion

[48] The Plaintiff cannot prove any basis for fiduciary, trust, contractual, or other legal duty owed by the Defendants to protect Burns Bog, so its claim cannot succeed. There is no genuine issue for trial, so summary judgment should be granted against the Plaintiff with costs to the Defendants.

The Plaintiff

[49] This case is not appropriate for summary disposition because the issues are complex and require a full hearing on the merits. To adjudicate the case, the Court will have to interpret several statutes and the Covenant. The issues raised touch on environmental and public policy and involve consideration of the public good. Although the Defendants do not want the case to be given a full hearing, the public interest favours a full hearing in this case.

[50] The Court should also allow this matter to proceed to trial to develop the law on environmental issues. Section 91 of the *Constitution Act, 1867* gives jurisdiction over the environment to the Federal Government. This is to ensure uniform regulation across Canada. The Federal Court is the appropriate court to consider the issues the Plaintiff has raised. Given the importance of the Federal Government in environmental protection, the Court should give guidance only after a full hearing in this case. The Court's jurisdiction over environmental law is analogous to its jurisdiction over maritime law, in that it is necessary to ensure uniformity across Canada. The

existence of the doctrine of environmental trust in Canadian law requires a full hearing on the merits.

[51] Protection of the environment is an important issue in Canada, so the Court should give the Plaintiff a full hearing. Although the Defendant has said there is no statutory basis for the trust the Plaintiff asserts that the law on this point is unsettled. The facts of this case are unique, so a full hearing is required.

[52] The Defendants have given no authority for their argument that the only remedy available to the Plaintiffs was an application for judicial review. The Court should consider all remedies available.

Plaintiff has Standing

[53] Recent cases from this Court and the Federal Court of Appeal dealing with the SARA show that the Plaintiff has standing to bring this application. The Plaintiff has a long-standing connection to Burns Bog and is an interested party.

Issues for Trial

Law is Unsettled

[54] Summary judgment is appropriate where there is no genuine issue for trial. However, there is a genuine issue for trial in this case: whether the Court should extend the common-law to include an environmental trust. Such a trust could arise on the facts of this case, so a full oral hearing is required. Until the law in this area is fully developed, summary judgment is inappropriate.

[55] In this case, the relevant facts are contested by the parties, so summary judgment is inappropriate. Further, full discovery is necessary to establish the history of the Covenant and ensure the SFPR was designed to protect Burns Bog. The Defendant has not led any evidence to show the hydrology of Burns Bog has been protected or what impact the SFPR will have on the Bog.

Duty to Protect the Bog

[56] The Defendants have said they do not owe any duty to protect Burns Bog. However, there is no legal authority for this argument. The duty to protect Burns Bog can be supported by contractual, trust, fiduciary, and statutory obligations. Under the Covenant, Management Agreement, and Management Plan, the Defendants are under a duty to protect Burns Bog. The Defendants do not own the Bog, but their provision of funding to construct the SFPR imposes a public trust on them. The Defendants have also undertaken fiduciary obligations with respect to the Bog. The Fisheries Act, MBCA, CEPA, and SARA impose an obligation on the Defendants to protect Burns Bog. The Court will also have to consider how the Covenant imposes a duty on the Defendants to protect Burns Bog.

[57] The Defendants are also under a duty to protect the environment which is broader than any proprietary interest and can be grounded in a number of sources. A full hearing is necessary to determine the scope of the duty the plaintiffs assert. A full hearing is necessary to consider whether the public interest grounds the duty to protect the environment.

[58] The facts in this case are unique. Municipal, Provincial, and Federal authorities joined together to create a unique contract which creates park-like status for Burns Bog. However,

government inaction has harmed the Bog by allowing it to be drained. The impact of this government inaction is an issue which must be addressed in a full hearing.

[59] There is a valid cause of action in this case. The existence of a trust or stewardship relationship between the Defendant and Burns Bog is one which requires a full hearing on the merits.

Conclusion

[60] The Defendants' motion should be dismissed and the case returned to the case management judge. With the assistance of experience counsel, the issues in this case can be resolved fully. The Plaintiff should also be awarded costs of this motion.

ANALYSIS

[61] There is no dispute between the parties about the rules and principles applicable to summary judgment.

[62] Sections 213 - 215 of the Rules govern motions for summary judgment. The Rules permit an application for summary judgment on all or some of the issues raised in the pleadings. If the Court is satisfied there is no genuine issue for trial, the Court must grant summary judgment accordingly.

[63] The Supreme Court of Canada in *Canada (Attorney General) v Lameman* 2008 SCC 14, at paragraph 10, recently emphasized the importance of summary judgment for our justice system:

> The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[64] At paragraphs 20 and 21 of *TPG Technology*, above, Justice David Near confirmed the well-established principle that the question for the Court on an application for summary judgment is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at any future trial. On a motion for summary judgment, the responding party has the evidentiary burden of showing that there is a genuine issue for trial, but the moving party bears the legal onus of establishing the facts necessary to obtain summary judgment. Absent any issue of credibility, the Court is to consider and determine the facts necessary to decide questions of fact and law if that can be done on the whole of the evidence presented.

[65] In my view, this matter is appropriate for summary judgment. There are no contested facts on the matter at issue which need to be resolved in order to determine that the Plaintiff's claim has no chance of success and that it should not be allowed to proceed to trial.

The Central Issue

[66] As the Defendants correctly point out, the issue before me in this motion is not whether the construction of the SFPR by the Province may impact the ecology of Burns Bog. The issue is whether there is a genuine issue for trial over whether the Defendants owe to the Plaintiff any duty

with respect to Burns Bog that compels any of the Defendants to intervene and ensure that the construction of the SFPR does not impact the ecological integrity of Burns Bog.

[67] When it comes to arguing that there is a genuine issue for trial over whether Canada has such a duty or obligation, the Plaintiff relies heavily upon assertion but brings little to Court by way of evidence and authority.

[68] It is well-established that, on a motion for summary judgment, both sides must file such evidence as is reasonably available to them and which could assist the court in determining if there is a genuine issue for trial. The responding party cannot rest on its pleadings and must prove specific facts to show there is a genuine issue. See *Kanematsu GmbH v Acadia Shipbrokers Ltd.*, [2000] FCJ No 978 (CA).

[69] In the present case, the Plaintiff has produced and relies upon the affidavit from its president, Ms. Eliza Olson. Ms. Olson helpfully explains the history and purpose of the Plaintiff. She also explains the Plaintiff's concerns:

> The Plaintiff wishes to advise the court that it has been in operation for the last 20 years and it did not take filing this action lightly but given the importance of the issue and stewardship role that we have sought, we have commenced this action to protect Burns Bog for future generations. It is our belief that the project with respect to the construction of the South Fraser Perimeter Road (SFPR) will impact Burns Bog and affect its hydrology and that of the surrounding land and have an adverse long term effect as the hydrology will be impacted causing irreparable harm. These include but are not limited to the following:
>
> a. affecting the hydrology of the adjacent lands and impacting overall hydrology
> b. affecting the habitat of Sandhill cranes
> c. affecting the habitat of various fish species and
> d. affecting the habitat of small mammals and species at risk including the Red-backed vole.

> The Plaintiff at the outset wishes to say it does not wish to block the SFPR but wants to have the project reviewed and/or modified so that the Bog's raised area provides sufficient drainage, so that the Bog is not dried out leading to ecological harm and environmental damage.

[70] While Ms. Olson assists the Court in understanding concerns about the future of Burns Bog that lie behind this lawsuit, she provides no evidence of relevance for the issue before me in this motion, which is whether the Defendants owe some contractual, trust, fiduciary or statutory obligation to maintain the ecological integrity of Burns Bog.

[71] Mr. Straith, acting for the Plaintiff, was helpful in providing the Court with a better understanding of the general concern. In essence, he says that the Defendants have failed to safeguard the hydrology of the Bog in breach of its Covenant to do so and, in particular, by contributing to the financing of the SFPR and by allowing ministerial decisions to dilute the protections set out in the Covenant. He says that Canada has "changed the game plan" and reneged on its commitment and the duty to protect the Bog for all Canadians. Mr. Straith says that the situation is very complex and that the Plaintiff intends to call evidence at trial that will show how matters have changed since the Covenant was entered into and since the SFPR project was initiated.

[72] The only evidence before me comes from Ms. Olson and she says the Plaintiff believes the SFPR will affect the hydrology of the Bog and will have an adverse long-term impact. However, there is no real evidence to support these beliefs and, in any event, such beliefs do not assist me in understanding what the Defendants' legal responsibility is for the Bog, or how the Defendants may have allowed the situation to deteriorate since entering into the Covenant.

[73] It is well-established that a summary judgment motion must be supported by specific evidence and the parties cannot simply rely upon their pleadings. (See *White v Canada*, [1998] FCJ

No 981 (TD). Assertions in a statement of claim which are not supported by evidence will not be treated as proven facts (see *Kirkbi AG v Ritvik Holdings Inc.*, [1998] FCJ No 912). A response to a motion for summary judgment cannot be based on conjecture as to what the evidence might be at a later stage in the proceedings. In fact, the Court is entitled to assume that the parties have put their best foot forward and that, if the case were to go to trial, no additional evidence would be presented. It is not sufficient for a responding party to say that more and better evidence will, or may, be available at trial. See *Rude Native Inc. v Tyrone T. Resto Lounge* 2010 FC 1278.

[74] In the present case, there is no specific evidence before me on the background concerns and the Plaintiff's assertion that the Defendants have allowed a game change to occur, and have reneged on the Covenant. In addition, there is no evidence at all before me that the Defendants have assumed some kind of legal obligation to take steps to prevent the Province from constructing the SFPR in a manner that might compromise the Bog's ecological integrity. The Plaintiff has simply asserted legal duties in the abstract and has made no effort to show the Court how such duties could arise on the facts of this case. The Plaintiff says that the environment is an important issue for Canadians and that Burns Bog needs to be protected, but there is no factual underpinning to show what the dangers to the Bog are or how the Defendants, given the facts of this case, are fixed with the legal duties and obligations asserted.

[75] There is an obvious reason for this lack of evidence. The issue of Canada's obligations is almost entirely legal. We have before us all of the relevant agreements and principles required to answer the question of whether there is a genuine case for trial on this matter. There are no credibility concerns and no facts in dispute. This is the kind of question that the Court is well able to address and answer by way of summary judgment.

[76] Having reviewed the record before me, the relevant agreements, and the principles and authorities put forward by both sides, it is my view that the Defendants have made their case for summary judgment. Generally speaking, I accept the Defendants' reasoning and authority on each point and adopt them for purposes of these reasons.

The Covenant

[77] Canada does not owe any duty to the Plaintiff, the Bog or the general public respecting the protection of the Bog's ecological integrity. This is because:

a. The Covenant, Management Agreement and Management Plan do not impose upon Canada any positive obligations respecting the protection of the Bog;

b. Canada does not owe any trust obligations respecting the Bog because Canada does not own the Bog. Moreover, there is no basis in law or equity for the imposition of a "public trust" duty in this case;

c. Canada has not undertaken any fiduciary obligations with respect to the Bog; and,

d. None of the statutes cited by the Plaintiff impose upon Canada any obligations with respect to the protection of the Bog.

[78] In order to succeed in a claim based in contract, the Plaintiff must identify the specific obligation that Canada was required to perform and a breach of that obligation. I agree with the Defendants that a review of the terms of each of the Covenant, Management Agreement and Management Plan demonstrates that none of these documents impose upon Canada any obligations in relation to the protection of the Bog's ecological integrity.

[79] Canada holds the benefit of the Covenant and may choose to enforce it in the event of a breach of the Covenant by one of the Bog Owners. However, the Covenant does not impose upon Canada any obligations respecting the Bog.

[80] Further, the Covenant applies only to the Bog and does not limit the use of land outside of the Bog. Accordingly, the Covenant does not give rise to any obligations on Canada to ensure that the SFPR is constructed by the Province in a manner consistent with the preservation of the Bog.

[81] The restrictions on land use in the Covenant do not apply to Canada. Canada is not one of the Bog Owners.

[82] Moreover, Canada did not make any commitments under the Covenant to take steps to protect the Bog or to prevent activities that may damage the Bog.

[83] Canada holds the benefit of the Covenant pursuant to section 219 of the *Land Titles Act*. Canada may choose to take steps to enforce the Covenant in the event of a breach by one of the Bog Owners. However, the Covenant does not require Canada to take steps to remedy a breach of the Covenant. Rather, the Covenant provides that Canada may waive any breach of the Agreement.

The Management Agreement

[84] Similarly, I agree with the Defendants that the Management Agreement does not operate to impose upon Canada any duties respecting the protection of the Bog.

[85] The Covenant contemplates that the parties will collaborate to develop a management plan governing the long-term management of the Bog. Pending the development of such a management plan, the parties entered into the Management Agreement.

[86] The parties to the Management Agreement are Canada, Delta, Vancouver, and the Province. The Management Agreement acknowledged, *inter alia*, Canada's contribution to the purchase of the Bog and that the Bog Owners have agreed to enter into a Covenant that would restrict the use of the Local Government Land and the Provincial Land.

[87] It is clear that the Management Agreement was intended to act as a bridge and to provide for the management of the Bog while the parties worked towards the development of the long-term Management Plan.

[88] There are no provisions in the Management Agreement requiring Canada to take any steps to protect the Bog. Canada's only commitment in the Management Agreement is to participate in the collaborative planning team to prepare the Management Plan.

[89] The Management Agreement does not support the Plaintiff's claim that Canada owes any kind of duty to protect the ecological integrity of the Bog.

The Management Plan

[90] The Management Plan contemplated by the Covenant and the Management Agreement was completed in May of 2007. The Management Plan sets out the policy direction and actions that are designed to maintain the Bog's ecological integrity.

[91] As the Defendants point out, the Management Plan is not a contract, but is a policy document produced by a team that included representatives from VANCOUVER, the Province, Delta and Canada.

[92] The Management Plan identifies priorities and recommended actions respecting the management of the Bog in the areas on hydrology, lagg, wildlife, land interests, access to Bog lands, vegetation and wildlife, habitat and connectivity with adjacent lands and public education.

[93] I agree with the Defendants that the Management Plan does not place any obligations on Canada respecting the protection of the Bog's ecological integrity. I also agree with the Defendants that the Management Plan does not support the Plaintiff's claim that Canada owes any duty to protect the ecological integrity of the Bog.

No Trust Duty

[94] The Plaintiff suggests that Canada owes a variety of trust obligations with respect to the Bog but does little to suggest how such obligations have arisen on the facts of this case. In particular, the Plaintiff alleges that Canada is in an "environmental and/or fiduciary an [*sic*]/or legal trust relationship" and that a "public and/or equitable or environment trust" was "created by the operation of Canadian environmental law." The Defendants and the Court are left to surmise how these obligations may have come about in the present case. The Defendants have taken the Court back to basic principles and have, in my view, clearly demonstrated that there is nothing to support such obligations in this case.

[95] To begin with, a trust is a category of fiduciary relationship in which the trustee holds the title to property and manages it for the benefit of another, who has exclusive enjoyment of the property. As the Defendants point out, there are three essential characteristics of trusts, commonly referred to as the "three certainties":

> […] first the language of the alleged settlor must be imperative; secondly, the subject matter or trust property must be certain; thirdly, the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring the property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must secondly be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained. Thirdly, the objects of the trust must be equally clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust falls to come into existence or, to put it differently, is void.

See *Scrimes*, above, at paragraph16.

[96] To establish a trust, it is also necessary to prove that the trust property is vested in the trustee. As established in *Scrimes*, above, at paragraph 17, there must be "an equitable interest based on a conscientious obligation which can be enforced against the legal owner" of the trust property, or no trust can exist.

[97] This means that the Plaintiff must prove that Canada took ownership of specific trust property with the intention of holding that property in trust for the specified object.

[98] The Plaintiff does not specifically identify the trust property in the Statement of Claim, but states that Canada is in a "trust relationship" with the Bog. The Plaintiff appears to allege that Canada holds the Bog subject to a trust.

[99] However, Canada does not own the Bog. Ownership of the trust property by the trustee is an essential element of a trust. A trust is not perfected until the trust property is vested in the trustee. Accordingly, I agree with the Defendants that Canada is not a trustee of the Bog and does not owe to the Plaintiff, the Bog or the Canadian public any trust obligations respecting the Bog.

[100] Despite the fact that Canada does not own the Bog, the Plaintiff alleges that a "public and/or equitable or environment trust" was created by agreement, statute and/or by an environmental trust doctrine. I agree with the Defendants that these allegations are bound to fail.

[101] A review of the terms of the Covenant demonstrates that it does not create a trust relationship between Canada and the Bog.

[102] The Covenant is a contract between Canada and the Bog Owners. The extent of Canada's interest in the Bog is defined by the Covenant. The Covenant does not give Canada title to the Bog. Further, it does not give Canada the ability to control the Bog.

[103] Moreover, the Covenant expressly states that "no tort or fiduciary obligations or liabilities of any kind are created or exist between the parties in respect of this Agreement and nothing in the Agreement creates any duty of care or other duty on any of the parties to anyone else."

[104] *Zeitler*, above, shows at paragraph 70 that

> In cases in which it is established that there is a contractual relationship between the parties, the interpretation of either facts or documents must not be distorted or given undue emphasis in order to impose the existence of a trust, where a reasonable and impartial interpretation would reveal that such a trust was neither intended nor created.

See also *Scrimes*, above, at paragraph19.

[105] Given the express disclaimer of any fiduciary obligations within the Covenant, I agree with the Defendants that it would be a "distortion" of its terms to find that it imposes any kind of trust duty on Canada. This aspect of the claim must fail.

No Public Trust

[106] The Plaintiff also refers to a "public trust […] created by operation of Canadian environmental law", and suggests that the Bog "is in a public trust and or equitable relationship with the Defendants." The Plaintiff suggests that the "public trust" requires Canada to take positive steps to protect land that is owned by other parties. This seems to me to be the Plaintiff's principal argument.

[107] My review of the case law suggests that the Defendants are correct when they say that, to date, no Canadian courts have recognized a public trust duty requiring the Crown to take positive steps to protect the environment generally or a specific property.

[108] In *Canfor*, above, Justice Binnie considered the possibility that there may be a place in Canadian law for a public trust doctrine, similar to the doctrine found in American law. After considering the American law, Justice Binnie concluded that it was not the proper case to embark upon a consideration of the issues involved because the issues were not fully addressed in the Court below.

[109] In the US, the American Public Trust doctrine recognizes that a state's title to some lands may be held in trust for the public. The Public Trust Doctrine has been relied upon to permit the state to sue for damage to public resources and to restrain the state's own use of some public lands.

[110] The key component of the American cases considered by Justice Binnie appears to be that they involved state obligations respecting public resources.

[111] In *Canfor,* the province owned the land and sought a valuation of tort damages for the publicly owned resource. As the Defendants point out, this is a very different situation from the case at bar where the Bog is not owned by Canada. It is difficult to conceive of how a public trust duty could be imposed upon Canada concerning lands that it does not own. The Plaintiff is asserting some vague and undefined general concept that, in the end, amounts to saying that Canada has a general public trust duty to protect the environment in a way that the Plaintiff says it ought to be protected in this case. There is no legal support for such an assertion and, in my view, it is contrary to established principle and Canada's obligations to consider the best interests of all Canadians.

[112] I think the Defendants are right to point out that the fact that Canada does not own the Bog presents a starkly different factual scenario than the one before the Supreme Court of Canada in *Canfor*. The Plaintiff is not suggesting that Canada must protect federally owned land. Rather, the Plaintiff seeks to impose upon Canada a trust duty to take steps to protect land that is owned by the Province, Vancouver and Delta. I agree that there is no basis in law or equity for the imposition of such a duty on Canada in this case. This aspect of the claim is bound to fail.

No Fiduciary Duty

[113] The Plaintiff also asserts that Canada owed it, the Canadian public, and the Bog itself a fiduciary obligation.

[114] I agree that such a claim is certain to fail. The Crown does not owe a fiduciary obligation to the public at large.

[115] Additionally, the Plaintiff cannot succeed in its assertion that Canada owes a fiduciary obligation to the Bog itself. Fiduciary obligations can only be owed to persons or classes of persons, not geographical locations.

[116] In order to succeed therefore the Plaintiff must establish that Canada owes a fiduciary obligation to the Plaintiff.

[117] The Defendants are right when they point out that the relationship between the Crown and the Plaintiff does not fall into any established fiduciary relationship (trustee-*cestui qui trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation and guardian-ward or parent-child). Therefore, to succeed in the claim based on a fiduciary duty, the Plaintiff must demonstrate an *ad hoc* fiduciary relationship.

[118] The Supreme Court of Canada in *Elder Advocates*, above, recently emphasized that "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances."

[119] In order to establish an *ad hoc* fiduciary duty:

a. The evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary;

b. The duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them; and

c. The claimant must show that the alleged fiduciaries power may affect the legal or the substantial practical interests of the beneficiary.

[120] I agree with the Defendants that, in the present case, the Plaintiff fails on each of these requirements.

[121] First, there has been no undertaking made by Canada to act in the best interests of the Plaintiff. Such an undertaking will rarely be found to have been made by the Crown:

> "[c]ompelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance."

See *Elder Advocates*, above, at paragraph 44.

[122] Though such undertakings can be either express or implied, a "general obligation to the public or sectors of the public cannot meet the requirement of an undertaking," and the "mere grant to a public authority of discretionary power to effect the person's interest does not suffice." See *Elder Advocates*, above, at paragraphs 45 and 48.

[123] In this case, there has been no undertaking by Canada to put the interests of the Plaintiff before all others. Indeed, the Covenant expressly states that it creates no duties to any outside

parties. The lack of an undertaking of undivided loyalty to the Plaintiff in itself is sufficient to dispose of the fiduciary obligation claim.

[124] However, I agree that the Plaintiff also fails the second and third steps in the *Elder Advocates* test. The government is entitled to make distinctions between different groups. In order to establish a fiduciary duty, the Plaintiff "must point to a deliberate forsaking of the interests of all others in favour of himself or his class." See *Elder Advocates*, above, at paragraph 49. Nothing other than voluntary membership in an organization distinguishes the Plaintiff from any other member of the Canadian public. The Plaintiff group has an interest in preservation of the Bog, but the government of Canada is allowed to choose between competing interests.

[125] Finally, the Plaintiff has no legal or substantial practical interest in the Bog. The Plaintiff must show more than an impact on their "well-being, property or security." The interest affected must be a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement. See *Elder Advocates*, above, at paragraph 51. The Plaintiff has no legal entitlement to the Bog; it has the same interest in the preservation of British Columbia's environment shared by all.

No Statutory Duty

[126] The Plaintiff alleges generally that the *Fisheries Act*, MBCA, CEPA, and SARA impose a "trust and/or fiduciary an[*sic*]/or legal relationship with respect to Burns Bog." I do not think any of these statutes imposes a duty on the Defendants to protect Burns Bog. The *Fisheries Act* is an Act respecting the federal regulations of fisheries in Canada. The MBCA implements a convention to protect migratory birds in Canada and the USA. The CEPA is all about pollution prevention and the

protection of the environment and human health in order to contribute to sustainable development. The SARA is an Act to protect of wildlife at risk in Canada. Nothing in any of these Acts states or implies that Canada has any fiduciary, trust or legal relationship with the Bog.

[127] If a statute does not clearly state that it creates a fiduciary duty, it does not do so:

> If the undertaking [creating a fiduciary obligation] is alleged to flow from the statute, the language in the legislation must clearly support it… The mere grant to a public authority of discretionary power to affect a person's interest does not suffice.

See *Elder Advocates*, above, at paragraph 45.

[128] I once again agree with the Defendants that the allegation of a statutory duty is bound to fail because there is no basis for finding any obligation created by statute.

Conclusions

[129] The Plaintiff has chosen to respond to and resist this motion, not by addressing the Defendants' factual and legal arguments, but by appealing to the importance of the environment and an assertion that Canada should assume stewardship of the Bog so that the Plaintiff's concerns about the SFPR can be dealt with. The only evidence I have about those concerns comes from Ms. Olson, who tells me that the Plaintiff does not wish to block the SFPR, but wants to have the project reviewed and/or modified so that the Bog's raised area provides sufficient drainage, and so that the Bog is not dried out, leading to ecological harm and environmental damage.

[130] These may well be worthwhile objectives and I can well appreciate the Plaintiff's concerns over the future of the Bog and its frustrations in trying to find an appropriate legal context in which to raise those concerns. But I have nothing before me that substantiates those concerns and, more

importantly, I have nothing before me to suggest that the Defendants have a legal obligation — or the legal right — to step in and, on behalf of the Plaintiff, insist that the Province's SFPR project be reviewed and/or modified in ways that have not even been placed before me.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The Defendants' motion for summary judgment is granted and the Plaintiff's action is dismissed with costs to the Defendants.

"James Russell"

Judge

FEDERAL COURT
NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1963-10
STYLE OF CAUSE:	**BURNS BOG CONSERVATION SOCIETY**
	- and -
	THE ATTORNEY GENERAL OF CANADA; THE MINISTER OF TRANSPORT AND INFRASTRUCTURE; THE MINISTER OF ENVIRONMENT; THE MINISTER OF FISHERIES and THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	July 12, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	August 29, 2012

APPEARANCES:

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Sheri Vigneau Lindsay Morphy	**DEFENDANTS**

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