Indexed as:

Kamloops Indian Band v. Harper Ranch Ltd. (B.C.C.A.)

Between
Clarence T. Jules, Chief of the Kamloops Indian Band, on behalf of himself and all other members of the Kamloops Indian Band, Plaintiffs, (Respondents), and
Harper Ranch Ltd., Best West Rlty. Ltd. and Her Majesty The Queen in Right of The Province of British Columbia, Defendants, (Applicants), and
Her Majesty The Queen in Right of The Province of British Columbia, Third Party, and
The Attorney General of British Columbia, Intervenor

[1991] B.C.J. No. 874

81 D.L.R. (4th) 323

26 A.C.W.S. (3d) 1158

Vancouver Registry: CA010895 and CA010911

British Columbia Court of Appeal

Carrothers, Southin, Legg, Taylor and Cumming JJ.A.

Heard: March 28, 1991
Judgment: April 17, 1991

(12 pp.)

Appeals -- Indians -- Injunctions -- Real property -- Whether refusal of leave to appeal injunction valid.

Application for review of a decision refusing leave to appeal an order enjoining them from entering lands claimed to be a part of the respondents' Indian reserve. The applicant was the registered owner and had granted an option to a third party who requested the claimant Indian band to remove signs. The Band claimed lands had been reserved to Indians before the Crown grant of 1872 and they had

rights in priority. At the application for injunction, the band also argued aboriginal title and allotment of reserve.

HELD: Application dismissed. Remedies were available at trial but applicants had been dilatory in bringing matter along.

STATUTES, REGULATIONS AND RULES CITED:

Land Title Act, R.S.B.C. 1979, c. 219, ss. 23(1), 25. Constitution Act, 1867, ss. 91(24), 109. Constitution Act, 1982, s. 35.
British Columbia Supreme Court Rules, Rule 20.

Counsel for the Respondents: Leslie Pinder and David R. Paterson.
Counsel for the Third Party and Intervenor: D.M.M. Goldie, Q.C. and D. Murray Tevlin.

BY THE COURT:-- This is an application for review of the refusal by Mr. Justice Wood, sitting as a chambers judge of this Court, to grant leave to the defendants, Harper Ranch Ltd. and Best West Rlty. Ltd., to appeal from an order enjoining them from entering on or into lands claimed by the plaintiffs to be part of the Kamloops Indian Reserve.

For reasons which will become apparent, the course of this litigation is determinative of this application.

On 27th January, 1989, the plaintiffs issued their writ claiming, in part:

> A. For a declaration that certain lands and premises situate, lying and being, in the Province of British Columbia, and more particularly known and described as District Lots 1 and 2, Group 6, Kamloops (formerly Yale-Lytton) Division, Yale District, Kamloops Assessment Area (the "Scheidam Flats") are reserved for the exclusive occupation, use and benefit of the Plaintiff and all other members of the Kamloops Indian Band (collectively referred to as the "Band");
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> * * *
>
> B. For a declaration that the Band is entitled to the exclusive use and occupation and benefit of the Scheidam Flats;
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> * * *

C. For a declaration that a contract dated 30th September, 1988 between Harper Ranch Ltd. ("Harper") and Best West Rlty. Ltd. ("Best West") and filed at the Kamloops Land Title Office under No. 0P XB20157 (the "Contract") is void and ineffective to the extent that it purports to convey to Best West an option to purchase from Harper the Scheidam Flats.

* * *

I. For an injunction prohibiting the sale or transfer of the Scheidam Flats by Harper.

* * *

N. For an injunction restraining either of the defendants from trespassing on the Scheidam Flats.

At the material time, Harper was the person named in a certificate of indefeasible title as the owner of the lands.

By the Land Title Act, R.S.B.C. 1979, c. 219, s. 23(1):

> Every indefeasible title, as long as it remains in force and uncancelled, shall be conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to
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> (a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown;

[Here follow other exceptions.]

By s. 25(1) of that Act:

> No action of ejectment or other action for the recovery of land for which an indefeasible title has been registered shall be commenced or maintained against the registered owner named in the indefeasible title, except in the case of
>
> [Here follow clauses which do not apply to the case at bar.]
>
> (g) a right arising under any of the paragraphs of section 23(1).

> (2) In any case other than those enumerated by way of exception in subjection (1), the production of a subsisting state of title certificate shall be held in all courts to be an absolute bar and estoppel to an action referred to in subjection (1) against the registered owner named in the certificate, notwithstanding a rule of law or equity to the contrary.

Best West had entered into an option agreement to purchase the land from Harper with the intention of developing it. It exercised its option on 22nd February, 1989 and acquired title then. Best West was aware of the claim the Indian Band was asserting with respect to this land and, on 23rd February, 1989 wrote to the Band announcing its intentions and requesting the removal from the property of a large sign which indicated the Band's claim to the land.

The plaintiff, on behalf of himself and the Band, claims that before the original Crown grant of these lands on 14th October, 1872 these lands became lands reserved for the Indians and, therefore, for various reasons, some recognized by the Land Title Act and some not, the Band has rights in priority to those of Harper and Best West. This allegation that the land was set aside for the Band prior to British Columbia's entry into Confederation raises a factual issue which ought to be resolved before a decision is reached as to whether the registered title is valid as against the Band under the Land Title Act. This is a consideration separate and distinct from any raised by the claims which the Band makes on constitutional grounds or by assertion of aboriginal right.

On the 10th March, 1989, the plaintiffs brought an application:

> For an ORDER that the Defendants, their agents, servants, and employees or any other person acting on their behalf, be restrained until the trial or other disposition of this action, from entering, constructing or commencing to construct a golf course on Scheidam Flats, more particularly known and described as:
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> > Lots 1 and 2 Group 6 Kamloops Division Yale District Kamloops Assessment Area
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> or by otherwise interfering with the Plaintiffs' use of Scheidam Flats, pursuant to Rules 44, 45 and 46 of the Rules of Court;

On the 13th March. 1989, the Attorney General brought an application:

> . . .for an order that the Attorney General of British Columbia be granted leave to intervene in the proceedings herein, or in the alternative, that no such leave is required;

On the 14th March, 1989, MacDonald, L.J.S.C. (as he then was) granted the Attorney General's application.

For nine days, from 13th March to 23rd March, MacDonald, L.J.S.C. heard the application for the interlocutory injunction.

On 4th April, the plaintiffs amended their writ by, among other things, adding this paragraph: The Plaintiffs' claims are based on aboriginal title and the allotment of a reserve by the Governor of the Colony of British Columbia in 1862, which claims take priority over the interests of the defendants in Scheidam Flats by virtue of the law of aboriginal title, section 91(24) and section 109 of the Constitution Act, 1867 and section 35 of the Constitution Act, 1982.

On 3rd May, 1989, in reasons for judgment over ninety pages in length, MacDonald, L.J.S.C. allowed the application saying:

> The Court would grant the plaintiffs' motion for an interlocutory injunction and would order that the defendants, their agents, servants, and employees or any other person acting on their behalf, be restrained until the trial or other disposition of this action, from entering, constructing or commencing to construct a golf course on Scheidam Flats, more particularly known and described as: Lots 1 and 2, Group 6, Kamloops Division, Yale District, Kamloops Assessment Area, or by otherwise interfering with the plaintiffs' use of Scheidam Flats.

On 20th May, 1989, Harper filed an application for leave to appeal from the order of 3rd May.

On 24th May, 1989, Best West sought an order:

1. Clarifying the terms of the injunction granted herein to permit the following:
(a) Completion of heritage resource impact studies by Arcas Associates, Consulting Archaeologists and Anthropologists;
(b) Completion of groundwater study by Hardy BBT Limited, Consulting Engineers;
(c) Registration of plan of subdivision of District Lots 1 and 2, Group 6, Kamloops (formerly Yale-Lytton) Division, Yale District, Kamloops Assessment Area;
2. For directions for the completion of any other process required by any government body for subdivision that does not require the physical disruption of the subject property;
3. For directions as to the nature and scope of the undertaking to be filed by the Plaintiffs.

On 30th May. 1989, MacDonald, L.J.S.C. said: "I have decided to resume the hearing." He did so and granted some modification of the order as pronounced.

On 31st May, 1989 Best West brought an application for leave to appeal from the judgment pronounced at the beginning of May.

On 18th August, 1989 Best West sought an order adding Her Majesty the Queen in Right of British Columbia as a defendant. That application came on for hearing on 12th September, 1989 and was granted.

An application was brought for leave to appeal from that order but leave was refused and review of, that order has not been sought.

On 26th SePtember. 1989, the plaintiffs delivered their a statement of claim.

On 1st November, 1989, Best West delivered a statement of defence and issued a third party notice against Her Majesty in Right of the Province of British Columbia.

Differences of opinion appear to have arisen between the parties as to the nature and scope of the undertaking to be given by the Kamloops Indian Band. Judge MacDonald was unavailable to hear this dispute and, ultimately, pursuant to a direction of the Chief Justice, Davies, J. was nominated to deal with the point. He did so and subsequently the order pronounced in May, 1989 was entered in January, 1990.

On 7th May, 1990, the two applications for leave to appeal came on before Mr. Justice Wood in chambers.

On 31st May, 1990, giving extensive reasons, he dismissed it.

On the 4th June, 1990, the applicants filed a notice seeking review of that order.

On the 10th October and 2nd November, 1990, there were applications for particulars but these are not before us.

Some time in the summer of 1990, the application to review the decision of Wood, J.A. was set down to be heard on the 15th January, 1991. The reason for the length of time elapsing was that counsel for the Attorney General sought a five-judge court.

For reasons which cannot be blamed upon the parties, the hearing was rescheduled from the 15th January to the 28th March.

From this account there emerges one salient fact: Neither side has made much in the way of effort to bring this case on for trial. The plaintiffs, who are dominus litis, took almost nine months to the day from the day of the issuance of the writ to deliver their statement of claim. As we do not know

when the defendants filed their appearances, we cannot say when the 21 days prescribed by Supreme Court Rule 20 expired. But we assume the defendants would not have been heard on the injunction application if they had not, by the day it came on, entered appearances.

Thus, we are in the situation that from the time the order sought to be appealed was granted to the first time this application for review was scheduled to come on for hearing in this Court, twenty months had elapsed. In that time neither side had taken those steps open to it under the Rules of Court to make this action ready for trial, obtain a trial date and proceed to trial.

Mr. Goldie for the Attorney General put forward a number of reasons why the refusal should be reviewed. We do not propose to come to any conclusion on them for, in our view, this matter falls to be decided on the public interest in the proper administration of justice.

In our opinion, we should not grant leave to appeal when the party seeking leave has remedies available in the trial court which may resolve a major issue, or which may entitle him to apply to vary or vacate the order complained of, but has taken no step to obtain those remedies.

Mr. Paterson concedes that it is implicit in an interlocutory injunction that it remains in force until the trial or other disposition of the action and that it is made "until further order". The defendants have the right to apply to vary or set aside the injunction if the plaintiffs have not proceeded with their action with due diligence following the granting of the injunction. They also have the right to force the plaintiffs to proceed with the trial in order to remove any doubt which the action has raised concerning the validity of their title. In view of the time that has elapsed since Mr. Justice Wood refused leave to appeal on 31st May, 1990 without any significant step having been taken by the defendants to force the plaintiffs on to trial or to seek to vary or set aside the injunction, we consider that it is not in the interests of justice to grant leave to the applicants.

For these reasons, and without either agreeing or disagreeing with the reasons of our Brother Wood, we decline to interfere with his decision.

CARROTHERS J.A.
SOUTHIN J.A.
LEGG J.A.
TAYLOR J.A.
CUMMING J.A.