BOLTON ET AL. v. FOREST PEST MANAGEMENT INSTITUTE ET AL.

British Columbia Court of Appeal, Macfarlane J.A. (in Chambers), August 16, 1985

Arthur Pape, William J. Andrews and Calvin Sandborn, for the appellants
George C. Carruthers, for the respondents

The plaintiff, holder of a registered trapline, sued on his behalf and on behalf of members of an Indian band to restrain an experimental herbicide spraying program which the defendants proposed to carry out to determine whether the herbicide had a toxic effect on fish and other animals. The plaintiffs alleged that the spraying of the herbicide would endanger fish and other game in the area. The taking of fish, game and edible plants for food was an important component of the bands members' traditional lifestyle and comprised 40 percent of the diet of the band members. The plaintiffs applied for an interim injunction pending disposition of an appeal from the dismissal of an application for an interlocutory injunction.

Held: Application allowed.

1. The jurisdiction of the British Columbia Supreme Court was not ousted by the provisions of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c.10, ss.17(4), 18, The Federal Court did not have exclusive jurisdiction because the relief sought was against servants of the Crown; also, the defendant did not fall within the description of "federal board, commission or other tribunal".

2. The defendants, servants of the Crown, were not immune from action in the circumstances of this case. Even if they had a defence of statutory authority given the permits under which the experiment had been authorized, that would not be a bar to the proceedings.

3. On an interim application, the court need only be satisfied that there is some merit in the contention by the plaintiff that they enjoy rights which may, if established, support a claim in nuisance. A right of fishing and trapping may constitute a profit a prendre. There was, therefore, merit in the plaintiffs' submission that they had a right to maintain an action in private nuisance.

4. There was also merit in the submission that the activity and interest of the plaintiffs was distinct and different from that of the general public; that being so, the plaintiffs had standing to maintain an action in public nuisance without the support of the Attorney General of British Columbia.

5. If an injunction was not granted pending the hearing of the appeal, the spraying would go ahead and the rights of the plaintiffs to appeal would be empty rights. In such an event, the opportunity of the plaintiffs to preserve their rights would be lost. If the experiment established the harm alleged, the harm would be irreparable and irremedial. Damages would be difficult, if not impossible, to assess. Damages in this case would be an inappropriate remedy. Although a party should not be lightly deprived of the benefit of the judgment they have obtained in a trial court, risk of harm to the plaintiffs in this case was such that an interim order should be granted.

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MACFARLANE J.A. (orally): This application arises out of an appeal from a refusal by Southin J. of an application for an interlocutory injunction restraining the defendants from spraying the herbicide, Garlon, in areas in which the plaintiffs allege they have tights. The plaintiffs' action is based in nuisance and in negligence, but the argument proceeded in relation to the claims of nuisance only.

The application before me is for an order pursuant to s.10(2) of the Court of Appeal Act [S.B.C. 1982, c.7], namely, for an interim order to prevent prejudice to the plaintiffs, who ate the appellants. The order which is sought is that there be an interim injunction to the plaintiffs to restrain the herbicide spraying program which the defendants propose to carry out and to restrain that activity until the hearing and determination of the appeal in this matter.

The project which the plaintiffs seek to stop is being carried out by the Forest Pest Management Institute, an unincorporated association of civil servants involved in research on behalf of the Canadian Forestry Service. The defendant Reynolds is the research director of the institute. The

defendant ministers of the Federal Crown are those whose departments are involved in carrying out research pursuant to government policy.

The Forest Test Management Institute is established pursuant to the Forestry Development and Research Act [R.S.C. 1970, c.F-30) of the Canadian Forestry Service and, as I have indicated, exercises a mandate to do research and provide scientific advice regarding the registration of pesticides in Canada pursuant to the federal provisions of the Pest Control Products Act [R.S.C. 1970, c.P-10] and regulations. The other statute which is involved is the Forestry Development and Research Act, R.S.C. 1970, c.F-30, which provides that the minister shall provide for the conduct of research relating to the protection, management and utilization of forest products, and may establish and maintain laboratories and other necessary facilities for such purposes.

The background of the matter is that Dow Chemical Company applied in the early 1980'9 for the registration, in Canada, of Garlon, a herbicide. This herbicide has the effect of containing weeds, and weed trees and bush, and thus encouraging the growth of carnivores. Scientists involved in the institute have been authorized by provincial and federal permits to conduct research trials near Terrace, British Columbia. After the trials, they will be able to advise the Director of the Plant Products Division of Agriculture Canada whether from its perspective the herbicide is suitable for registration in Canada. The proposed research is part of a five-year ongoing forestry-herbicide research project in British Columbia which commenced in 1984, involving the British Columbia Ministry of Forestry and the Canadian Forestry Service and others. The project which the defendants propose to undertake in the water courses on the Skeena Rivet flood plain are a part only of this five-year project. The Skeena project is being carried out to determine whether or not the herbicide, when sprayed on trees and brush and other growth at a distance from water courses, may have the deleterious effect of endangering fish, game, and other elements of the environment. To put it shortly, the aim of the project is to determine, by experiment, whether this herbicide has a toxic effect on fish and other animals. The project is, of course, important to the forest industry of British Columbia and indirectly to the economy of this province. If the herbicide is admitted into Canada for use here, and is an effective chemical, it may increase the quality and quantity of the forest product in British Columbia.

The research is being conducted on the Skeena River flood plain because the sites which have been selected are considered typical of coastal forest sites in which the herbicide Garlon would be most useful in British Columbia. While highly productive in one sense, these sites ate environmentally sensitive from a fisheries and game perspective. The areas in which the research is to be conducted, both land, river and river beds, ate owned or controlled by the Crown.

Counsel for the defendants, who propose to conduct these experiments in the Skeena area, submits that there is no real risk in the use of Garlon and relies upon scientific opinion which forms pare of the material filed. But the fact remains that the experiment in the Skeena area is being conducted for the very purpose of ascertaining whether the chemical is dangerous or not, and to ascertain if it is safe to permit it to be used in Canada. This application must, therefore, proceed on the basis that it is an open question whether the chemical will do damage to any private rights in the fishery or the game in the area, prima facie, there is a risk to fish and game.

The plaintiffs submit that they have an action in private nuisance or have standing to advance a claim based on public nuisance. Southin J. held that they did not. I should describe the interests and activities of the plaintiffs. The plaintiff Russell Bolton is the holder of a registered trapline. A portion of the defendants' proposed spray area is within the area of the registered trapline. I will discuss the legal nature of this registered trapline later by having reference to the Wildlife Act [S.B.C. 1982, c.57] of British Columbia under which it was granted. From the trapline, Mr. Bolton harvests furbearing animals, including beaver. Members of the Indian band harvest fish, animals and edible vegetation from the whole area of the Skeena River watershed from Terrace to Tyee. Food harvested in this way, including salmon, moose, bear, deer, berries and edible plants, comprises 40 percent of the diet of band members. The taking of fish for food is an important component of the band members' traditional lifestyle. The fish are also heavily relied on for food. The trapline held by Russell Bolton provides not only food, but is a commercial operation carried on by him and authorized as such under the permit which he holds under the Wildlife Act.

At the time when the defendants propose to conduct their spraying experiment, the band members would normally be working at resource harvesting throughout the area. Alex Bolton, and other members of the band, hold Indian food fish permits allowing them to take fish for food from the Skeena River. During one week, food fish permit holders are allowed to fish everyday. The defendants propose to spray the herbicide, Garlon, in three portions of the area from which the band members harvest their food. The spray areas are also within the area where the band

members are permitted to conduct food fishing on the Skeena River. The proposed test spray areas are bounded by water and also include within them many small sloughs and streams.

The first question which arises on this application is whether the courts in British Columbia can grant injunctive relief to these plaintiffs against these defendants. Counsel for the defendants has submitted that the jurisdiction of the British Columbia courts is ousted by the provisions of the Federal Court Act [R.S.C. 1970 (2nd Supp.), c.10]. He took that position by way of preliminary objection, and I said I would accede to it. I did not give any reasons at that time, but will give short reasons now. It is true that s.17(1) of the Federal Court Act gives the trial division of that court exclusive jurisdiction in all cases, unless otherwise provided, where relief is claimed against the Crown. "Relief" is defined in the Act as including relief by way of injunction. But the relief in this case is sought, primarily, against servants of the Crown.

Section 17(4) of the Federal Court Act provides:

> (4) the Trial Division has concurrent original jurisdiction...
> (b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of his duties as an officer or servant of the Crown.

For limitations on the jurisdiction of the Federal Court in a matter which involves a claim in negligence against servants of the Crown, see Pac. West. Airlines v. R., [1979] 2 F.C. 476, 13 C.P.C. 299, 105 D.L.R. (3d) 46 at 51-52 (affirmed on appeal [1980] 1 F.C. 86, 14 C.P.C. 165, 105 D.L.R. (3d) 44 (C.A.)).

Section 18 of the Federal Court Act gives the trial division of the Federal Court exclusive jurisdiction to issue an injunction against any "federal board, commission or other tribunal" but the defendants do not fall within that description. No other provisions of the Act appear to give exclusive jurisdiction to the Federal Court in a claim of this kind.

I am not persuaded that the jurisdiction of the courts in British Columbia is ousted by the provisions of the Federal Court Act.

Counsel for the defendants then submits that an injunction cannot be granted because the action is one that is against the Crown and the Crown has immunity from such actions. Counsel for the plaintiffs submits that the action is not against the Crown but against servants of the Crown who, it is apprehended, ate about to commit the tort of nuisance. Counsel submits that such conduct by servants of the Crown, if not expressly authorized by statute, is enjoinable: see Conseil des Ports Nationaux v. Langelier, [1969] S.C.R. 60, and particularly the summary of principles expressed by Martland J. at pp. 71-72; see also Baton Broadcasting Ltd. v. C.B.C., [1966] 2 O.R. 169, 56 D.L.R. (2d) 215 (H.C.). I am not persuaded that the defendants are immune from the action in the circumstances of this case. It may be arguable that they have a defence of statutory authority, but that is not a bat to the proceedings. It is a matter to be dealt with when the merits are considered. If there be no Crown immunity, then it is open to the courts in British Columbia to grant injunctive relief if the circumstances justify it.

The grounds of appeal are:

> 1. That the learned Chamber a Judge erred in finding that the Plaintiffs do not have sufficient or suitable legal interests on which to base an action in private nuisance.
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> 2. That the learned Chambers Judge erred in finding that the Plaintiffs do not have sufficient or suitable legal interests on which to base an action in public nuisance.

In finding that no action in private nuisance could be maintained by the plaintiffs, Southin J. said:

> Counsel for the Plaintiffs asserted that both the trapline and the food fishing licence created profits a prendre. That there can be a right of fishery which constitutes a profit a prendre is clear. Such rights are usually created by deed and at one time, no doubt, could be created by prescription. Those interests akin to them which are interests in land, can be created by statute is also cleat. In the end, having considered the statutory provisions upon which the fishing licence and the trapline licence rest, I am firmly of the opinion that neither of these interests is a profit prendre. They are merely licences and thus the holders thereof cannot maintain an action for private nuisance for interference with them.

In finding that the plaintiffs did not have standing to advance the claim in public nuisance, Southin J. said:

> The law is that public nuisances can only be enjoined at the instance of Her Majesty' s Attorney General for British Columbia unless the person suing can show that he or she will suffer some special damage over and above that suffered by the public generally. The evidence does not, I think, warrant me in coming to a conclusion that there is any triable issue that the plaintiffs fall within the special category of persons who may sue for a public nuisance when the Attorney General has not done so: see Filion v. N.B. Int. Paper Co., 8 M.P.R. 89, [1934] 3 D.L.R. 22 (N.B.C.A.).

The question which I must consider on this application for an interim injunction is whether the plaintiffs, who are appealing the refusal of the injunction, have rights which may be prejudiced if Z do not grant this order. On this interim application, I think I need only be satisfied that there is some merit in the contention by the plaintiffs that they enjoy rights which may, if established, support a claim in nuisance. I agree with Southin J. that a right of fishing may constitute a profit Zl prendre. I think that may be extended to the right to take game from lands. The rights of the plaintiffs are based upon licences granted pursuant to statute. The position of the plaintiffs is that the trapline registration is a profit a prendre. In support of that position, counsel has referred me to ss. 42 to 46 of the Wildlife Act and I need not set those out in these reasons. In summary, they provide that a person commits an offence when he sets a trap for animals in an area of the province unless he is the registered holder of a trapline. The statute provides to whom trapline registrations may be given. A trapline can be registered in the name of one person only. While it does not give the holder of the trapline any proprietary rights in wildlife or restrict other persons from wildlife, it nevertheless is a tight to take animals ferae naturae (wild game) from the lands over which the registered trapline is given.

Counsel for the plaintiffs has put before me the decision of the Supreme Court of Canada in R. in Right of B.C. v. Tenet, [1985] 3 W.W.R. 673, 17 D.L.R. (4th) 1 [B.C.], and has referred me to the judgment of Wilson J., with whom Dickson C.J.C. agreed, and particularly at pp.690-91. The judgment provides a definition of profit a prendre:

> A profit a prendre is defined in Stroud's Judicial Dictionary, 4th ed., vol. 4, at p.2141, as "a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil". In Black's Law Dictionary, 5th ed. (1979), it is defined as "a right to make some use of the soil of another, such as a right to mine metals, and it carries with it the right of entry and the tight to remove and take from the land the designated products or profit and also includes the right to use such of the surface as is necessary and convenient for the exercise of the profit."
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> Wells J. elaborated on the nature of a profit a prendre in Cherry v. Fetch, [1948] O.W.N. 378 (H.C.), where he said at p.380:
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> > It has been said that a profit a prendre is a right to take something off the land of another person. It may be mote fully defined as a right to enter on the land of another person and take some profit of the soil such as minerals, oil, stones, trees, turf, fish or game, for the use of the owner of the right. It is an incorporeal hereditament, and unlike an easement it is not necessarily appurtenant to a dominant tenement but may be held as a right in gross, and as such may be assigned and dealt with as a valuable interest according to the ordinary rules of property.

I think that the registered trapline in this case falls within that description of a profit a prendre. Further support for the that description of a profit a position of the plaintiffs is to be found in the English decision of R. v. Surrey County Court Judge, [1910] 2 K.B. 4LO (Div. Ct.).

In summary, then, I am satisfied that there is some merit in the submission that there is a tight in the plaintiffs to maintain an action in private nuisance. I think, also, that the material shows that there is some merit in the submission that the activity and interest of the plaintiffs is distinct and different from that of the general public. That being so, there is some merit in the submission that the plaintiffs have standing to maintain an action in public nuisance without the support of the Attorney General of the province.

A further point not considered by Southin J. must be dealt with. Counsel for the defendants submits that there is no reasonable probability that the plaintiffs will succeed at trial in obtaining an injunction because of a defence of statutory authority which is available to the plaintiffs. The background of that submission is that the defendants have obtained a permit under the Pesticide Control Act, R.S.B.C. 1979, c.322. Under that statute, an official described as the administrator is empowered to receive and consider applications for permits regarding the application of pesticide.

In considering such an application, he must take into account whether an unreasonable adverse effect may follow the application of the herbicide. In this case, an application was made to the administrator by the institute and was granted. The application is made to the administrator without notice to anyone. After it is granted, it is advertised in the community in which the pesticide operations are to take place, and there is an appeal procedure by which opponents may express their disapproval. In this case, the issuance of the permit was advertised in the Terrace area and for some reason, which I do not know, the plaintiffs did not respond and they did not appeal. The defendants submit that spraying has been done pursuant to this permit, and that the spraying which is to be done will be that which is authorized by this permit and, therefore, any damage which occurs as a result may not be recovered in this action. In short, he submits that a defence of statutory authority would fully protect the defendants from any liability in this case.

The defence of statutory authority is discussed in Friesen v. Forest Protection Ltd. (1978), 4 R.P.R. 58 at 77, 22 N.B.R.(2d) 146, 39 A.P.R. 146. This passage comes from the judgment of Dickson J., speaking as a single judge of the Queen's Bench Division of the New Brunswick Supreme Court. He said, quoting from Fleming, The Law of Torts, 3rd ed., at p.395:

> But in order to furnish a defence, authority to commit the nuisance must be express or necessarily implied. This is the case when the legislature has either authorized a certain use on a particular site which will inevitably constitute a nuisance or when it has imperatively directed a use within a certain area where a nuisance cannot be avoided. But if the statute is merely permissive and not mandatory, and the grantee has a wide choice as to area, the discretion must be exercised in strict conformity with private rights.

The submission of counsel for the plaintiffs is that the Pesticide Control Act does not authorize the commission of a tort, or provide protection to the holder of a permit from liability if he commits a tort while carrying out activities under the permit. He submits that the Pesticide Control Act is not even a statute which authorizes the particular activity in this case. It only delegates to an official, the administrator, the function of issuing permits, but does not authorize him to issue permits to conduct tortious activity. While there may be an arguable defence of statutory authority, I am not persuaded that it would necessarily succeed in the circumstances of this case.

The position is, then, that there is some merit in the action of the plaintiffs.

The next question is whether an interim injunction should be granted to the plaintiffs to preserve their rights pending the hearing of the appeal. Section 10(2)(b) of the Court of Appeal Act authorizes such an order to prevent prejudice. I think the principles used in deciding whether to grant a stay of proceedings, when there is an order to be stayed, are appropriate for consideration on an application under s.10(2)(b). Those principles may be stated in this way. The Court of Appeal has the power to grant a stay of proceedings pending disposition of an appeal in a proper case. It is discretionary, and should only be exercised when it is necessary to preserve the subject matter of the litigation pending final decision of the court, to prevent irremedial damage, or where there are other special circumstances. On such an application, the court must attempt to do justice between the parties, that is, not prevent an appellant from prosecuting an appeal, while at the same time not causing prejudice to the respondents,

If an injunction is not granted pending the hearing of this appeal, the spraying will go ahead and the rights of the plaintiffs to appeal will be empty rights. In such an event, the opportunity of the plaintiffs to preserve their rights will be lost. If the experiment establishes that the herbicide, upon entering the water courses and surrounding terrain, is toxic to fish and game and to the environment generally, I think the harm can be said to be irreparable and irremedial. Damages in a case like this would be very difficult, if not impossible, to assess. It is not just a matter of dealing with the damages to be suffered by a commercial fishing operation whose profits year by year are known and whose loss of profits may be easily calculated when such a catastrophe occurs. Here, damages, in my view, would be an entirely inappropriate remedy. We are speaking here of a risk of poisoning the fish, game and environment generally. In those circumstances, the risk ought not to be undertaken unless there is some very compelling reason why the project must go ahead. In that respect, of course, I must consider the submissions made by the defendants with respect to prejudice to them arising from any order that I might make.

Counsel for the defendants has summarized the prejudice to the defendants in this way: (1) the defendants, if I grant an interim order, will be deprived temporarily of the benefit of the judgment which they obtained from Southin J.; (2) costs have been incurred to date in preparing for the experiments to be conducted in the Skeena basin and they are considerable; (3) the research project of the Canadian Forestry Service will be crippled if I make an order, and the benefits to the forest industry in British Columbia will be postponed if they are unable to use the herbicide at an

early date; (4) there is irreparable harm if any public authority is prevented from carrying out public policy. I am not persuaded that any or all of those matters outweigh the prejudice to the plaintiffs if I should refuse the injunction.

This court does not lightly deprive parties of the benefit of the judgment which they have obtained in a trial court, but nevertheless, a function of this court is to review orders made in the lower courts and to make appropriate orders in this court to see that justice is done.

With respect to the financial costs to the defendants if the project be postponed, I think that can be dealt with by making it a term of the interim injunction order that plaintiffs, if they are unsuccessful in their appeal, Pay to the defendants the damages suffered by the defendants by reason of not being able to go ahead with this spraying program this year.

I do not think there is any merit in the submission that any order which I might make would cripple the research program of the Canadian Forestry Service. This is a five-year program which commenced in 1983 or 1984. The experiment in the Skeena basin is a small segment of that program. Undoubtedly, it is an important part of the research for it is intended to determine by that experiment, if it goes ahead, whether this herbicide is toxic to fish, game and the environment generally. Any Order which I make will be in effect until the hearing of this appeal. I fully recognize from what counsel have told me that the project may not be able to go ahead this year if I make this order. I do not understand why there is any urgency in a five-year project to do this segment of it this year. If the appeal is unsuccessful, then the spraying program can proceed next year or the year after that. I am not persuaded either that there is going to be significant detrimental effect to the forest industry, or to the economy of the province by reason of the interim order which I am going to make. There is no assurance at this point that the herbicide will be permitted to be used in Canada at all. It is important to the economy of British Columbia generally and to the people of this province that the herbicide be not used in this province until the government is sure that it will not be toxic to fish, game or the environment. Such dangers to the environment ate worth investigating carefully and over a period of time. No benefit to the growth of our trees is going to be worth sacrificing a large part of the other environment of the area. If the herbicide is safe and can be used in the province, it will be available soon enough (having regard to the length of timber tenure here) and will serve the forest industry and the economy of this province for years to come.

As for preventing a public authority from carrying out its policy and thereby causing to the public generally irreparable harm, I need only repeat what I have said. This court does not act to prevent anybody from carrying out proper activities. When danger is apprehended from certain activities, then the court acts cautiously before permitting those acts to go ahead. Irreparable harm will not be suffered to the public by this temporary delay in the use of this herbicide. Quite to the contrary, as I have said, the public interest is not only in advancing the interests of the forest industry, but in the preservation of a healthy environment.

I would, therefore, grant the application for an interim injunction pending the hearing of this appeal. There will be one term only of that injunction, and that will be that the plaintiffs file a written undertaking to pay to the defendants damages incurred by reason of this order, that is, if the appeal to this court is dismissed. If the appeal should be successful, then the panel which hears the appeal may have to consider whether to attach an additional term to the order which they make pending the trial of the action.