OMINAYAK ET AL. V. NORCEN ENERGY RESOURCES LTD. ET AL.

Alberta Court of Appeal, McDermid, Harradence and Kerans JJ.A. , January 11, 1985

J.A. O'Reilly and K.E. Staroszik, for the applicants
J.M. Robertson, Q.C., and R.A. Coad, for the respondents Dome Petroleum Limited, Chieftain Development Co. Ltd., Shell Canada Limited, Union Oil Company of Canada Limited, Numac Oil & Gas Ltd. and Amoco Canada Petroleum Company Ltd.
D.O. Sabey, Q.C., H.M. Kay and L.A. Taylor, for the respondents Norcen Energy Resources Limited, Petro-Canada Exploration Inc., and Petrofina Canada Limited
H.L. Irving, Q.C., E.L. Bunnell and M.A. Irving, for the respondent the Crown in right of Alberta

Members of an Indian band brought a class action claiming entitlement to 8500 square miles in northern Alberta. The action was not expected to be ready for trial until 1986. The applicants sought an interim injunction to limit the defendants' activities on the land. The defendants included the Province of Alberta and several oil companies. The Alberta Court of Queen' s Bench dismissed the application ([1984] 4 C.N.L.R. 27).

Held: Appeal dismissed.

Per KERANS J.A. for the Court

1. An application for an interim injunction, to succeed, must establish (i) a serious issue to be tried; (ii) the applicant will suffer irreparable harm before trial if no injunction is created; and (iii) that the balance of convenience between the parties favours the granting of the injunction.

2. The learned chambers judge held that a serious issue had been raised but held that it was not established that the activity of the defendant was causing irreparable harm. That finding was not unreasonable on the evidence.

3. Some evidence indicates a reduction in the wildlife population but the connection between it and the activity of the defendants was not proven.

4. As well, it was established that the defendants have producing oil fields in the area. In these circumstances, the balance of convenience favours the defendants.

Editor's Note: An application for leave to appeal to the Supreme Court of Canada was quashed, May 13, 1985.

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KERANS J.A. (orally): This is an appeal from a refusal of an interim injunction [29 Alta.L.R. (2d) 151, [1984] 4 C.N.L.R. 27 (Alta.Q.B.)].

The appellants have brought a class action on behalf of what they say is an identifiable band of Indians called the Lubicon. They suggest the class contains at least 50 households and 250 people. The claim is that this group is not bound by Treaty No.8 because neither they nor any ancestors signed that treaty or any adhesion. Thus, it is said, they have an Indian title to their traditional hunting and trapping grounds which Canada has not extinguished and Alberta cannot extinguish. This "hunting and trapping territory" extends over 8,500 square miles of Crown lands in Buffalo Head Hills in north-central Alberta including almost all that territory between R.7 and R.21 west of the 5th meridian and from a line roughly parallel to the south boundary of Twp. 69 R.7 to the north boundary Twp. 103 R.7. The defendant Alberta and the other defendants, who are on portions of these lands with the consent of Alberta mainly for the purpose of oil and gas exploration and production, deny every one of the allegations. They say that there is no identifiable band of 50 households whose ancestorship can be demonstrated to be different from those bands who signed Treaty No.8 or its adhesions, that the class in any event does not in fact hunt and trap in the entire area claimed, that it is not an ancestral hunting area because the Cree ancestors of the class came to the area less than 200 years ago and that they never had exclusive aboriginal possession, and that in any event Alberta can and has, by occupying lands with Canada's consent, extinguished any Indian title in the area.

The appellants alternatively seek a declaration that, assuming that they are bound by Treaty No.8, a 25-square-mile Indian reserve on the edge of Lubicon Lake has been established for them by Canada with the consent of Alberta. In that regard, it is common ground that, in the 1930's, the two governments began to move toward the creation of a reserve but that all formalities were never quite completed. The issue is whether the process had got to the point where a reserve exists in the eyes of the law. The defendants say that no reserve has been created nor indeed can any reserve be created by judicial order. A reserve can only be created by the joint action of Canada and Alberta, which is a matter for negotiation, not litigation. The issues are joined and must go to trial.

The appellant's third alternative claim is closely related to the second but it claims entitlement to a reserve of more than 25 square miles; the larger area is what the parties call the “reserve area”. It extends through R.11-15 north from a line parallel to the south boundary of Twp. 87 R.11.

The appellants suggest that they can be ready for trial during 1986. Meanwhile, in 1982, they sought interim relief by way of an interim injunction. The thrust of the claim is that, with the consent of Alberta, the respondent corporations have engaged since 1979 in a vast expansion of oil and gas exploration and development activity which has driven away the wildlife. The original request effectively was for the court to order Alberta and all its licensees to forthwith leave the entire 8,500 square miles. Some preliminary issues arose and were decided and then the "interim" application finally came on for hearing in 1983. After more than 20 days of argument, the motion was dismissed by the learned chambers judge in November 1983. This appeal was heard in January 1985. Before us, and for the first time, the claim to Interim exclusive possession for all the subject lands was abandoned, and a more limited injunction sought.

It is settled law that an applicant for an interim injunction must establish: (1) that he raises a serious issue to be tried; (2) that he will before a trial suffer irreparable harm if no injunction is granted; and (3) that the balance of convenience between the parties favours relief to him.

The learned chambers judge held that, for the purposes of the application, he accepts that a serious issue had been raised. He found as a fact, however, that there was no irreparable harm. Further, he found that the balance of convenience favours no injunction.

The attack by the appellant on his findings has several parts. The first is that the oil and gas exploration and production activity engaged in by the defendant companies with the consent of the defendant Alberta was driving away the wild animals and thus destroying or threatening to destroy the well-spring of an entire culture. The appellants adopt for themselves this description by Malouf J. of the Indians in James Bay:

> The Cree Indians...occupying the territory and the lands adjacent there to have been hunting, trapping and fishing there since time immemorial. They have been exercising these rights in a very large part of the territory and the lands adjacent there including their trap lines, the lakes, the rivers and the streams. These pursuits are still of great importance to them and constitute a way of life for a very great number of them. Their diet is dependent, at least in part on the animals which they hunt and trap, and on the fish which they catch. The sale of fur bearing animals represents a source of revenue for them; and the animals which they trap and hunt and the fish which they catch represent, if measured in dollars, an additional form of revenue. The hides of certain animals are used as clothing. They have a unique concept of the land, make use of all its fruits and produce including all animal life therein and any interference there with compromises their very existence as a people. They wish to continue their way of life.

The learned chambers judge would not accept this statement as a totally accurate factual description of the societal state in 1983 of the class of which the appellants claim to be representative. He said [pp.157-58 Alta.L.R., p.32 C.N.L.R.]:

> This is not a case of an isolated community in the remote north where access is only available by air on rare occasions and whose way of life is dependent to a great extent on living off the land itself. The twentieth century, for better or for worse, has been part of the applicants' lives for a considerable period of time.

We understand this to be a finding that the traditional way of life of the plaintiff class may indeed be deteriorating. But he was not satisfied on the evidence before him that the cause of that change is the activity of the defendant companies since 1979 as alleged. He said [p.158 Alta.L.R., p.32 C.N.L.R.]:

> The influence of the outside world comes from various sources, in many cases not connected with any of the activities of any of the respondents.

In support of his finding, we observe that on the appellants' own evidence there had been some agriculture in the area before 1980. There had been oil exploration throughout the hunting and trapping territory before 1960, and that by 1970 there existed in the area extensive roads (as far north as Bison Lake), five producing oil fields, pipelines, airstrips and truck trails.

We note in passing that most of this activity has been south of a line parallel to the north boundary of Twp.87 R.7. On the other hand all but one of the traplines are south of that line, the moose hunt is south of that line, and only four families live north of that line. There is also no moose hunting south of Twp .83 R. 7 and no traplines and no residents. The areas of significance, then, are the reserve area, which lies north of a line parallel to the south boundary of Twp.83 R.11 and south of a line parallel to the south boundary of Twp.87 R.11, and an area north of the reserve area which lies between a line parallel to the south boundary of 87 R.11 and a line drawn parallel to the south boundary of 97 R.11.

Before us, it was conceded that the situation in the reserve area had already, at the time of application, so changed that the balance of convenience favours no injunction except against future seismic and wildcat activity and interference with access and settlement. This leaves for consideration the area to the north, between Twp.87 and 97, an area roughly 60 miles by 60 miles in which about 60 families live, some of whom are in the plaintiff class. There are about 16 registered trap lines in this area. Between 1980-1982 (map 24) about 20 wells were drilled in the area, fewer than the number drilled in the period 1961-1970, a period in which apparently no emergency arose. There is little evidence to show markedly increased drilling activity outside the reserve area, but there is evidence of increased seismic activity.

It is said for the appellants that the learned chambers judge erred in his finding that any deterioration in the way of life does not date from 1979 and the activities of the respondents. There was evidence before him to support that finding and we have not been persuaded that it is an unreasonable finding on that evidence. The evidence just summarized is some of that evidence.

It is alternatively argued that we ought ourselves to assess the evidence and make an independent finding. We refuse to do this; the applicable standard of review is error of law and that has not been met. It is not our function to retry every appeal.

This appeal must proceed, then, on the basis that the appellants could not prove that the activities of the respondents since 1979 represent a threat to the way of life of sufficient gravity that it might be destroyed by 1986, when this case should go to trial.

The next attack on the judgement of the learned chambers judge is that, even if their culture is already under fatal attack from causes other than the activities of the defendants, nevertheless the hunting and trapping of wild animals was and is the principal means of livelihood of most if not all the plaintiff class and the activities of the defendants were doing irreparable harm to that activity.

The third and last attack is that the learned chambers judge did not deal with the argument that the title claims of the plaintiff class give it at least a prima facie right to exclusive possession for which interim relief is available.

If he failed to deal with these two arguments, we seriously question whether this was because the arguments were not put before him alternatively. The materials before him were, if we may say so, permeated with hyperbolic claims of cultural harm. By way of example only, we cite from para.5 of the affidavit of Chief Bernard Ominayak (A.B. 163), where he says: "Activities of respondents, as foresaid, threaten imminent destruction of applicants, their livelihood, their way of life and their society."

In any event, we will now deal with these points ourselves.

As to the claim for an interim exclusive possession order or at least some elements of an interim exclusive possession order, we simply do not accept as a proposition of law that simple trespass without more is irreparable harm or that irreparable harm need not be shown if a right to exclusive possession is claimed. In most cases where such relief is given, the interim order passes the same

tests for an order after trial because the right of exclusive possession is established in fact and law. That is far from this case.

We accept that the position taken by the defendants arguably is that the plaintiff class has no right to any possession of any sort in any part of the subject lands including even their homes. Any attempt to force them from their dwellings might indeed prompt interim relief. A similar point might be made about traditional burial grounds or other special places and access generally to hunting and trapping areas. But the appellants have failed to point to evidence in the appeal book to show us that such action had, at the time when relief was sought, been taken or indeed threatened. We are told of one or two incidents of apparently accidental destruction of traps, snares or pathways and some signs claiming roads to be private. But any real harm in this regard has not yet happened, it is only a fear for the future. This, then, is a quia timet claim.

The standard of proof for a quia timet interim injunction is properly very high. As stated in Sharpe on Injunctions [Injunctions and Specific Performance (1983)] (p.70), the applicants must show: "... a high degree of probability that the harm will in fact occur."

There is no compelling evidence before the court to meet that test.

During the remaining year or so until trial, we assume there is no reason why the present dwellings need be disturbed, nor any burial sites, nor any trap-sites or snares, nor any reason why the plaintiff class be denied access generally to hunt and trap. No order, however, is needed unless the threat is imminent and real. On the contrary, counsel for Alberta undertook that no effort would be made by Alberta to dislodge persons from their dwellings. The second attack, that relating to the alleged interference with their livelihood, now comes for consideration. We first note that there is evidence in the appeal book indicating a reduction in the wildlife population in the hunting and trapping area, and more particularly the reserve area, between 1980 and 1983. Further, it is conceded that there are producing oilfields in or about the reserve area and the appellants concede, as I have said, that the balance of convenience in that area favours the defendants, because to abandon the area to the animals would require abandoning producing fields.

Not withstanding, relief is sought against new exploratory activity in both the Indian reserve and the reserve area. There is no logic to this in view of the concession made. New activity is not going to affect the hunting or trapping in that area if they are already "lost", to use Mr. O'Reilly's expression. Such an order would be mere harassment for no good purpose.

Relief is also sought in respect of the hunting and trapping territory beyond the reserve area. The activity of the defendants which allegedly has caused harm to the plaintiff class in that area is seismic activity and exploratory drilling.

The evidence indicates that 26 commercially viable traplines have been operated in the hunting and trapping territory, although some of these are in fact inside the reserve area. The evidence also indicates that there is a large moose population in the area between Twp.87 and 97. While the evidence does not indicate any major reduction in animal harvest before 1982, there is an allegation of anywhere from 50 per cent to 70 per cent reduction during the winter of 1982-83 from the winter of 1981-82. It is very difficult, however, to segregate the evidence in this respect between that speaking of the reserve area and that speaking of the far larger hunting and trapping territory because, of course, that distinction was not made for the purpose of the chambers application. We do note that map 24 indicates only six wells drilled north of Twp.90 R.7 up to 1982. Much reliance was put upon the evidence of reduced trap harvest reported by John Simon Auger, by Edward Laboucan, and by Bernard Ominayak. But, as we read the evidence, they ran traplines in trap areas 1441, 351, and 2652, respectively (A.B. 1186). These traplines are all near the area of the producing fields and are very close to the area for which relief has been effectively abandoned. Heavy reliance was also placed on the evidence of John F. Labukan. But this trapline fell in an area which was subject to a forest fire during 1982.

There were other factors in the evidence indicating that any reduction in harvest might not be as a result of the seismic and exploration activities of the respondents for which injunctive relief is now sought. Indeed, the learned chambers judge made a finding adverse to the appellants in this respect (A.B. 672). He said [p.157 Alta.L.R., p.32 C.N.L.R.]:

> In addition the suggestion of the respondents' activities having a negative effect on the hunting and trapping is to a considerable extent countered by the evidence adduced by the respondents as to the effect, if any, their activity may have on the wildlife.

It is said for the appellants that a causal relationship between the harm alleged and the actions of the defendants need not be shown in order to get interim relief. We reject this argument. Some causal relationship must be shown.

It is said for the appellants that irreparable harm includes any interference with livelihood because an interference with livelihood is never adequately compensable in damages. For irreparable harm, it is said, it is not necessary to talk of destruction of livelihood. It is sufficient to talk about activities which interfere with, compromise, affect, or are incompatible with the earning of the livelihood. It is said that "irreparable harm" means harm not adequately compensable in damages and that "adequately compensable" in turn means only a claim which itself is a money claim. We reject this argument. We accept the proposition in High on the Law of Injunction, 4th ed., vol.1, p.36, that:

> By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice.

For the purposes of interim relief, and for the purposes of the test expressed by this court in Law Soc. of Alta. v. Black, 29 Alta.L.R. (2d) 326, [1984] 6 W.W.R. 755, 8 D.L.R. (4th) 347, 7 Admin.L.R. 55, this is what we mean by irreparable harm: it is harm for which no fair and reasonable redress would be available after trial.

It was argued most strenuously for the appellants that the "irreparable harm" test should be considered as merely part of the "balance of convenience" test. We disagree and reassert the proposition put by us in Law Soc. of Alta. v. Black that, in Alberta, there is a tripartite sequential test.

First one must establish that the cause of action is not frivolous; next one must establish that there would be no fair and reasonable redress available if there were no Interim relief; third, the balance of convenience, having regard to all relevant factors, must favour an injunction. We think that the courts should not forget that an interim injunction is emergent relief. The claimant seeks a remedy without proof of his claim. This inversion should only be considered in cases where the harm is of such seriousness and of such a nature that any redress available after trial would not be fair or reasonable. This hurdle must be met before the balance of convenience is weighed.

To be sure, when one gets to the balance of convenience, one returns both to the harm done and to the cause of action. The harm done to the plaintiff must be weighed against the harm done to the defendant just as the likelihood of victory by the plaintiff must also be weighed against the harm done to the defendant if he succeeds, particularly in a case, as here, where no indemnification as to the defendant's damages is available. But the sequential test remains.

We do not accept that any reduction in the wildlife population in the hunting and trapping area, even assuming that the activities of the defendants are the cause of it, is irreparable harm. The reduction must be critical. On the appellants' own materials, the respondents' activities in 1979 through 1982, while intense in some areas, had not destroyed the commercial viability of the trapping nor caused any great shortage of red meat. The evidence respecting season 1982-83 is, as I have observed, equivocal in terms of the hunting and trapping beyond the reserve area and its immediate environs. The case simply is not proven.

The claim in truth is based on fear for the future, a fear partly based on what has happened in the reserve area. This claim then also is a quia timet claim, as was conceded during oral argument. The real thrust of the claim of the appellants is that, in time, trapping will cease to be commercially viable and there will be a meat shortage.

Is this feared destruction of the hunt very likely to arise before trial? Seismic activity and exploratory drilling is, in the nature of things, temporary. It is conceded that after it ends the wildlife will return in number. We simply do not know whether new fields have or will be found, so we do not know if there will be new permanent development beyond the existing fields. It would on the basis of the evidence before us, be sheer speculation to say that, before the trial of this matter in 1986, the traplines will cease to be commercially viable and there will be a serious red meat shortage. In any event, the time-span here is sufficiently short that the plaintiffs could, if successful at trial, gain through damages sufficient moneys to restore the wilderness and compensate themselves for any interim losses. For this reason alone, we would affirm the decision of the learned chambers judge.

In any event, we agree with him that, on the balance of convenience, the harm done to the respondents would far outweigh any harm done to the appellants during the interval before trial. The principal argument for the appellants on balance of convenience is the very one already rejected as not proven: that the activities of the defendants have produced a "disastrous impact" including "possible loss of a job for everybody in the community" with "possible short-term consequences like loss of self-esteem and welfare", and otherwise a "severe impairment" and endangerment of a traditional way of life on the ancestral homelands. These are, as I have said, the very allegations of imminent destruction of a way of life and livelihood already found to be not proven.

For these reasons we would dismiss the appeal with costs, the costs to be on the same terms set by the learned chambers judge.