Citation: Songhees First Nation v. Canada (Attorney General) et al 2002 BCSC 1628

Date: 20021126
Docket: 01 1328
Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SONGHEES FIRST NATION

PLAINTIFF

AND:

ATTORNEY GENERAL OF CANADA, and
THE ESTATE OF IRENE COOPER, by her administrators
WILLIAM GOSSE, HARVEY GEORGE, and CHARLOTTE THOMPSON

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE R. D. WILSON
(ON COSTS)

Counsel for the Plaintiff: R.J.M. Janes

Counsel for the Defendant Attorney General of Canada: B. A. Burns and J. Mules

Written Submissions Received: October 3, 2002 and October 28, 2002
Victoria, BC

I.

[1] In February 2002, the parties set down for hearing and disposal, the following point of law:

> ... when an Indian in lawful possession of land on a reserve, which has been leased by Her Majesty the Queen in right of Canada ... pursuant to s. 58(3) of the ***Indian Act***, R.S.C. 1985, c. I-5, dies, and devises his, or her, interest, in that land, to a person ... not entitled to reside on that reserve, under the ***Indian Act***, is Canada obligated to pay the rent collected between the date on which that Indian dies and the date upon which the land is disposed of, pursuant to s. 50(2), (3) and (4) to:
>
> (1) the Band on whose reserve the land is situated; or
>
> (2) the Heir; or
>
> (3) some other person or persons, and, if so, to whom?

[2] The question has been answered. The parties now seek an order fixing the scale of costs. The plaintiff says this was a matter of unusual importance. Canada says it was a matter of more than ordinary importance. That contest defines the issue.

II.

[3] The rule makers start from the recognition that all litigation is difficult. They also recognize that some litigation is important. They then prescribe a continuum of

difficulty and importance. The plaintiff says the matter falls at the furtherest reach of that continuum. Canada says not quite.

[4] The plaintiff's position is founded on the following propositions:

1) the question posed was of unusual difficulty and thus greater importance;

2) the question "... is vastly more important than a case which deals with the interpretation of a particular contract or deed or the interpretation of a statute with a more narrowly defined scope of application.";

3) "... the special relationship between First Nations and the Crown [should be] a factor weighing [in] favour of a higher scale of costs so as to ensure a fuller degree of indemnity on a situation where the intervention of the Courts was needed in order to ensure the Crown complied with its lawful duties.";

4) "Fundamentally, it is the Crown's legal duty to ensure that the band's assets are protected from non-band members. ... The protection of that policy

> will be furthered in the context of this case by the award of costs on Scale 5."

III.

[5] The plaintiff's propositions are not persuasive.

[6] First, this was a matter of ordinary difficulty. Uncomplicated facts were admitted. The statutory provisions and judicial precedence applicable to those facts were not complex.

[7] Second, the issue was one of importance to a class or body of persons; but was not of general interest. That is to say, the issue did concern Indians and Indian Bands in the context of estate administration; it did not concern Indians or Indian Bands in a universal sense.

[8] Third, and fourth, there is nothing in the evidence to suggest that Canada did not act in the utmost good faith in the position it has traditionally taken on this issue.

[9] In an affidavit sworn 19 June 2002, in the Court of Appeal, Ms. Sherry Evans, a Policy and Issues Analyst for Canada, said, among other things:

> 16. The Department of Indian Affairs considers estates administration to be a private family matter and its policies and practices regarding estates

> administration are intended to respect the right of aboriginal individuals to privacy and autonomy in dealing with their personal affairs, while yet meeting the requirements of the Indian Act. Since 1993 the Department has published literature and made public presentations encouraging aboriginal people to view estate administration as their personal responsibility, and as an intensely private matter in which outside institutions ought not be involved. ...
>
> 17. In the past, the Department of Indian Affairs undertook the primary role in administering the estates of aboriginal people. Since 1976, however, the policy and practices of the Department have changed substantially, and the current policy in all cases is to encourage family members of the deceased to administer the estate, and for the Department itself to become involved as administrator only as a last resort. In order to give full recognition to the authority and responsibility of the aboriginal decedent's family member or nominee, the express policy of the Department is one of minimal involvement. ...

IV.

[10] The referent for the adverb "unusual" in Appendix B is: "not often occurring or observed; different from what is usual; remarkable; exceptional."[1]

[11] It is true that this question has not occurred or been observed before. That does not make it qualitatively different from disputes arising on the meaning to be assigned

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[1] ***Bradshaw Construction Ltd. v. Bank of Nova Scotia*** (1991), 54 B.C.L.R. (2d) 309 at page 318, paragraph 23; (B.C.S.C.), affirmed on appeal (1992), 73 B.C.L.R. (2d) 212 (B.C.C.A.).

to words in a statute. There was nothing remarkable or exceptional about this issue.

[12] Canada concedes that the matter was of more than ordinary importance. Accordingly, costs are fixed at Scale 4.

"R.D. Wilson, J."
The Honourable Mr. Justice R.D. Wilson