SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) *v.* Lameman, 2008 SCC 14

DATE: 20080403
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BETWEEN:

Attorney General of Canada
Appellant
v.
Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch and Elsie Gladue, on their own behalf and on behalf of all descendants of the Papaschase Indian Band No. 136
Respondents
- and -
Her Majesty The Queen in Right of Alberta
Respondent
- and -
Assembly of First Nations and Federation of Saskatchewan Indian Nations
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

REASONS FOR JUDGMENT: The Court
(paras. 1 to 20)

canada (a.g.) *v.* lameman

Attorney General of Canada *Appellant*

v.

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Neutral citation: 2008 SCC 14.

File No.: 31871.

2008: February 22; 2008: April 3.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

on appeal from the court of appeal for alberta

Limitation of actions — Action by aboriginal people — Discovery of cause of action — Action brought against Crown based on breach of fiduciary duty, fraudulent and malicious behaviour and treaty breach — Whether claims statute-barred — Limitation of Actions Act, R.S.A. 1980, c. L-15, s. 4.

In 1877, the Papaschase Indians were allotted a reserve in what is now southeast Edmonton. In 1886, Chief Papaschase and other members of his Band surrendered their treaty rights and rights connected with the Reserve in exchange for a cash payment. Three men and their families, found to be the remaining members of the Band, entered into an agreement with the government in 1889 to surrender their interest in the Reserve with a view to its sale or lease, on the condition that the proceeds be held in trust and paid to Band members and their descendants. In 2001, the plaintiffs, claiming to be descendants of Chief Papaschase and other Papaschase Band members, commenced an action against the Crown for breach of fiduciary duty, fraudulent and malicious behaviour, and treaty breach. The Crown applied for summary dismissal of the claims. The chambers judge granted the application. He found that (1) most of the claims in the action failed to show a genuine issue for trial; (2) the plaintiffs did not have standing to bring the action; and (3) the claims were barred by the Alberta *Limitation of Actions Act*, with the exception of the claim for an accounting of any proceeds of sale of the Reserve the Crown might still have in its possession. The Court of Appeal set aside the decision, holding that all or most of the issues raised were genuine, triable issues, including the standing and limitations issues.

Held: The appeal should be allowed.

The chambers judge's order should be restored. A defendant who seeks summary dismissal must prove that there is "no genuine issue of material fact requiring trial". In this case, there is no "genuine issue" for trial. Assuming that the claims disclosed triable issues and that standing could be established, the claims, except the claim for an accounting, are barred by the *Limitation of Actions Act*. The claim relating to the accounting of any proceeds received from the sale of the Reserve is a continuing claim and not caught by the Act. The evidence filed by the government established that the causes of action now raised would have been clear in the 1970s to the plaintiffs, exercising due diligence. The plaintiffs filed no material in response to this evidence. The only available inference on the state of the evidence is that the causes of action became discoverable within the meaning of the *Limitation of Actions Act* in the 1970s and that the claims are now statute-barred. Accordingly, the plaintiffs' action should be dismissed, with the exception of the claim for an accounting, provided that the Crown is still in possession of the funds received from the sale of the reserve lands and that a plaintiff demonstrate that he or she has standing to bring this claim. [1] [11-12] [16-17]

Cases Cited

Referred to: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547; *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44; *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147.

Statutes and Regulations Cited

Limitation of Actions Act, R.S.A. 1980, c. L-15, s. 4.

Limitations Act, S.A. 1996, c. L-15.1, s. 13.

APPEAL from a judgment of the Alberta Court of Appeal (Côté and Paperny JJ.A. and Sulyma J. (*ad hoc*)) (2006), 66 Alta. L.R. (4th) 243, 404 A.R. 349, [2007] 2 W.W.R. 440, [2007] 2 C.N.L.R. 283, [2006] A.J. No. 1603 (QL), 2006 CarswellAlta 1686, 2006 ABCA 392, reversing in part a decision by Slatter J. (2004), 43 Alta. L.R. (4th) 41, 365 A.R. 1, [2005] 8 W.W.R. 442, [2004] 4 C.N.L.R. 110, [2004] A.J. No. 999 (QL), 2004 CarswellAlta 1170, 2004 ABQB 655, summarily dismissing the plaintiffs' claims against the Crown. Appeal allowed.

Mark R. Kindrachuk, Q.C., and *Michele E. Annich*, for the appellant.

Eugene Meehan, Q.C., *Ronald S. Maurice* and *Marie-France Major*, for the respondents Lameman et al.

Written submissions only by *Donald N. Kruk* and *Angela Edgington*, for the respondent Her Majesty the Queen in Right of Alberta.

Bryan P. Schwartz and *Chief Wilton Littlechild, Q.C.*, for the intervener the Assembly of First Nations.

Written submissions only by *Michelle J. Ouellette, Q.C.*, for the intervener the Federation of Saskatchewan Indian Nations.

The following is the judgment delivered by

[1] THE COURT — We are all of the view that the appeal should be allowed and the order of the chambers judge restored. It follows that the plaintiffs' action should be dismissed, with the exception of claims relating to accounting for funds received from the sale of the reserve lands, provided that the appellant is still in possession of such funds and that a plaintiff demonstrate that he or she has standing to bring this claim.

[2] The plaintiffs bring this action on their own behalf and on behalf of all descendants of the Papaschase Indian Band No. 136. The facts are shrouded in the mists of time and some details are disputed, but the broad picture is the following.

[3] In 1877, the Papaschase Indians adhered to Treaty No. 6 and were allotted a reserve in what is now southeast Edmonton. In 1886, Chief Papaschase and a number of other members of his Band — the Band's core leadership group — "took scrip". This meant that in exchange for a cash payment they surrendered their treaty rights and rights connected with the Reserve. These members left the Reserve. A few years later in 1889, the people whom government officials found to be remaining members of the Band — three men and their families — entered into an agreement to surrender their interest in the Reserve to the government with a view to its sale or lease, on condition that the proceeds be held in trust and paid to Band members and their descendants. It appears that these people ended up joining the Enoch Band. Over the years, the government paid monies from the sale of the Papaschase Reserve to the members of the Enoch Band, in accordance with an agreement signed in 1894 between the government and the two surviving Band members who had agreed to the Reserve's surrender.

[4] In 2001, the plaintiffs, claiming to be descendants of Chief Papaschase and other Papaschase Band members, commenced an action against the Crown. Their claim alleged that the government had wrongfully allowed Papaschase Band members to take scrip without properly advising them of the consequences; that the government had wrongfully pressured the Band to surrender the Reserve under the influence of the Edmonton settlement's lobbying; and that the government had thereby caused the dissolution of the Band. The claim also alleged that the government did not follow the rules to obtain a legal surrender of the Reserve; that the government had not sold the Reserve land for market value; and that the government had mismanaged the sale proceeds, in particular by distributing them to the Enoch Band. Finally, the claim alleged that the government had breached its treaty obligations by not granting the Band all the land to which it was entitled under the Treaty; and by failing to provide the Band with farming implements, and food in times of famine. These allegations, it was said, gave rise to causes of action for breach of fiduciary duty, fraudulent and malicious behaviour, and treaty breach.

[5] The government brought a motion for summary judgment, asking that the claim be dismissed on the ground that the allegations in the statement of claim raised no genuine issue for trial. The main issues on the motion were: (1) whether the facts alleged disclosed triable issues; (2) whether the plaintiffs had standing to raise these issues; and (3) whether the claims were barred by statutes of limitations or the equitable doctrines of laches and acquiescence.

[6] The chambers judge, Slatter J., found that most of the claims lacked the factual basis necessary to qualify as genuine issues for trial: (2004), 43 Alta. L.R. (4th) 41, 2004 ABQB 655. However, he held that the statement of claim disclosed three

triable issues: (1) whether the Reserve granted to the Papaschase Band was the proper size; (2) whether the government had properly disposed of the proceeds of the sale of the Reserve; and (3) whether the Crown had breached the Band's treaty rights to food.

[7] The chambers judge went on to find against the plaintiffs on the remaining two issues. He found the plaintiffs lacked standing to bring the representative action; they were claiming collective rights of a Band that had ceased to exist, and did not meet the criteria for Band membership (i.e. showing their ancestors were Band members who had not taken up scrip or joined other bands, or by showing their ancestors were entitled to funds from the Reserve sale). And he found that the claims were barred by the *Limitation of Actions Act*, R.S.A. 1980, c. L-15, with the exception of the claim for an accounting of any proceeds of sale the Crown might still have in its possession.

[8] The majority of the Court of Appeal found that all or most of the issues raised were genuine, triable issues, with Côté J.A. dissenting and finding that the claims for malice, fraud and bad faith should be dismissed: (2006), 66 Alta. L.R. (4th) 243, 2006 ABCA 392. Unlike the Chambers Judge, the Court of Appeal found that whether the plaintiffs had standing to bring the action was a triable issue. It cited the circularity and unfairness of denying Band status for purposes of litigating the destruction of Band status; and held that the government bore the burden of proving that there were no persons in existence who could have standing. On the limitations issue, the Court of Appeal held that the evidence was mixed on whether the claim was discoverable in the 1970s and that this was a matter that should be resolved at trial.

[9] The government appeals to this Court, asking us to dismiss the plaintiffs' action on the grounds that they have no standing and that their claims are statute-barred,

and asking us to reinstate the order of the chambers judge. We note that no notice of a constitutional question was given, and that no constitutional challenges lie before the Court.

[10] This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.*, (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v.*

Ottawa (City), [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.

[12] We are of the view that, assuming that the claims disclosed triable issues and that standing could be established, the claims are barred by operation of the *Limitation of Actions Act*. There is "no genuine issue" for trial. Were the action allowed to proceed to trial, it would surely fail on this ground. Accordingly, we agree with the chambers judge that it must be struck out, except for the claim for an accounting of the proceeds of sale, which is a continuing claim and not caught by the *Limitation of Actions Act*.

[13] This Court emphasized in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, that the rules on limitation periods apply to Aboriginal claims. The policy behind limitation periods is to strike a balance between protecting the defendant's entitlement, after a time, to organize his affairs without fearing a suit, and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims, as stated at para. 121 of *Wewaykum*:

> Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

[14] Pursuant to s. 13 of the *Limitations Act*, S.A. 1996, c. L-15.1, Aboriginal claims are governed by the previous *Limitation of Actions Act*. The applicable limitation periods provision reads:

> **4** (1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:
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> . . .
>
> (c) actions
>
> (i) for the recovery of money, other than a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, or
>
> (ii) for an account or for not accounting,
>
> within 6 years after the cause of action arose;
>
> . . .
>
> (e) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within 6 years from the discovery of the cause of action;
>
> . . .
>
> (g) any other action not in this Act or any other Act specifically provided for, within 6 years after the cause of action therein arose.

[15] The issue becomes when the cause of action "arose" or, in the case of equitable claims, was actually "discovered".

[16] The applicable definition of when a cause of action arises was articulated by this Court in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224:

> . . . a cause of action arises for purposes of a limitation period when the material facts on which it is based <u>have been discovered</u> or <u>ought to have been discovered</u> by the plaintiff <u>by the exercise of reasonable diligence</u> . . . [Emphasis added.]

[17] It is argued that the causes of action here advanced were discoverable as early as the 1880s and 1890s. We do not find it necessary, however, to go back so far.

The evidence filed by the government establishes that in the 1970s the causes of action now raised would have been clear to the plaintiffs, exercising due diligence. In the mid-1970s, an Edmonton lawyer, James C. Robb, sent letters of inquiry to the Department of Indian and Northern Affairs on behalf of unidentified Papaschase descendants. The ensuing correspondence reveals that in 1974, a group of Papaschase descendants intended to submit a land claim "in the near future". This suggests some actual knowledge of the relevant facts, but there is more. When the Department advised Mr. Robb that the Enoch Band had already submitted a claim regarding the surrender of the Papaschase Reserve, Mr. Robb responded that a joint claim would not be possible. Having been informed of the Enoch Band's claim, these Papaschase descendants knew that the Enoch Band had or was in the process of gathering the relevant information. Indeed, in 1979 the Enoch Band provided funding to Kenneth James Tyler to write a Master's thesis on the events surrounding the surrender of the Papaschase Reserve. The Tyler Thesis covers most if not all of the facts that form the basis of the claims in this action. Mr. Tyler interviewed several Enoch Band elders in the course of his research. It is thus clear that members of the Enoch Band were aware of the facts on which this action was based in 1979. The chambers judge, on all the evidence, concluded that any interested party exercising due diligence could have uncovered the same facts Mr. Tyler did.

[18] The plaintiffs filed no material in response to this evidence. They did not say whether or not, in the 1970s, they knew of the causes of action they now raise. There is no explanation for how, as members of the Papaschase Descendants Council, they could have been unaware of these matters, with due diligence, when some Papaschase descendants were aware of the Enoch Band's claim. On this state of the evidence, the

only available inference is that these causes of action became discoverable within the meaning of the *Limitation of Actions Act* in the 1970s, and that the claims are now statute-barred.

[19] We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others.

[20] For these reasons, we would allow the appeal and restore the order of the chambers judge. Each party should bear its own costs in this Court.

Appeal allowed.

Solicitor for the appellant: Deputy Attorney General of Canada, Saskatoon.

Solicitors for the respondents Lameman et al.: Lang Michener, Ottawa; Maurice Law, Redwood Meadows.

Solicitor for the respondent Her Majesty the Queen in Right of Alberta: Alberta Justice, Edmonton.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

Solicitors for the intervener the Federation of Saskatchewan Indian Nations: McKercher McKercher & Whitmore, Saskatoon.