Federal Court Cour fédérale

Date: 20140327

Docket: T-2579-91

Citation: 2014 FC 296

Ottawa, Ontario, March 27, 2014

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ROGER SOUTHWIND, FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Third Party

and

HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

Third Party

ORDER AND REASONS

I. Overview

[1] The plaintiffs seek damages for the flooding of their reserve lands in north-western Ontario and eastern Manitoba. They claim loss of their land and the use of that land, as well as loss of hunting, fishing and harvesting rights. The flooding was caused by the building of a dam on Lac Seul for purposes of generating hydroelectric power.

[2] Three government parties – Canada, Ontario and Manitoba - came to a cost-sharing agreement in 1928, the Lac Seul Storage Agreement (LSSA). The LSSA was confirmed in a federal statute, the *Lac Seul Conservation Act*, 18-19 Geo V, c 32. Under the LSSA, Ontario was responsible for two-fifths of the capital costs of building the dam and Canada was responsible for the remaining three-fifths. In 1929, Canada's interests in Crown lands in Manitoba were transferred to the province under the *Manitoba Natural Resources Transfer Act*, CCSM c N30 (MNRTA). The MNRTA specifically provides that Manitoba must pay Canada for its expenditures under the LSSA.

[3] The government parties came to another agreement in 1943 regarding the total cost of the dam, including compensation payable to the Lac Seul Band for flooding, damage to homes and timber, and the cost of moving graves. These costs were added to the capital cost of the dam. Manitoba paid out its share over a 50-year period, with a "final" payment made in 1980.

Thereafter, the three governments discussed terms of a potential new agreement, but never arrived at one.

[4] In response to the plaintiffs' efforts to obtain additional compensation, Canada seeks to add Ontario and Manitoba as third parties, arguing that any additional compensation should be regarded as an additional capital cost of the dam, and that the two provinces are obliged to pay their corresponding shares as set out in the LSSA and MNRTA.

[5] By way of this motion for summary judgment, Manitoba requests that it be removed as a third party to this action, arguing that there is no genuine issue for trial, given that it has already met all of its obligations under the LSSA and was released from any further liability when it made its final payment to Canada in 1980. Manitoba also contends that the time has run out for it to be added as a party.

[6] In my view, there is a genuine issue requiring a trial. It would be open to the trial judge to conclude that at least some of the damages that may be owing to the plaintiffs fall within the capital costs of building the dam, and that some portion of those damages are Manitoba's responsibility under the LSSA and the MNRTA, both of which remain in force. Further, I am not satisfied that the third party claim against Manitoba is out of time. Accordingly, I must dismiss Manitoba's motion.

[7] There are two issues:

1. Is there a genuine issue requiring a trial?

2. Is the claim against Manitoba out of time?

II. Issue One – Is there a genuine issue requiring a trial?

(1) The test

[8] The Supreme Court of Canada recently revisited the test for summary judgment: *Hryniak v Mauldin*, 2014 SCC 7. Previously, the question to be answered on a motion for summary judgment was whether there was a "genuine issue *for* trial". Now, the test is whether there is "a genuine issue *requiring* a trial" (para 43 – my emphasis). A full trial is no longer the default process (para 43).

[9] There will be no genuine issue requiring a trial where, on a pre-trial motion, the judge is able to reach a fair and just determination on the merits. This will be the case when the process (1) allows the judge to make the necessary findings of fact; (2) allows the judge to apply the law to the facts; and (3) is a proportionate, more expeditious, and less expensive means to achieve a just result (at para 49). On the other hand, a process that does not give a judge confidence in his or her conclusions can never be the proportionate way to resolve a dispute (*Hryniak*, at para 50).

[10] Even if the judge finds that there appears to be a genuine issue requiring a trial, the next step is to determine if a trial can be avoided (at para 66). To decide that question, the judge

should weigh the evidence, evaluate credibility, and draw reasonable inferences (*Hryniak*, at para 44).

(2) The Evidence

[11] The evidence before me shows that some persons involved in the discussions surrounding the LSSA may have believed that they had achieved a final agreement and, in particular, that Manitoba's obligations were discharged in 1980. However, in my view, those perceptions do not permit me to conclude that Manitoba no longer has any financial obligations for capital costs. This question requires a trial. If Canada is found to be liable to the plaintiffs for additional damage caused by flooding, some of those costs may be regarded as part of the capital costs of building the dam, and fall partly on Manitoba, according to the LSSA and the MNRTA.

[12] Some of the capital costs identified in the LSSA relate to the actual construction of the dam. Others relate to the operation of the dam and compensation for property taken or injuriously affected by its construction. These provisions are broad enough to capture the kind of damage for which the plaintiffs seek compensation in this action.

[13] I note that the documentary evidence before me shows that:

- The losses experienced by the Lac Seul Band were calculated in 1928 to be $120,200, which included loss of timber, hay, rice, hunting, trapping, fishing, 52 houses and gardens, and 8,000 acres of land;
- In 1932, the total capital cost of the project was estimated to be $752,023.99, which included a figure of $50,000 for compensation for flooding;

- Ontario and Canada considered the figure of $120,200 as compensation to the Band to be excessive;
- In 1932, Ontario was willing to pay 40% of the compensation to the Band for actual damages (*ie* damage to buildings, gardens, hay and rice) but not for loss of land, given that Ontario had also suffered damage to land;
- Compensation to the Band came within the overall capital cost of the project;
- A 1941 valuation of the damage to land belonging to the Band recommended that additional losses should be recognized (*eg*, $138,200 for muskrats, and $290.40 for cemeteries), which would bring the total figure to $282,744.51;
- The parties proposed in 1941 that the total figure should be $100,000, which would include compensation on moral grounds for muskrats and rice;
- In 1943, Ontario and Manitoba wished to keep compensation to a minimum and suggested that no compensation be granted for timber and a nominal amount ($15,000) should be given for muskrats and rice, putting the final settlement at $72,539.00;
- This figure was carried forward into the overall net settlement and Manitoba agreed with it;
- The actual amount paid to the Band, however, was about $50,000.00;
- Manitoba regarded its payment of $58,710.61 in December 1979 as the "final payment" under the 50-year amortization arrangement and the project was then "fully paid off";

- Subsequent discussion among the parties was aimed at arriving at an agreement regarding additional capital costs of the project but none was achieved; the parties operated under an ongoing "gentleman's agreement"; and
- When it received a Statement of Claim from the Lac Seul Band in 1991, Ontario wondered whether the terms of the LSSA applied to the claim.

(3) Conclusion

[14] This evidence is insufficiently definitive to be able to conclude that a trial is not required. While the parties came to an agreement about the amount to be paid to be Band, I cannot conclude on the evidence before me that there was a clear understanding that their obligations, particularly those of Manitoba, had been fully discharged for all time. Indeed, even in the 1980s, the parties appeared to understand that the LSSA remained in effect and that they could be liable for additional capital costs as they arose. The parties also regarded compensation to the Band as forming part of the capital cost of the dam and were aware that there were some losses that were not included in the settlement to which they agreed in1943. It is at least possible that the additional compensation sought by Band could also be considered a capital cost, for which Manitoba would be liable for a proportion. Many of the provisions of the Statement of Claim make reference to losses resulting from the flooding of the Band's lands and would have been regarded as capital costs under the broad definition of those costs in the LSSA (*eg*, loss of land and use of land, gardens, timber, buildings, *etc*).

[15] In my view, these issues require definitive determination by the trial judge and cannot be decided on this motion.

III. Issue Two – Is the claim against Manitoba out of time?

[16] Manitoba argues that the plaintiffs' claim is barred by the six-year limitation period in the *Crown Liability and Proceedings Act*, RSC 1985 c C-50, s 32, or similar provisions under Manitoba laws (the *Limitation of Actions Act*, CCSM c L150, ss 2(1)(*i*), 2(1)(*n*)). That period began to run, according to Manitoba, in 1980, when it made its final payment under the LSSA. Alternatively, the time period began to run in 1985 when, the Lac Seul First Nation filed a Specific Claim for compensation. In the further alternative, it began in 1991 when the Statement of Claim was filed.

[17] Manitoba also argues that the doctrines of laches and estoppel stand in the way of any liability on its part. Regarding laches, Manitoba argues that Canada effectively abandoned any claim by doing nothing to pursue any liability against it after 1943. On estoppel, Manitoba relies on alleged representations made by Canada to the effect that Manitoba's obligations were complete.

[18] In my view, Manitoba's arguments do not lead to a conclusion that a trial is not required. The LSSA and the MNRTA are still in force, so it is not clear that a limitation period has even started to run on Manitoba's liability. As Justice Michael Phelan pointed out, the LSSA is not a simple contract. It is "both a contractual and a political agreement enshrined in legislation and ratified by the relevant political entities" (*Southwind et al v Canada*, 2011 FC 351, at para 35). Arguably, the clock begins only when there has been a finding that an obligation under the LSSA

or the MNRTA has not been met; that has not yet occurred. The fact that Canada could have moved earlier does not mean that its opportunity to do so has expired.

[19] I accept that limitation periods serve important purposes, among them, avoiding the problems that can arise when witnesses are no longer available, historical documents are missing, and new approaches to liability can be unfairly applied to past conduct (*Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)* 2012 FC 915, at para 28). However, it is not at all clear that those problems arise here – the evidentiary record appears to be fairly complete and the general terms of potential liability have already been settled among the government parties. The question remains whether the plaintiffs' losses amount to additional capital costs that should be apportioned according to those terms.

[20] Regarding laches, I see no evidence that Canada acquiesced to any refusal on Manitoba's part to accept liability for capital costs. There is no evidence of such a refusal. Further, there is nothing inherently unreasonable about permitting the claim against Manitoba to go to trial.

[21] On estoppel, again, I cannot find any clear representation on Canada's part that Manitoba's liability had been fully discharged. The 1943 agreement, still in force, was drawn up based on the government parties' assumptions about how things stood at the time. No formal release from further liability was executed at that point or, in fact, at any point. Indeed, in more recent years, the parties seemed to recognize that the question of their liability for additional capital costs was a live issue.

[22] While Canada was primarily responsible for calculating the damages owed to the Band, Manitoba was aware that the Band was not consulted on this issue and, in my view, cannot reasonably assert that it received a definitive representation that its obligations toward the Band had been fully discharged in 1943. In fact, the evidence suggests that the government parties, concerned about the overall costs involved, may have knowingly discounted their obligations toward the Lac Seul Band.

[23] Accordingly, I cannot conclude that the claim against Manitoba is out of time, or is otherwise barred by estoppel or the doctrine of laches.

IV. Conclusion and Disposition

[24] Manitoba's motion for summary judgment disallowing the third-party claim brought against it by Canada must be dismissed. There are genuine issues requiring a trial - namely, whether Manitoba continues to be liable for any additional capital costs arising out of the LSSA and, if so, whether Canada's claim is barred. The evidence before me does not permit me to arrive at definitive conclusions on either of those issues.

[25] Therefore, Manitoba's motion for summary judgment is dismissed, with costs.

ORDER

THIS COURT ORDERS that the motion is dismissed, with costs.

"James W. O'Reilly"
Judge

Annex

Crown Liability and Proceedings Act, RSC 1985 c C-50	*Loi sur la responsabilité civile de l'État et le contentieux administratif*, LRC (1985), ch C-50
Prescription and Limitation	Prescription
32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	**32.** Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.
Limitation of Actions Act, CCSM c L150	*Loi sur la Prescription*, CPLM c L150
Limitation	Délais de prescription
2(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:	**2(1)** Les actions suivantes se prescrivent par les délais respectifs indiqués ci-dessous :
(*i*) actions for the recovery of money (except in respect of a debt charged upon land), whether recoverable as a debt or damages or otherwise, and whether a recognizance, bond, covenant, or other specialty, or on a simple contract, express or implied, and actions for an account or not accounting, within six years after the cause of action arose;	*i*) une action en recouvrement d'une somme d'argent (sauf celle relative à une créance grevant un bien-fonds), que cette somme d'argent soit recouvrable à titre de dette, de dommages-intérêts ou à un autre titre, ou que cette somme découle d'un engagement, d'un cautionnement, d'un contrat ou d'un contrat scellé ou d'une convention verbale, expresse ou tacite, se prescrit par six ans, à compter de la naissance de la cause d'action; il en est de même d'une action en reddition de compte ou pour non-reddition de compte;
(*n*) any other action for which provision is not specifically made in this Act, within six years after the cause of action arose.	n) une autre action qui ne fait pas explicitement l'objet d'une disposition de la présente loi, se prescrit par six ans, à compter de la naissance de la cause d'action.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2579-91
STYLE OF CAUSE:	ROGER SOUTHWIND, FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AND HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AND HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA
PLACE OF HEARING:	WINNIPEG, MANITOBA
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DATED:	MARCH 27, 2014

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