Athabasca Chipewyan First Nation v. Canada, 1998 ABQB 448

Date: 19980612
Action No. 9703-07620

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

THE ATHABASCA CHIPEWYAN FIRST NATION AND CHIEF ARCHIE CYPRIEN, acting on his own behalf and on behalf of all members of the ATHABASCA CHIPEWYAN FIRST NATION

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRSAND NORTHERN DEVELOPMENT AND PUBLIC WORKS AND GOVERNMENT SERVICES CANADA AND NATURAL RESOURCES CANADA AND HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA , AND BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Defendants

REASONS FOR DECISION
of
W. J. QUINN, Masters in Chambers

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[1] Her Majesty the Queen in the Right of British Columbia and B.C. Hydro and Power Authority ("B.C. Hydro") are making this application pursuant to Rule 27 of the Alberta Rules of Court, to set aside the statement of claim in this action as against them as well as the service of the statement of claim on them.

[2] On December 19, 1997 I made an ex parte order for service ex juris upon the Province of British Columbia and it agent, B.C. Hydro.

[3] The defendants submit that by reason of Crown immunity and sovereign immunity the Alberta Court of Queen's Bench has no jurisdiction in this matter.

[4] Crown immunity is a general common-law rule that the Crown cannot be sued in any court. The common law can, however, be changed by statute so that the Crown can be sued in a court which has been granted jurisdiction over the Crown by statute.

> See: *Hogg, Peter W., Liability of the Crown* (1989) (2nd Ed.) at 266

[5] By statute both the Province of British Columbia and B.C. Hydro may be sued in British Columbia in accordance with the relevant legislation.

> See: *Crown Proceeding Act*, R.S.B.C. 1996, c. 89

[6] In the *Cristina*, 1938 A.C. 485 at 490 *Lord Atkin* described foreign sovereign immunity in the following words:

> A country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceeding whether the proceedings involve process against his person or seek to recover from him specific property damages.

[7] It is clear from *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551 that agents of the Crown such as B.C. Hydro are entitled to sovereign immunity and other Crown immunities in the same manner as the Crown proper.

[8] In paragraph 4 of the written submission of the plaintiffs it is stated that British Columbia and B.C. Hydro do not dispute that they are properly impleaded in respect of the matters claimed in the statement of claim and do not claim Crown immunity in respect of the pleadings.

[9] I do not understand that statement unless it is intended to refer to proceedings commenced in British Columbia. If British Columbia and B.C. Hydro do not dispute they are properly impleaded I do not understand why they are asking for an order that the statement of claim be set aside.

[10] In the written submission of British Columbia and B.C. Hydro they are claiming both Crown immunity and foreign sovereign immunity.

[11] Paragraph 5 of the written submission of the plaintiffs states there is no provision in the *Crown Proceedings Act of B.C.* which limits the liability of the B.C.Crown to proceedings taken in B.C. and that accordingly the B.C. Crown and its agents may be subject to the jurisdiction of the Alberta courts.

[12] In *Phillips et al v. Beary et al*, (1994) 29 C.P.C. (3d) 258 it was held that the *Proceedings against the Crown Act (Sask)* did not constitute an external waiver of sovereign immunity, and a declaration was made that the British Columbia Supreme Court had no jurisdiction over the Government of Saskatchewan. In my opinion the same result should apply to an action against the British Columbia Government and its agent commenced in Alberta and the reliance of British Columbia on sovereign immunity ought not to be treated as having been waived by the British Columbia legislation.

[13] It is submitted by the plaintiffs that Alberta should not be considered as a sovereign foreign jurisdiction as far as British Columbia is concerned, and that the foreign sovereign immunity should be held not to exist in the present case.

[14] The plaintiffs rely on *Morguard Investments Ltd. v. DeSavoye,* (1990) 76 D.L.R. 4th 256 (S.C.C.) , but in my opinion that case is of no assistance here. It was concerning a mortgage foreclosure on Alberta land in which the defendant had moved to British Columbia and was served ex juris there when foreclosure proceedings were taken in Alberta. The defendant did not appear or defend the action. A judgment for a deficiency was recovered against him. A separate action was commenced against the defendant in British Columbia to enforce the Alberta deficiency. The Supreme Court held the defendant had properly been sued in British Columbia notwithstanding that he had not entered an appearance in the Alberta action.

[15] There was no Crown involvement in the *Morguard* case and questions of Crown immunity and sovereign immunity were not raised or discussed.

[16] Counsel for the plaintiffs also rely on the restrictive theory of sovereign immunity. In *Jaffe v. Miller et al*, 103 D.L.R. (4th) 315 at 321 (Ontario C.A.) *Finlayson J.A.* says:

> Sovereign immunity at common law was not absolute, however. It was modified over time and admitted of four exceptions. A foreigner has no immunity in respect of (1) land situate in the host state, (2) trust funds or moneys lodged for the payment of creditors, (3) debts incurred for service of its property in the host state and (4) commercial transactions entered into with a trader in the host state: see *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*, [1975] 3 All E.R. 961 (C.A.) At pp. 965-6.
>
> However, the notion that sovereign immunity is not absolute is of recent origin. Latterly there has been a shift to what is referred to as the “restrictive principle of sovereign immunity”. A brief review of the nature of the two approaches to sovereign immunity - restrictive and absolute - is helpful in

> understanding the impact and effect of the *State Immunity Act.*

[17] The doctrine of absolute immunity is stated by *Lord Atkin* in the passage from the *Cristina* quoted above.

[18] In *I. Congreso del Partido*, [1983] 1 A.C. 244 (H.L.) *Lord Wilberforce* stated a new approach to sovereign immunity could be sustained in the following way:

> The relevant exception, or limitation which has been engrafted upon the principle of immunity of states, under the so called "restrictive theory", arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations: (a) it is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions.

[19] In my opinion the common law theory of restrictive sovereign immunity cannot be relied on by the plaintiffs to defeat the defendants' application for two reasons:

1. The exception pertaining to land situate in the host state refers to land owned by the foreign state in the host state. In the present case British Columbia does not own the land which is the subject of the plaintiffs' claim.
2. The commercial transaction exception does not apply because neither British Columbia nor B.C. Hydro entered into a commercial transaction in the host state (Alberta).

[20] The Plaintiffs rely on the *State Immunity Act*, S.C. 1982, c. s-18.

[21] In the *Jaffe* case, (supra) *Finlayson C.A.* made the following comment about the *State Immunity Act* at page 320:

> The *State Immunity Act* was proclaimed, and by its terms, came into force on July 15, 1982 [S.C. 1980-81, c. 95]. It is intended as the domestic implementation of international legal principles that have evolved on a state-by-state basis rather than being created or codified by multilateral treaty. Generally, the effect of sovereign

> immunity is that the host country recognizes the independence of every other sovereign state and declines to exercise by means of its courts any of its territorial jurisdiction over that sovereign or its property which, but for this doctrine, would be subject to its jurisdiction: see *The "Parlement Belge" (1880), 5 P.D. 197 (C.A.) At p. 217.*

[22] The following are portions of the *State Immunity Act* pertinent to the present application:

> 2. In this Act,
>
> "commercial activity" means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character;
>
> . . . . .
>
> 3.(1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.
>
> . . . . .
>
> 5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state. 1980-81-82-83, c. 95, s.5.
>
> 6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to
> (a) any death or personal injury, or
> (b) any damage to or loss of property
> that occurs in Canada. 1980-81-82-83, c.95, s.6.

[23] In my view *The State Immunity Act* does not apply to the present case because British Columbia is not a foreign state within the contemplation of the said act.

[24] I agree with the following statement of *Campebell L.J. S.C.* in *Western Surety Co. v. Elk Valley Logging Ltd. et al; The Queen in the Right of Alberta, Third Party*, (B.C.S.C.) 23 D.L.R. (4th) 464 at 471:

> The defendant Hollowink suggests that the provisions of the *State Immunity Act* prevent any claim of immunity here. With respect, I am unable to find any application of that Act to the situation here. Clearly it is intended to deal with countries outside of Canada. It refers to foreign states and

> defines a “foreign state” to include a province of a foreign state. That surely cannot refer to Canadian provinces unless Canada is considered a “foreign state” and nothing in the Act lends itself to such an interpretation.

[25] Counsel for Her Majesty the Queen in the right of Canada (“Canada”) submits that the issue to be determined on the present application is whether the doctrine of sovereign immunity applies to British Columbia Hydro and Power Authority. He acknowledges that B.C. Hydro is for all its purposes an agent of Her Majesty in the Right of British Columbia and that its purposes may only be exercised as an agent of her majesty.

[26] His position in the present application is stated in paragraphs 8 and 9 of his written submission. They are as follows:

> 8. The Respondent Her Majesty the Queen in Right of Canada respectfully submits that under the express terms of its Act of incorporation, British Columbia Hydro and Power Authority cannot lawfully act other than as an agent of Her Majesty the Queen in Right of British Columbia. No provision in the Authority’s enabling legislation permits it to commit wrongful or tortious acts, therefore when the Authority is alleged to have committed such acts, it is not entitled to rely upon the doctrine of “sovereign immunity”, as that doctrine cannot and does not apply to agents who act outside the scope of their agency.
>
> 9. The Statement of Claim filed by the Athabasca Chipewyan First Nation on April 18th, 1997 alleges, *inter alia*, that British Columbia Hydro and Power Authority was negligent in the construction and operation of the W.A.C. Bennett Dam, which is located in the Province of British Columbia. In alleging wrongful and tortious conduct as against British Columbia Hydro and Power Authority, that entity is no longer deemed to be acting within the scope of its statutory agency, and is therefore subject to suit. This is reflected in section 30(1) and (2) of the *Hydro and Power Authority Act*.

[27] The following sections of the *Crown Proceedings Act*, R.S.B.C. ch. 89 are pertinent to the present application, namely:

> 2 Subject to this Act,

(a) proceeding against the government by way of petition of right is abolished.

(b) a claim against the government that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceeding against the government in accordance with this Act, without the grant of a fiat by the Lieutenant Governor.

(c) the government is subject to all the liabilities to which it would be liable if it were a person, and

(d) the law relating to indemnity and contribution is enforceable by and against the government for any liability to which it is subject, as if the government were a person.

3.(2) Nothing in section 2 does any of the following:

(d) authorizes proceedings against the government for a cause of action that is enforceable against a corporation or other agency owned or controlled by the government;

[28] The following section of the *Hydro and Power Authority Act*, 1996, R.S.B.C., ch. 212 are also pertinent to the present application:

"authority" means the British Columbia Hydro and Power Authority continued under this Act;

3 (1) The authority is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government.

30 (1) The authority may sue and be sued in its own corporate name for any right or obligation acquired or incurred by it on behalf of the government as if the right or obligation had been acquired or incurred on its own behalf and also in respect of any liabilities in tort to which it is made subject by this Act.

(2) The authority is liable in tort for the damages for which if it were a private person of full age and capacity it would be subject

(a) for torts committed by its servants or agents,

[29] It is clear from this legislation that persons alleging injury or loss from tortious activity of B.C. Hydro:

1. Cannot sue the B.C. Government;

2. Can sue B.C. Hydro and Power;

3. Can look to the B.C. Government for payment of a judgment they obtained against B.C. Hydro and Power.

[30] The *Hydro and Power Authority Act* gives very wide powers to the Authority to do whatever was required for the construction and operation of the W.A. C. Bennett Dam, but (not surprisingly) it does not purport to authorize any tortious activity by the Authority. On the contrary, it permits the Authority to be sued in tort and does away with the possibility of the Authority sheltering against a tort claim by relying on Crown immunity.

[31] Counsel for Canada cites *R. v. Eldorado Nuclear Ltd.*. [1983] 2 S.C.R. 551 as authority that a crown agent is only entitled to immunity when it acts within the scope of the public purposes it is statutorily empowered to pursue and he cites *Feather v. The Queen,* (1865) 122 E.R. (C.A.) 1191 as authority that the Crown cannot authorize the commission of a wrongful or tortious act by an agent servant or officer of the Crown.

[32] The B.C. legislation quoted above does not contradict or derogate from those authorities but rather confirms them by stripping the Authority of any defence it might otherwise have raised as an agent of the Crown.

[33] British Columbia Hydro and Power Authority clearly can be sued in B.C., but the question raised by the present application is whether it can be sued in Alberta. Does the B.C. legislation do away with the sovereign immunity the Authority could otherwise claim?

[34] In *Phillips (Guardian ad litem) v. Beary*, 29 C.P.C. (3d) 258 the Government of Saskatchewan had been third partied in a British Columbia action and it applied for an order declaring that the British Columbia court had no jurisdiction over it. *Hood J.* granted the order. At pp. 259-260 he said:

> I reject the submission of counsel for the defendant that the provision os the Saskatchewan Proceedings Against the Crown Act, R.S.S. 1978, c. P.27 constitute an external waiver of sovereign immunity as well as an internal waiver of Crown immunity, by The Government of Saskatchewan. In my opinion clear and precise wording in the said statute

> would be required before this court could find that The Government of Saskatchewan has waived its sovereign immunity such that the government may be sued in this court like any other person.

[35] By parity of reasoning I conclude that *Hydro and Power Authority Act*, R.S. B.C. 1996 c. 212 which deprived the Authority of its right as an agent of the Crown to claim immunity within British Columbia did not constitute an external waiver of sovereign immunity.

[36] Accordingly I hold that the said defendants can both rely on sovereign immunity and that their application to set aside the statement of claim herein as well as the service thereof be set aside.

[37] The applicants are entitled to their taxable costs.

DATED at Edmonton, Alberta this 12th day of June, 1998.

W. J. QUINN
M.C. C.Q.B.A.

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