Citation: Sun Peaks Resort Corporation v Billy et al
2001 BCSC 1056

Date: 20010718
Docket: SO13235
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SUN PEAKS RESORT CORPORATION

PLAINTIFF

AND:

JANICE BILLY, AMANDA SOPER, NICOLE MANUEL, JOHN DOE, JANE DOE and other persons unknown to the Plaintiff acting in concert with them

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE MORRISON

Counsel for the Plaintiff: John J. L. Hunter, Q.C. and Sarah P. Pike

Counsel for the Defendant: Louise Mandell, Q.C. and C. MacIntosh

Date and Place of Hearing: July 17 & 18, 2001 Vancouver, BC

[1] This is an application by the plaintiff, a ski resort north of Kamloops, for an interlocutory injunction restraining certain persons from occupying land leased by the plaintiff from the Provincial Government.

[2] The land in question is District Lot 6256, Kamloops Division of Yale District.

[3] The defendants are members of the Adams Lake Indian Band and the Neskonlith Indian Band, both Bands being within the Secwepemc Nation.

[4] In and around the area in question, there are 17 Indian bands who are part of the Secewpemc Nation, the Adams Lake and Neskonlith being two of the 17.

[5] The plaintiff claims the defendants, by setting up a protest camp on Block A, part of District Lot 6256, are impeding the plaintiff’s access to the land; and by being camped on property leased by the Sun Peaks Resort, the defendants are interfering with certain construction and work relating to a sewage line that the plaintiff says must be constructed before the winter months set in.

[6] In 1993, the Provincial Government signed a Master Development Agreement with Tod Mountain Development Ltd. which gave Tod Mountain the right to control the area and develop

the ski resort business. The corporate plaintiff is the successor to Tod Mountain, governed by the same terms of the Master Agreement.

[7] The plaintiff commenced its development of the resort in 1993 and has invested significant funds in developing the area as an all season resort. The affidavit material filed by the plaintiff indicates there is also substantial development by other parties at Sun Peaks. Sun Peaks earns its revenue from sales of land to developers, lift ticket revenues, equipment rentals, retail sales and food and beverage sales. The plaintiff is developing the resort as a destination resort for both winter and summer recreation.

[8] District Lot 6256 has at all material times been property leased from the Crown. In 1994, the plaintiff wanted to put a service station on the property, so an area known as Block A was taken out and put in the name of the plaintiff in fee simple. In 1998, the lease was renewed between the Provincial Government and the plaintiff, and it was in 1999 that the plaintiff, having decided not to build a service station, returned Block A to the Crown. It was not until June 2001 that Block A was placed back into the lease, by way of a Modification Agreement. At the time of this hearing, Block A is clearly with the leasehold land.

[9] However, in October or November 2000, a Native group began occupying a portion of Block A shortly after the plaintiff announced the next phase of development at the resort. This occupation was clearly in opposition to Sun Peaks expansion plans.

[10] Affidavit material filed by the defendant sets out their concerns with the obvious conflict between the ski resort and the defendants. In addition to their concern over the expansion plans of the resort, the defendants are also in conflict with the plaintiff claiming a lack of studies or consultation with regard to the environmental impact and the impact on the members of the Secwepemc Nation. The affidavits of both parties filed detail the hostilities, confrontations and misunderstandings that have occurred over the past year.

[11] One of the central concerns of the defendants is that when the plaintiff applied for the Modification Agreement on June 8, 2001 to include Block A into the existing lease, there was no consultation with the defendants nor any public notice, even though it was clear that the defendants had been on the land since November, 2000. When the defendants picked the location of their protest camp, they were aware that it was Crown Land at that time, and not subject to any lease. They had wanted and expected consultation in the event of the

plaintiff making an application to include Block A within the leasehold lands. This never occurred.

[12] Then on June 26, 2001, Sun Peaks sent a letter advising the defendants that the occupiers of the protest camp would have to vacate the property, and that was expected to be done by July 6, 2001. The letter set out that the resort intended to proceed with construction of the sewage line which would have to pass through or by the protest camp.

[13] As of the date of this hearing, all but three protestors have voluntarily removed themselves from the camp. Counsel for the defendant advises that three persons are at the campsite, and that only two pup tents remain at the site.

[14] While the occupation has clearly been a source of concern to the plaintiff, it has apparently been the catalyst or some beneficial changes for a number of members of the Adams Lake and Neskonlith Bands. The evidence of the defendants is that by re-establishing their presence on these lands, which had not been occupied by them in recent times, they have reminded themselves of their obligation to protect the land, their traditional territory and to preserve it for their heritage. A part of their protest has been to inform the public of their concerns with regard to the resort development, to inform the public of the Secwepemc Nation’s aboriginal title and rights

claims to the area. The protest camp has served as a gathering place within the past few months for some members of their community, and the elders have assisted younger members of the bands in learning how to live off the land, the importance of social and cultural gatherings, how to gather traditional foods and medicines, and learning more about the Secwepemc Nation traditions and language.

[15] Counsel for the plaintiff points out that the defendants' argument is really a challenge to the tenure generally, and that this is not the proper forum or issue here. That there is no evidence to suggest that the leasehold which the government has granted to the plaintiff is invalid. The plaintiff suggests that any challenge that the defendants may have on the issue of aboriginal title is a matter more properly brought before the Courts by way of an action, rather than objecting to this application for interlocutory relief.

[16] In this dispute, both sides have acted with some restraint and respect. There are some exceptions, cited in affidavit evidence by both sides, but I would regard those incidents as exceptions.

[17] However, as part of the injunctive relief sought, the plaintiff also seeks an enforcement order as part of the relief. Because of some past incidents involving the

defendants, the plaintiff asks the Court to conclude that the injunction will not be voluntarily obeyed, and that therefore there must be a inclusion of police authorization, and that without such language, the R.C.M.P. might be reluctant to enforce the order. Counsel cited the decision of ***McMillan Bloedel v. Simpson,*** [1996] 2 S.C.R. 1048, para. 41.

[18] Counsel for the defendants argues that the injunction should not be granted. That the plaintiff comes to Court with unclean hands, seeking a remedy in equity. This is partly because, according to the defendants, the plaintiff relies on the Modification Agreement which was obtained to help break-up the protest camp. The Modification Agreement was made “behind closed doors” between the Province and the plaintiff, after the conflict between the parties was apparent. There was no consultation with the defendants and no public notice with regard to that Modification Agreement.

[19] Alternatively, the defendants say that if an injunction is to be granted, it should be very specific, it should not interfere with the lawful exercise of the rights of freedom of expression and protest, and should not extend beyond the leasehold property into Crown land. Further, there are insufficient grounds to include an enforcement order, which would criminalize those who are in occupation at this time.

[20] First, I must determine whether or not there is a serious question to be tried, and in my view, there is. The plaintiff has a valid lease, and there were no laws broken in reaching the Modification Agreement with the Province in June of this year. The land in question was previously part of the leased premises, and whether or not the lapse of time from 1999 to June of 2001 was simply late paperwork, as suggested by counsel for the plaintiff, is irrelevant. The land in question is now subject to a valid lease, and the plaintiff has the right under the ***Land Act***, R.S.B.C. 1996, Ch. 245 to take proceedings to recover possession of that land. And the plaintiff has the right to undertake the sewer line construction as planned.

[21] Will a refusal to grant this relief bring harm to the plaintiff? The law is clear that interference with an on-going business can and will be regarded as harm within the meaning of the test for this kind of injunctive relief. Irreparable harm need not be proved. The plaintiff has established that its rights to the property have been interfered with by the defendants.

[22] On the question of the balance of convenience, that is, which of the two parties will suffer the greater harm from either granting or refusing this relief, I agree with counsel

for the plaintiff that the balance of convenience favours the granting of this injunction. There are no permanent structures on the property belonging to the defendants, and the defendants' occupation of the land has been recent, since late October of November, 2000. The number of people in actual occupation has been few, and counsel for the plaintiff points out that the kind of activities and dissemination of information by the defendants can be moved to Crown land, in a manner that would not interfere with the rights of the plaintiff.

[23] Accordingly, there will be an order for the injunctive relief claimed by the plaintiff. There will be an order that Irene Billy, Henry Sauls and George Manuel, Jr., the three persons whom I understand to be occupying the land in question, and each of them and all persons having notice of this order shall be restrained and enjoined until a trial of this action or until further order of this Court from occupying any part of District Lot 6256, Kamloops Division of Yale District, unless or until:

(a) each has the plaintiff's express written permission;

(b) impeding access to the land; or

(c) interfering in any way with excavation, construction or work related to a sewage line on the land on or adjacent to the land.

[24] I assume that on receiving notice by way of a copy of this order that those persons will leave the land forthwith.

[25] I am not including an enforcement order in the order that I am granting at this time. These parties are neighbours. Within the last few months, the defendants have voluntarily, or upon being asked, have removed themselves from lands within the leasehold in question. That indicates to me good faith on the part of the defendants. Without diminishing the integrity of their protest, the defendants have moved and shown respect for the law, and I expect no less now.

[26] In the event that the persons named in this order refuse to leave the lands, as now ordered, the plaintiff shall be at liberty to make a further application to me on short notice and I will make myself available. I would hope that would not be necessary.

"Nancy Morrison, J."
Madam Justice Nancy Morrison