Federal Court  Cour fédérale

Date: 20130408

Docket: T-2007-12

Citation: 2013 FC 350

Ottawa, Ontario, April 8, 2013

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

THAHOKETOTEH OF KANEKOTA

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] The Plaintiff, who is self represented, commenced an action against Her Majesty the Queen [the Crown or the Defendant] in this Court by serving and filing a Statement of Claim on November 5, 2012. The Plaintiff seeks:

> [A] declaration that [HMQ] is under the "legal duty" type of "Trust" within the meaning of *In re Indian Claims (1896)* and section 109 of the *Constitution Act, 1867*, not to apply or permit the application of federal or provincial law to the Grand River or Haldimand Tract except by treaty in compliance with the *Royal Proclamation of 1763* and proven, in the event of dispute, before the Standing Royal Committee consulted by the *Order in Council (UK), 1704*.

[2] Beyond a description of himself as being "Onkwehonwe . . . of the Kanionkehaka [. . . Mohawk] Nation", the Plaintiff pleads no facts. Rather, the Plaintiff's Statement of Claim consists of a series of legal submissions. In the final paragraph 14 of his Statement of Claim, the Plaintiff states that:

> The only genuine issue is the *prima facie* identity of the proper law of the territory and corresponding trust relationship between the parties, a question of constitutional jurisdictional law alone that is settled for *stare decisis* purposes.

[3] On this basis, the Plaintiff proposes that the action be disposed of on the basis of Rule 220(1)(a) of the *Federal Courts Rules*, SOR/98-106 as a preliminary question of constitutional law and, concurrent with his Statement of Claim, also filed a "Motion Record" asking the Court to determine the above question.

[4] On January 3, 2013, the Defendant filed a Motion to strike the Plaintiff's action. The Defendant asserts that the action should be struck on the basis that it is plain and evident that the claim cannot succeed (Rule 221(1)(a)).

[5] For the reasons which follow, I agree with the Defendant and will strike the action without leave to amend. There are two overarching reasons for this conclusion: (a) there are no factual underpinnings to the claim; and (b) the action has no reasonable grounds of success.

Lack of Factual Context

[6] The Plaintiff seeks a substantial declaration of his constitutional rights. However, the fatal flaw in his Statement of Claim is that it sets out no specific allegations against the Defendant, beyond what I infer to be a vague and general assertion that the Defendant has not recognized the land rights of the Kanionkehaka Nation or the trust relationship between that First Nation and the Crown. No instances or details of how this alleged failure has impacted the Plaintiff are pleaded. This is not an appropriate situation to decide a pure question of law, since the question posed is entirely hypothetical and lacks factual context.

[7] A cause of action must lie on material facts. This is particularly true of actions in which a plaintiff seeks to resolve a constitutional question. As has been clearly pointed out by the Supreme Court of Canada, "Constitutional questions should not be discussed in a factual vacuum" (*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para 46, [2002] 2 SCR 146).

[8] I am cognisant that this Court is willing to adjudicate pure questions of law in certain instances. For example, in *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2008 FC 823, [2008] FCJ No 1025 [*Daniels (Hugessen J)*], Justice Hugessen refused to strike a statement of claim for declaratory relief vis-à-vis the rights of non-status Indians and the Métis.

[9] However, in contrast to the present case, the Statement of Claim in *Daniels* disclosed many material facts and presented much more than a hypothetical legal question As described by Prothonotary Hargrave in an earlier decision involving the same claim (*Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2002 FCT 295 at para 5, [2002] 4 FC 550):

> The claim which the Plaintiffs now bring is not for any specific rights, but rather for declarations first, as to the scope of "Indians", within subsection 91(24) of the *Constitution Act*, 1867; second, that they are owed a fiduciary duty by the Crown; and third, that they are entitled, in the abstract, to be negotiated with in good faith. As I have indicated, no specific rights are set out as being sought, however the Statement of Claim does enumerate a number of examples of denials and refusals met by Métis and non-status Indians, including as to health care benefits; education benefits; lack of access to material and cultural benefits available to status Indians; criminal prosecution for seeking to exercise Aboriginal rights to hunt, trap, fish and gather on public lands; and a failure on the part of the federal government to negotiate or enter treaties with respect to unextinguished Aboriginal rights. It is not these denied benefits, per se, which the Plaintiffs seek to embody in the relief sought in the Statement of Claim, but rather they seek declarations which, in turn, might allow the Plaintiffs, as examples of non-status Indian and Métis people, to one day prove an entitlement to that of which they say they have been deprived. The important aspect here is that the Plaintiffs look for a designation. That such designation may, in the future, lead to a right is not, at this point, relevant. [Emphasis added.]

[10] Moreover, the record before the trial judge who ultimately heard the action was immense, including extensive expert testimony and over 800 exhibits, containing selections from over 15,000 documents (*Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6 at para 70, [2013] FCJ No 4 [*Daniels (Phelan J)*]).

[11] Before me, I have no such statement of claim and no such record. There is nothing in the Statement of Claim to describe how the Plaintiff suffered harm in the absence of the declaration sought or how the declaration could assist him.

[12] In *Daniels (Hugessen J)*, above at para 7, Justice Hugessen described the requirements for obtaining declaratory relief as follows:

> The classic three requirements in this and I think in every other Court for obtaining declaratory relief are:
>
> 1. That plaintiff has an interest.
>
> 2. That there be a serious contradictor for the claim.
>
> 3. That the issue raised and upon which a declaration is sought is a real and serious one and not merely hypothetical or academic. (*Montana Band of Indians v. Canada*, [1991] 2 F.C. 30 (C.A.), leave to appeal to S.C.C. refused (1991), [1991] S.C.C.A. No. 164, 136 N.R. 421).

[13] In the case before me, the Plaintiff has raised an issue that is "merely hypothetical or academic". In the circumstances, I am of the view that the action should be struck on the basis that it lacks a cause of action.

No Reasonable Cause of Action

[14] However, in the event that I am wrong and that this Statement of Claim pleads a justiciable issue, I turn to the question of whether there is a prospect that the claim will succeed.

In other words, are the allegations made in the Statement of Claim sustainable on their merits? The answer, in my view, is "no".

[15] The test for striking a claim is well known. As set out in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17, [2011] 3 SCR 45, "a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action".

[16] The Plaintiff's entire claim rests on two documents. Firstly, he argues that the Grand River and Haldimand Tract should not be subject to federal or provincial law, except as allowed by treaty, in accordance with the *Royal Proclamation of 1763*, RSC 1985, App II, No 1 [*Royal Proclamation*]. Secondly, the Plaintiff asserts that the Standing Royal Committee constituted by an Order in Council dated 1704 has jurisdiction over any dispute in this regard.

[17] In my view, both of these arguments are fatally flawed; neither the *Royal Proclamation* nor the 1704 Order in Council has the effect asserted by the Plaintiff.

Royal Proclamation

[18] Contrary to the contention of the Plaintiff, the *Royal Proclamation* does not and cannot preclude the application of federal and provincial law within the land at issue. The *Royal Proclamation* was revoked before the land interest asserted by the Plaintiff first arose, rendering the proclamation irrelevant.

[19] The *Royal Proclamation* is an exercise of royal prerogative (*Chippewas of Sarnia Band v Canada (Attorney General)* (2000), 51 OR (3d) 641 at paras 186-192, 195 DLR (4th) 135 (CA) [*Chippewas*]). As such, it may be displaced by statute (*Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215 at para 27, 199 DLR (4th) 228 (CA)).

[20] The problem for the Plaintiff is that the *Royal Proclamation*, insofar as it may have affected the lands that are the subject of the Plaintiff's pleadings, was revoked by the *Quebec Act, 1774* (UK), 14 George III, c 83 [*Quebec Act*]. In particular, section IV of the *Quebec Act* repealed the *Royal Proclamation* as it relates to the government and administration of justice in Quebec and southern Ontario, which, at that time, formed part of Quebec.

[21] This understanding of the history of the *Royal Proclamation* gives rise to the fatal flaw in the Plaintiff's argument. The Plaintiff relies on a land grant to the Mohawks in the *Haldimand Proclamation of 1784*. Aboriginal interests protected by the *Royal Proclamation*, while in force, continued in accordance with section III of the *Quebec Act* (see, for example, *St Catharines Milling and Lumber Co v Ontario (Attorney General)* (1887), 13 SCR 577 at 648; *Ontario (Attorney General) v Bear Island Foundation* (1989), 68 OR (2d) 394 at 410, 58 DLR (4th) 117 (CA) aff'd [1991] 2 SCR 570, 83 DLR (4th) 381 [*Bear Island*]). However, the interest now asserted by the Plaintiff did not arise until after the repeal of the *Royal Proclamation*. The *Royal Proclamation* cannot have any legal relevance to an interest in land that did not exist until after it was revoked.

[22] The present situation resembles the *Bear Island* case. In *Bear Island*, the Ontario Court of Appeal determined that the *Quebec Act* revoked the surrender provisions of the *Royal Proclamation* Consequently, a surrender that occurred after this revocation was not subject to the surrender procedures in the proclamation (*Bear Island,* above at 410; see, also, *Chippewas*, above at paras 19, 186-219). Similarly, in the present case, an interest which arose through a land grant in 1784 cannot be protected by the *Royal Proclamation*, repealed in 1775.

[23] In sum, it is plain and obvious that the *Royal Proclamation* cannot preclude the application of federal and provincial law based on the arguments of the Plaintiff.

Order in Council

[24] The Order in Council asserted by the Plaintiff neither precludes the application of federal and provincial law, nor provides for a dispute resolution mechanism applicable to all disputes between First Nations and the Crown.

[25] The 1704 Order in Council specifically addresses a particular dispute between the Crown and the Mohegans. The purpose of the Commission created by the Order in Council was to protect the interests of the Mohegans in their reserve land in a peaceful manner. This dispute resolution mechanism, crafted to resolve a particular conflict over three hundred years ago, does not apply generally to disputes between First Nations and the Crown. In *R v Clark*, [1997] BCJ No 715 (Prov Ct) at paragraphs 33-35, Justice Friesen came to this conclusion in the context of contempt proceedings. Justice Bowman of the Tax Court of Canada similarly found that the 1704

Order in Council has no legal relevance in Canada, and, even if it did, any legal effect would not be preserved by s. 109 and s. 129 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 (*Clark v Canada*, [1994] TCJ No 1046 at paras 12-16, aff'd [1997] 2 CTC 334, [1997] FCJ No 555 (CA)).

[26] Moreover, any appeal to the Privy Council created by the 1704 Order in Council was abolished in 1949. Section 52 of the *Supreme Court Act*, RSC 1985, c S-26 provides the Supreme Court with "exclusive ultimate appellate civil and criminal jurisdiction within and for Canada". The *Supreme Court Act* was declared *intra vires* by both the Supreme Court and Judicial Committee of the Privy Council (*Reference Re Supreme Court Act Amendment Act (Canada)*, [1940] SCR 49 at 69-70; *Ontario (Attorney General) v Canada (Attorney General)*, [1947] AC 127, [1947] 1 DLR 801 (PC)).

[27] In sum, the 1704 Order in Council created a specific dispute resolution mechanism to resolve a specific conflict that arose over three hundred years ago. It is plain and obvious that this Order in Council does not have general application to disputes between First Nations and the Crown as asserted by the Plaintiff.

Conclusion

[28] In conclusion, it is clear and obvious that the claim of the Plaintiff cannot succeed. Furthermore, there is nothing reflected in the pleadings that could, if amended, give rise to a cause of action. Therefore, the claim will be struck without leave to amend.

[29] It follows that the Plaintiff's motion to have this Court determine the questions in issue as a question of law, pursuant to Rule 220(1)(a) of the *Federal Courts Rules*, will be dismissed.

ORDER

THIS COURT ORDERS AND ADJUDGES that:

1. the Motion of the Defendant is granted and the action set out in the Statement of Claim of the Plaintiff is struck without leave to amend, with costs to the Defendant in the lump sum of $500, inclusive of taxes and disbursements; and

2. the Motion of the Plaintiff to have this Court determine a question of law pursuant to Rule 220(1)(a) of the *Federal Courts Rules* is dismissed.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2007-12
STYLE OF CAUSE:	THAHOKETOTEH KANEKOTA v HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 25, 2013
REASONS FOR ORDER AND ORDER:	SNIDER J.
DATED:	APRIL 8 2013

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