Federal Court  Cour fédérale

Date: 20160802

Docket: T-2072-14

Citation: 2016 FC 889

Ottawa, Ontario, August 2, 2016

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

HWLITSUM FIRST NATION, AS REPRESENTED BY ITS CHIEF AND COUNCIL CHIEF RAYMOND CLAYTON WILSON AND COUNCILLORS LINDSEY WILSON, JANICE WILSON, JIM HORNBROOK AND DANNY WILSON ON THEIR OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE HWLITSUM FIRST NATION

Plaintiffs

and

HER MAJESTY THE QUEEN, MUSQUEAM FIRST NATION, TSAWWASSEN FIRST NATION AND PENELAKUT FIRST NATION

Defendants

ORDER AND REASONS

[1] The Court is seized of a motion by the Defendant, Her Majesty the Queen ("the Crown"), for an order staying this proceeding on the ground that it is being proceeded with in the British

Columbia Supreme Court and that it is in the interest of justice that it be stayed, or, alternatively, that the Plaintiff, the Hwlitsum First Nation ("the Hwlitsum") be required to provide security for the Crown's costs. The other Defendants, the Musqueam First Nation, Tsawwassen First Nation and Penelakut First Nation, all support the Crown's motion to stay.

[2] The Hwlitsum paid, prior to the hearing, the outstanding order of costs upon which the Crown's alternative request was based. As a result, that part of the motion was not pursued at the hearing.

[3] It is perhaps useful to recall that the present action began in October 2014 as an application for judicial review of the way in which the Department of Fisheries and Ocean ("DFO") manages the west coast fisheries, by arbitrarily placing limits on First Nations' constitutional rights to fish without first limiting access to non-aboriginal fisheries, and of DFO's refusal to consider and recognize the Hwlitsum as an identifiable and appropriate aboriginal collective for the purpose of issuing to it a commercial fishing license.

[4] Almost concurrently with the filing of the application, the Hwlitsum also filed a Notice of Civil Claim in the British Columbia Supreme Court, seeking recognition of its aboriginal rights and title over certain tracts of land in BC, as well as various forms of relief flowing from that recognition.

[5] In the Federal Court application, the Hwlitsum brought a motion for an interim order allowing it to engage in fishing pursuant to its asserted aboriginal rights and enjoining DFO from

interfering with the exercise of that right other than for *bona fide* conservation purposes. That motion was dismissed in June 2015. At that point, the parties consented to an order "converting" the application into an action. Section 18.4 of the *Federal Courts Act* provides that applications for judicial review are to be determined "without delay and in a summary way". However, the Court may direct that an application for judicial review "be treated and proceeded with as an action". Such a "conversion" is not intended to affect the scope of the application or the relief sought, but merely the procedure by which the issues will be brought to the Court for determination. This is not however what happened here.

[6] The Hwlitsum, in November 2015, served and filed a statement of claim that withdrew certain of the claims made in the original application, but also expanded the scope of the proceedings and added prayers for relief, including claims for damages, going beyond what was originally included in the application or would be available in a judicial review application.

[7] The Statement of Claim no longer seeks absolute or priority rights to fishing or a determination that these rights can only be limited for *bona fide* conservation purposes, but maintains its request for a declaration of the Hwlitsum's aboriginal right to fish, for the same access to fishing as other Coast Salish peoples and for declarations regarding the recognition of the Hwlitsum as an identifiable group of aboriginal people for the purposes of section 35 of the *Constitution Act 1982* and as an appropriate group for consultation and being granted access to fishing licenses. To those remedies, it added new requests for a declaration that the Hwlitsum is an Indian Band pursuant to the *Indian Act*, that it has a one-third interest in certain reserve lands surveyed in 1877, and that the Crown is in breach of the Hwlitsum's rights under the *Universal*

Declaration of Human Rights, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). It added claims for damages for those breaches, as well as for alleged breaches of the Crown's fiduciary duties and of the honour of the Crown, for loss of use of fishing rights and loss of use of reserve lands. In response to the Crown's motion for a stay, the Hwlitsum made further amendments to the Statement of Claim in an effort to remove duplications between it and the BC Civil Claim: it removed the request for a declaration of a one-third interest in reserve lands and the damage claim for loss of use of reserve lands, although it did not remove any of the factual allegations pleaded in support of those claims.

[8] The Hwlitsum argue that the Federal Court action is all about aboriginal fishing rights, and is different, distinct and not duplicative of the BC Civil Claim, which is all about aboriginal title.

[9] The BC Civil Claim (as further amended in May 2016), indeed essentially asserts aboriginal title over certain lands and the remedies sought in the BC Civil Claim predominantly relate to that claim. The BC Civil Claim did, in its first iteration, include some allegations of breaches of the Hwlitsum's aboriginal fishing rights by the Crown and of damages flowing from those breaches, but these references have been removed by the Hwlitsum prior to the hearing of this motion as part of its effort to distinguish the two proceedings.

[10] However, despite the Hwlitsum's efforts to distinguish the two claims in terms of the relief they seek, obvious duplications still exist: both actions still seek the same declaration "that

the Plaintiff First Nation is an "Indian Band" pursuant to the Indian Act", an issue which is at the very root of the disputes between the Hwlitsum, the Crown and the other defending First Nations. Both actions also seek the same declarations that Canada has breached obligations owed to the Hwlitsum under the same articles of the *Universal Declaration of Human Rights*, the ICESCR and the UNDRIP, including damages for those breaches, remedies which arise from the same complex set of facts alleged in both actions.

[11] Beyond these duplicative remedies, the factual overlap between the two actions is clear and significant.

[12] In order to establish the claims and rights asserted in the Statement of Claim in the Federal Court, the Hwlitsum have necessarily made extensive allegations relating to their asserted descendance from the Lamalcha Tribe of Indians, the origins of the Lamalcha, their relationships with other Coast Salish tribes or nations, including the other named Defendants the Musqueam, Tsawwassen and Penelakut First Nations, from pre-contact to the present day. The Statement of Claim describes the territory which the Lamalcha occupied and through which they travelled, their culture and way of life through the seasons and the years, their encounter with white fur traders and tragic conflict with the British Navy, the subsequent difficult relations between the alleged descendants of the survivors of that conflict, Canada and other Indian Bands, traced with painstaking details from 1870 to the 2000's, including the Hwlitsum's participation in various stages of modern treaty processes and their unsuccessful application to be recognized as an Indian Band. These "background" or historical facts take up 125 of the 161 paragraphs of the statement of claim, and are almost entirely reproduced in the BC Notice of Civil Claim. Only

36 paragraphs of the Federal Court Statement of Claim detail the Hwlitsum's specific struggles to access fishing licenses and are not reproduced in the BC Notice of Civil Claim. Following amendments made to the BC Notice of Civil Claim in May 2016, all of the Defendants to the Federal Court action are now also Defendants to the BC Civil Claim. The only differences between the parties to the two claims are that the Province of British Columbia, the City of Vancouver, the Vancouver Park Board, the City of Richmond, the Corporation of Delta, the Capital Regional District and the Inland Trust are Defendants to the BC Civil Claim, but not to the Federal Court action.

[13] The parties generally agree that in determining this motion, the Court should have regard to the factors set out in *White v E.B.F. Manufacturing Ltd.*, 2001 FCT 713 rather than apply the three part test of *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311.

[14] These factors are as follows:

1. Would the continuation of the action cause prejudice or injustice (not merely inconvenience or extra expense) to the defendant?
2. Would the stay work an injustice to the plaintiff?
3. The onus is on the party which seeks a stay to establish that these two conditions are met;
4. The grant or refusal of the stay is within the discretionary power of the judge;
5. The power to grant a stay may only be exercised sparingly and in the clearest of cases;
6. Are the facts alleged, the legal issues involved and the relief sought similar in both actions?

7. What are the possibilities of inconsistent findings in both Courts?

8. Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to another jurisdiction;

9. Priority ought not necessarily be given to the first proceeding over the second one or, vice versa.

[15] The Hwlitsum argue that the Defendants have not established that the continuation of both actions would cause them prejudice or injustice beyond mere inconvenience or extra expense. I find, however, that the level of waste and duplication involved in allowing the two actions to proceed simultaneously is so excessive as to rise beyond "mere inconvenience or extra expense" and to constitute prejudice.

[16] The factual overlap between the two actions covers nearly 150 years of history, as seen from the points of view of four different First Nations and the Crown. Discovery, expertise and trial time in respect of the common facts will be extensive, time consuming and costly. The Court in *White* reasoned that "extra expense and further inconvenience to the defendants (…) can always be remedied by way of costs". Here, however, those costs are very significant; the Hwlitsum has already claimed impecuniosity in a failed attempt at obtaining advanced costs in the BC Civil Claim; the Crown has had well documented difficulty in recovering the costs awarded to it in respect of the motion for interim relief; there are, in addition to the Crown, three other First Nation Defendants who might incur and be awarded significant costs; costs awards in the Federal Court are, in any event, not awarded on a substantial indemnity scale. Remedy for

the duplications by way of costs may accordingly be illusory or at best, an insufficient remedy in the circumstances.

[17] The Hwlitsum submit that a stay of the action would inflict a prejudice on it, as it would further delay the determination, and eventual exercise by its members, of their most fundamental right to fish for sustenance. According to the Hwlitsum, litigating the aboriginal fishing rights as part of the BC Civil Claim could easily take eight to ten years before a full hearing and determination. There is however no evidence or cogent argument to support the implicit suggestion in that statement that the BC Civil Claim would take less time to resolution without the fishing rights claim or that the fishing rights claim would take substantially less time to be resolved if it were to proceed in the Federal Court in parallel with the BC Claim. As the history of the proceedings before this Court attests, much of the delay inherent to litigating complex matters in a multi-party litigation are due to the difficulty of coordinating the availability of multiple parties for hearings, cross-examinations or discoveries, a difficulty that will be compounded and magnified if the two actions proceed in parallel. Further, a preliminary motion to determine standing that has significantly delayed the progress of the BC action is expected to arise as well in this action.

[18] The Court finds no merit to the Hwlitsum's argument that the Crown failed to raise abuse and duplication before agreeing to a conversion and that this creates an injustice, or that the Crown's refusal to negotiate with the Hwlitsum in the context of the BC treaty process has forced it to litigate. The record before the Court does not support the conclusion that, following the dismissal of the Hwlitsum's motion for interim relief, the decision to pursue the judicial

determination of the Hwlitsum's aboriginal right to fish and all remedies related thereto by way of a Federal Court action instead of as part of the BC Civil Claim was other than the Hwlitsum's own choice.

[19] Finally, the Hwlitsum raised at the hearing the possibility that it might no longer be allowed to amend the BC Civil Claim to introduce or reintroduce its claim for recognition of an aboriginal right to fish. No evidence was led to support this argument, but the Crown has indicated that, consistent with its view that the BC Civil Claim still includes claims for fishing rights, it would not object to the Hwlitsum clarifying, by way of particulars, its claim for aboriginal fishing rights. Even if that were insufficient and the Hwlitsum's concerns come to pass, a party ought not to be able to invoke as prejudice the foreseeable consequences of its own procedural choices.

[20] The next two criteria to be considered is whether the facts alleged, the legal issues involved and the relief sought are similar in both actions, and the possibilities of inconsistent findings in both courts. I have already concluded that the facts alleged in support of the Federal Court action are for the most part, not merely similar to, but the same as most of the facts alleged in support of the BC Civil Claim, and that some forms of relief are exactly the same in both actions.

[21] The Hwlitsum acknowledge that the same facts are pleaded in both actions, but argue that these facts relate only to "background facts" to establish occupation prior to sovereignty, present occupation, the customs and traditions integral to the distinctive Hwlitsum culture and to

standing, and that despite the extensive duplications, there is no risk of contradictory findings because the tests for establishing Aboriginal title, as claimed in the BC Civil Claim, and for establishing Aboriginal rights, as claimed in the Federal Court action, are markedly different and distinct, including in respect of the issue of the standing required to pursue those claims.

[22] While the Hwlitsum are correct that the essential relief sought in the two claims are different and require the application of different tests and standards, it is misguided in thinking that this alone eliminates the risk of contradictory findings. The desirability of avoiding contradictory judgments or findings is not confined to the determination of the rights between parties, but extends to the determination of the factual basis for those rights. What the Hwlitsum presents as "background facts" is not merely an uncontested recital of accepted historical record but the very factual foundation that the Hwlitsum must establish in order to prove its claims, a factual foundation which is vigorously contested by the Defendants in Federal Court action, who, as seen, are also defendants to the BC Civil Claim. There is a clear risk that if the same facts are tried in two different courts between these same parties, these courts could come to inconsistent or contradictory factual findings. Legal rights are not determined in a factual vacuum. Regardless of whether they are founded on different causes of action or proceed from different legal principles or analysis, determinations of the legal rights between the same parties are contradictory or inconsistent if they proceed from inconsistent or contradictory findings of fact. In the circumstances, it is clear that allowing the two actions to proceed to parallel trials gives rise to a very real possibility of inconsistent findings on essential aspects of the two claims, and thus, to inconsistent or contradictory judgments. The only way this would be avoided is for one of the two trials to proceed well before the other so that findings of relevant facts made in the

first trial became binding on the parties for the purpose of the second trial, in essence, that one of the actions be stayed pending the determination of the other.

[23] The Hwlitsum argue, invoking the eighth factor in *White*, that as adjudication in either forum is far from imminent (with the possible exception of the standing motion in the BC Supreme Court), the Court should refrain from interfering with the Hwlitsum's rights to access the Federal Court's jurisdiction. Given that the overlap between the two actions is extensive and that it involves the very factual foundation of the two claims, I find that waiting until either of the actions is ripe for determination would simply postpone the inevitable, allowing extensive discoveries to proceed in parallel and in duplicate, with one set of discoveries bound to be wasted.

[24] I am satisfied that this is a clear case where allowing the two actions to proceed in parallel will cause such excessive duplication in costs, efforts and resources, both of the parties and of the Court, and result in such inacceptable risks of inconsistent findings that a stay of proceedings is warranted.

[25] I am satisfied that a stay of the Federal Court action would not cause prejudice to the Hwlitsum. Of the 22 prayers for relief set out in the Statement of Claim, all but one are within the concurrent jurisdiction of the BC Supreme Court, are intimately related to or duplicative of the remedies sought in the BC Notice of Civil Claim, and either already are, could or should have been included in the BC Civil Claim. The only remedy which is within this Court's exclusive jurisdiction is an order in the nature of a *mandamus* found in paragraph N of the

Statement of Claim seeking "An order that the Defendant immediately consult with the Plaintiffs to accord Hwlitsum First Nation the same fishing rights and access to west coast fisheries as the Defendant First Nations and other Coast Salish First Nations." However, this remedy would naturally flow from the grant of any number of the other declarations and relief sought and over which the BC Supreme Court would have jurisdiction. There is no prejudice to the Hwlitsum in staying the Federal Court action until the Hwlitsum have pursued before the BC Court the much more comprehensive and inclusive claims and remedies already set out in its Notice of Civil Claim. On the contrary, it is the Hwlitsum's desire to split and pursue in parallel before two different Courts claims for relief arising from a common set of facts that cannot be justified and amounts to an abuse of process prejudicial to the Defendants.

[26] All parties seek their costs of this motion, including the costs of the first attendance on the scheduled return date of the motion on May 18, 2016. The hearing of May 18, 2016 was adjourned to June 9, 2010 to allow time for the Hwlitsum to make good on the undertaking made in its written submissions in response, filed April 18, 2016, to amend its pleadings to remove duplications. The Crown in particular seeks an order that its costs of the adjournment be made payable by the Hwlitsum's counsel personally, on the basis that he failed to serve the amended pleading before the hearing as promised and failed to advise the Defendants in a timely fashion that he would not be doing so. I agree that counsel for the Hwlitsum should have notified opposing counsel and the Court of the difficulties he was facing in delivering his amended pleadings before the hearing. However, I am satisfied that a reasonable justification for counsel's failure to file the amended pleadings was offered; the alleged "misconduct" of counsel therefore consists solely in failing to advise the Defendants that the amended pleadings would not be filed

in time. I also note that all counsel at the May 18, 2016 hearing professed their willingness to proceed with the motion on the basis of the existing pleadings, but that it was the Court's determination, and not the Defendant's principal wish, that the motion should be adjourned to be considered on the basis of the actual pleadings intended by the Hwlitsum. In the circumstances, while the costs thrown away for the preparation and attendance at the first hearing should be included in my assessment of the costs of this motion, I am not satisfied that it is appropriate, in the circumstances, to hold counsel for the Hwlitsum personally responsible for them. I am satisfied that the costs of the motion should be awarded against the Hwlitsum and in favour of the Defendants as follows:

- To the Crown, in the amount of $5,000.00;
- To the Musqueam First Nation and Tsawwssen First Nation, in the amount of $1,700.00 each, and
- To the Penelakut First Nation, in the amount of $500.00.

I am also satisfied that this is such a clear case of wasteful duplication that this motion should not have been opposed. The costs are therefore payable forthwith upon the exhaustion of all rights of appeal of this order.

ORDER

THIS COURT ORDERS that:

1. This proceeding is stayed until 45 days following conclusion of the proceeding before the Supreme Court of British Columbia in Civil Claim No. S-148643.

2. The parties shall, on the lifting of the stay, file written submissions as to whether they believe any part of this proceeding should continue to proceed, or whether, if an appeal of a judicial determination of the BC proceeding is pending, the present stay should be extended until the exhaustion of all avenues of appeal.

3. Costs of this motion shall be payable by the Plaintiffs to the Defendants as follows:

    - To her Majesty the Queen, in the amount of $5000.00;
    - To the Musqueam First Nation, in the amount of $1,700.00;
    - To the Tsawwssen First Nation, in the amount of $1,700.00, and
    - To the Penelakut First Nation, in the amount of $500.00;

    forthwith upon the expiration of time or exhaustion of all rights of appeal of this order.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2072-14
STYLE OF CAUSE:	HWLITSUM FIRST NATION, AS REPRESENTED BY ITS CHIEF AND COUNCIL CHIEF RAYMOND CLAYTON WILSON ET AL V HER MAJESTY THE QUEEN, MUSQUEAM FIRST NATION, TSAWWASSEN FIRST NATION AND PENELAKUT FIRST NATION
PLACE OF HEARING:	OTTAWA, ONTARIO VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 18, 2016 AND JUNE 9, 2016
REASONS FOR ORDER AND ORDER:	TABIB P.
DATED:	AUGUST 2, 2016

APPEARANCES:

Jeffrey R.W. Rath David Khan	FOR THE PLAINTIFFS
Steven Postman Alex Semple	FOR THE DEFENDANT HER MAJESTY THE QUEEN
Crystal Reeves	FOR THE DEFENDANT MUSQUEAM FIRST NATION
Geoff Plant Frederick Sheppard	FOR THE DEFENDANTS TSAWWASSEN FIRST NATION
Graham Kosakoski	FOR THE DEFENDANT PENELAKUT FIRST NATION

SOLICITORS OF RECORD:

Rath & Company Barristers and Solicitors Praddis, Alberta	FOR THE PLAINTIFFS
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT HER MAJESTY THE QUEEN
Mandell Pinder LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE DEFENDANT MUSQUEAM FIRST NATION
Gall Legge Grant Munroe LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE DEFENDANT TSAWWASSEN FIRST NATION
Rosenberg Law Barristers and Solicitors Vancouver, British Columbia	FOR THE DEFENDANT PENELAKUT FIRST NATION