Citation: Kruger et al v. Smith
2000 BCSC 1722

Date: 20001130
Docket: C792035
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MORRIS KRUGER, Chief of the Penticton Indian Band, on behalf of himself and all other members of the Penticton Indian Band; JAMES BAPTISTE, Jr., Chief of the Osoyoos Indian Band, on behalf of himself and all other members of the Osoyoos Indian Band; ROMEO EDWARDS, Chief of the Spallumcheen Indian Band, on behalf of himself and all other members of the Spallumcheen Indian Band; WILFRED BONNEAU, Chief of the Okanagan Indian Band, on behalf of himself and all other members of the Okanagan Indian Band; NORA ALLISON, Chief of Upper Similkameen Indian Band, on behalf of herself and all other members of the Upper Similkameen Indian Band; BARNETT ALLISON, Chief of the Lower Similkameen Indian Band, on behalf of himself and all other members of the Lower Similkameen Indian Band

PLAINTIFFS

AND:

**CHRISTINA JULIETTE SMITH,
Executrix of the Estate of Ernest Smith**

DEFENDANT

REASONS FOR JUDGMENT OF MASTER DONALDSON (IN CHAMBERS)

Counsel for the Plaintiffs: Louise Mandell

Counsel for the Defendant: Michael Robert Dirk

Date and Place of Hearing: November 20, 2000
Vancouver, BC

[1] This is a motion brought by the defendant that the plaintiffs' claim be dismissed for want of prosecution, and that the *lis pendens* and *caveat* filed by the plaintiffs be removed from registration at the Kamloops Land Title Office.

[2] The property in issue is District Lots 1998S and 1999S. These lands are in the southern Okanagan region of British Columbia, close to the town of Osoyoos. Situate on these lands is a lake known as "Spotted Lake".

[3] Ernest Ripley Smith obtained undersurface mineral rights for the two properties on the 20th of March, 1963, and on the 4th of February, 1964 purchased the surface rights.

[4] On the 22nd of March, 1979, the plaintiffs registered *caveats* at the Kamloops Land Title Office, claiming to be beneficiaries of an unregistered trust relating to the Spotted Lake property, and on the 15th of May, 1979, they commenced this action against Ernest Smith, and filed a *lis pendens* under number P27390 against the properties on the 18th of May, 1979. An appearance was entered on behalf of the defendant Ernest Smith on the 23rd of May, 1979.

[5] On the 16th of August, 1980, Ernest Ripley Smith died.

[6] On the 22nd of December, 1980, the then-solicitors for the defendant wrote to plaintiffs' solicitors advising they wished

the matter to proceed to trial without further delay. The following statement was also made:

> As a result of my client's instructions, I wish to advise that if I have not received the Statement of Claim on or before the 31st day of January, 1981, I will be bringing an application to have the matter dismissed.

[7] On the 5th of February, 1981, a notice of intention to proceed was filed, and a statement of claim was filed the 6th of March, 1981.

[8] On the 13th of March, 1981, counsel for the defendant confirmed by letter with counsel for the plaintiffs that she would be amending: "your claim in the Writ of Summons and/or Statement of Claim to include an aboriginal rights claim. . . I would advise that I will not be filing my Statement of Defence to the filed Statement of Claim until such time as I have the amendment. If this is not acceptable, would you please advise."

[9] On the 19th of June, 1981, a notice of motion was filed to substitute Christina Juliette Smith as the defendant in place of Ernest Smith, deceased, and "that the Amended Writ of Summons be served on the Defendant within 7 days of the date of the entry of the Order." In the affidavit in support of application sworn by Wayne Haimila, he describes himself as

being “co-Counsel for the Plaintiffs”. It is clear there was counsel representing the estate of Ernest Smith. That motion was adjourned until heard the 10th of July, 1981, at which time the orders sought were granted.

[10] On the 30th of October, 1989, notice of change of solicitor for the defendant was filed by Keith Purvin-Good, representing the defendant in place of W.D. Holland.

[11] This motion was filed the 20th of September, 2000, and was received by counsel on behalf of the plaintiffs shortly thereafter. Apparently, it was not until the 19th of October, 2000, that she received instructions to act in relation to the motion. The affidavit of Leslie Pinder sworn the 15th of November, 2000, and the affidavit of Jeanette Christine Armstrong sworn in Penticton the 19th of November, 2000, were relied upon at the hearing the 20th of November.

[12] The plaintiffs contend that, in discussions in 1978 and early 1979, Ernest Smith told “the Okanagan Chiefs and elders attending the meeting, that he knew that Spotted Lake did not belong to him; that he was looking after it for the Okanagan people and that he will return the Lake to our people.” In the spring of 1979, it became clear to the local bands, as a result of the rezoning application brought by Mr. Smith, that he wished to have the property rezoned. This rezoning

application was passed by the Regional District despite opposition by one or more of the Okanagan chiefs, and it was not until representations were directly made to the Ministry of Municipal Affairs, then headed by William N. Vander Zalm, that his decision to refuse to approve the Regional District by-law ended the matter. It is noteworthy that by letter dated the 12th of March, 1980, he wrote to then and present counsel to the plaintiffs stating in part as follows:

> Since the rejection, the Regional District has made representation to the effect that with a new application they could overcome most of my earlier objections and concerns. Therefore, it would seem that the Native people could only effectively seek to overcome their dilemma, and the dilemma of the owner and Title holder, by seeking to fairly acquire the site.
>
> Failing resolution of all of these matters, it will be only a matter of time before the process starts all over again, and the argument will once again be advanced (just as it has already been done in a fair manner) that anyone is entitled to seek approval for what they consider to be the highest priority and best possible use of their land.

[13] Jeanette Christine Armstrong, in her affidavit, states that “The Chiefs” wished to ensure that Mr. Smith be compensated when Spotted Lake was returned to the Okanagan people.

[14] It is contended by counsel, on behalf of the plaintiffs, that the plaintiffs made a commitment to negotiate, and indeed

an offer was made in the summer of 1981. Reference was made to a letter dated the 30th of July, 1981 addressed to then and present counsel for the plaintiffs from Peter Clark of the Department of Indian and Northern Affairs. It states in part as follows:

> I made a verbal offer to Mr. W.D. Holland in April of $75,000.00 which was considered by Mr. Holland to be inappropriate and not worth confirming in writing. He advises me that an offer in the "Millions" has been received subject to re-zoning.

[15] Counsel, on behalf of the plaintiffs, must have realized that there was a huge difference in that which the plaintiffs considered reasonable and the defendant considered reasonable for a sale of the property. Ms. Armstrong states in her affidavit:

> After Ernie Smith's death, the Okanagan people were unable to make any progress in discussions with Ernie Smith's son, Don Smith, and were unable to contact him for a number of years.

[16] The materials make it clear counsel on behalf of the plaintiff knew Christina Juliette Smith was the executrix of the estate, as is referenced in Mr. Haimila's affidavit of June 1981. It should also have been clear to the plaintiffs that she represented the estate and that she was represented by counsel.

[17] In Ms. Armstrong's affidavit, it is also clear that memories have significantly faded over the years. She states in paragraph 17:

> In the mid to late 1980s, although I cannot remember the exact year, Don Smith passed away. After the death of Don Smith, the Okanagan chiefs held another meeting which I attended in order to discuss Spotted Lake. We decided that we would leave the lis pendens on the property, and continue to try to settle this matter. Because of the spiritual and sacred nature of the Lake, it is the preference of the Okanagan people that an arrangement is made with the Smith family in a gentle and respectful manner.

[18] There is no documentation provided either by counsel for the plaintiffs or counsel for the defendant to indicate that there were any negotiations whatsoever following those undertaken in early 1981. There is, however, reference in Ms. Armstrong's affidavit, in paragraph 19, where she states the following:

> I have been advised by Chief Clarence Louie, Chief of the Osoyoos Indian Band (which is most closely located to Spotted Lake), that since her brother passed away, he has been involved in on-going discussions with Ernie Smith's daughter, Darlene MacMillan, about the purchase of Spotted Lake.

[19] There is no affidavit from Chief Clarence Louie, nor any indication that there have been any meaningful discussions whatsoever with Darlene MacMillan, or any other person. It

should again be noted that it is Christina Juliette Smith who is the executrix of the estate and that she was represented by counsel, notice of which was provided to counsel for the plaintiffs by filing the 30th of October, 1989 (Keith Purvin-Good).

[20] It is apparent from the material provided by the plaintiffs that an appraisal was obtained in January of 1997, indicating the property had a value of approximately $280,000. That appraisal includes reference to the difficulty in concluding what is the highest and best use for the property. There is no indication that the appraisal was discussed with any representative of the defendant, until a copy was apparently forwarded to present counsel on or about the 8th of November, 2000.

[21] It is clear that the claim of the plaintiffs is based upon conversations which took place in 1978 and 1979. The owner of the property, Ernest Smith, has been dead since 1980. At least one of the other participants, William Armstrong, has been dead for approximately eight years. There was apparently a tape recording of one the meetings held in the fall of 1978. On the material before me, there does not appear to be any references as to whether all meetings were recorded, and

indeed it is clear that in early 1979 the band knew that Ernest Smith wished to rezone the property and make use of it.

[22] It is clear from the material filed, and in particular, the affidavit of Ms. Armstrong, that a conscious decision was made by the Okanagan chiefs to leave the *lis pendens* in place and to take no further action in relation to the lawsuit. It is also clear that they considered the land to be protected from development as a result of the filing of the *lis pendens*.

[23] It would appear clear that the plaintiffs were satisfied to rely upon their legal position and the protections afforded by the filing of the *lis pendens*. It is contended on their behalf that they wished to resolve the matter by negotiations and purchase, however, it is clear that little, if any, efforts were made in that regard, at least so far as are documented in the material provided on behalf of the plaintiffs in opposition to the motion.

THE LAW

[24] The following authorities were referred to by counsel on behalf of the defendant:

E. Winter Limited v. Bazett et al
[1969] 70 W.W.R.81

Lindholm v. Pollen
(1986) 3 B.C.L.R. 23

Fraser v. Kokan
[1993] B.C.J. No. 2627,
Vancouver Registry No. C900725

Crispin v. Sidney (Town)
[1994] B.C.J. No. 142
Victoria Registry No. 89/884

Gary Wilson (c.o.b. Image Builders Inc.) v. Hrytsak
[1997] B.C.J. No. 1115,
New Westminster Registry No. S15438

Rhyolite Resources Inc. v. CanQuest Resources Corp.
[1997] B.C.J. No. 2608,
Vancouver Registry No. C902515

Vic Van Isle Construction Ltd. v. Lomenda
[1999] B.C.J. No. 3032,
Victoria Registry No. 98-2562

And the following authorities were referred to by counsel for the plaintiffs:

Baehr v. Robinson
[1991] B.C.J. No. 552
Vancouver Registry No. C862098

Clairmonte v. Canadian Imperial Bank of Commerce
(1970), 12 D.L.R. (3d) 425 (O.C.A.)

Galati v. Insurance Corp. of British Columbia
[1997] B.C.J. No. 2129
Vancouver Registry No. C930279

Irving v. Irving et al (1982), 140 D.L.R. (3d) 157 (C.A.)

Allen v. Sir Alfred McAlpine & Sons Ltd. et al
[1968] 2 W.L.R. 366 (C.A.)

Star-Ten Contracting Ltd. v. Laurentian Pacific
[1997] B.C.J. No. 2159
Vancouver Registry No. CA022545

Katountas v. Crane Canada Inc.
[1995] B.C.J. No. 2205
Nelson Registry No. 220616

[25] In the decision ***Rhyolite Resources Inc. v. CanQuest Resources Corp.*** [1997] B.C.J. No. 2608, Mr. Justice Hood reviewed most of the authorities cited, and makes reference to the three principles or tests to be applied, these being as follows:

1. Has there been an inordinate delay? If so,

2. Is the inordinate delay inexcusable? If so,

3. Has the delay caused a serious prejudice, or is it likely to cause serious prejudice, to the applicant?

4. Finally, even if the answer to all three questions posed is yes, the court must still ask itself whether, on balance, justice demands that the action should be dismissed.

He then in paragraph 17 states the following:

> What is an inordinate delay depends on the particular fact of the case. The court must consider the time which has expired since the cause of action arose, as well as the time that expired after the issuance of the Writ of Summons. Consideration should also be given to the limitation period, when it should expire, or if it has expired. Here the limitation period is ten years, because it is a claim for breach of trust. The case is essentially one for the return of trust property.

And at paragraphs 23 to 34:

> 23. A perusal of the cases referred to by counsel, and others, discloses that while there are guiding principles for the court to follow, the ultimate question is whether or not, on balance, justice demands that the action should be dismissed. Each case must depend on its particular facts. All circumstances must be considered by the court, in balancing the conduct, positions and interests of the parties in the scales of justice. And, I would add, that common sense in most cases should avoid difficulties created, in part, by the summary nature of the proceedings, and the present day subjective and self-serving evidence of the parties. An objective approach is to be preferred, if the task is to be properly performed.
>
> 24. Speaking generally, I have considered the usual factors in reaching my decision, most of which were referred to by counsel. Additionally, I have considered in more detail those particular factors which, in my opinion, are more important in this case.
>
> 25. I commence by reiterating two fundamental and overlapping principles. They are (1) that actions should be brought to trial with reasonable diligence and expedition in the interest of justice; and, (2) that the longer the delay, especially where the resolution of disputed facts and issues will depend on the recollection of witnesses as to what was said and done, the less likely that a fair trial of the issue is possible, and that therefore justice will be done. These principles are expressed in the Rules, Rule 1(5) for example, and in the cases. See for example, ***Fitzpatrick v. Batger*** [1967] 1 W.W.L.R. 706 (C.A.), ***Lindholm et al v. Pollen*** (1986) 3 B.C.L.R. (2d) 24 (S.C.), the classic case of ***Allen v. Sir Alfred McAlpine & Sons Ltd.*** (1967) 2 Q.B. 229 (C.A.), and ***Irving v. Irving et al*** (1989) 38 B.C.L.R. 318 (C.A.).

26. The conduct of the parties, of course, is important. Here, there is no evidence of active delay on the part of the defendants. They do not have an interest in seeing that the action is brought on at all, and they cannot be faulted for doing nothing in that regard. On the other hand, the plaintiff controls the proceedings, and it was its duty to get on with the action. There is no evidence before me of the delay being caused by a third party, or of the plaintiff otherwise being innocent in law. The plaintiff is responsible for the delay, and no acceptable reasons have been given.

27. There is no doubt that there has been an inordinate delay, and that it is inexcusable. Suggestions of “other pressing concerns on my business” and “difficulty paying the legal fees”, which seems to have arisen in July, 1996, are made, but rather weakly in my view. No satisfactory or acceptable reasons for the lengthy delay has been established. It is simply inexcusable, in all the circumstances.

28. I am also of the view that the delay is likely to cause serious prejudice to the defendants, that is to say, that there is a real risk that a fair trial cannot take place. On the evidence before me, and assuming that the onus is on the defendants, the onus is not a heavy one. A *prima facie* case has been made out. It is to be noted that the action has not been set down for trial to date. If it is set down, by the time of trial the witnesses will be giving evidence about what was said and done approximately ten years earlier.

29. In my opinion the decisions of those strong Judges in ***Allen*** (supra), are particularly applicable and on point. At page 255 Diplock, L.J. sets out the principles:

> And where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony, of witnesses recounting what they then recall of events which happened

> in the past, memories grow dim, witnesses may die or disappear. The chances of the court's being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. But there may come a time when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached the public interest in the administration of justice demands that the action should not be allowed to proceed. (My emphasis)

30. And at page 258:

> It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the grounds that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.

31. And at page 259:

> What then are the principles which the court should apply in exercising its discretion to dismiss an action for want of prosecution upon a defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order, and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff, or his lawyers have been responsible, has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date in which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience to a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied would depend upon the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend upon the recollections of witnesses of events which happened long ago. (My emphasis)

32. At page 245 Denning, M.R. put it this way:

> The principle upon which we go is clear:
>
> > When the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may, in its discretion, dismiss the action straight a way, leaving the plaintiff to his remedy against his own solicitor who has brought him to this place.

In ***Allen***, unlike the present case, the plaintiff was innocent at law.

33. Finally, I refer to the oft quoted principles stated by Salmon, L.J. at page 268, as follows:

> In order for such an application to succeed, the defendant must show:
>
> (1) That there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. <u>These vary infinitely from case to case, but inordinate delay should not be too difficult to recognize when it occurs</u>. (My emphasis)
>
> (2) That this inordinate delay is inexcusable. As a rule, <u>until a credible excuse is made out, the natural inference would be that is is inexcusable</u>. (My emphasis)
>
> (3) That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of

> the issue between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of serious prejudice at the trial. (My emphasis)
>
> If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. If he is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault. (My emphasis)

34. I do not read the cases as holding that a defendant must always establish absolutely that he has been prejudiced by the delay; although in a given case this may be necessary, for example, where the delay is for a relatively short period. But often he could not do this unless and until a full trial has been held, and the witnesses, whose reflections are said to be affected, have testified. In some cases it will be simply a matter of inference from the evidence adduced. A lengthy period of delay alone, in most cases, will give rise to the inference, as a matter of common sense. It likely will be impossible to have a fair trial after such a delay. The fairness of the trial, which is fundamental to the administration of justice, and our very judicial system, is to be preserved.

[26] Here, it should be noted that the claim of trust relates to real property registered in the name of the defendant Ernest Ripley Smith, registered in accordance with the Torrens land registry system of the Province of British Columbia. The basis of the trust, as alleged, follows from several meetings which apparently took place in the fall of 1978 and spring of 1979 between Okanagan elders and Ernie Smith. That was followed in 1979 with an application by Ernie Smith to the Regional District to rezone Spotted Lake, which application despite the objection of the Okanagan elders, was successful.

[27] The writ was issued the 15th of May, 1979. Ernest Smith died in August of 1980. The statement of claim was not filed until May of 1981. It is contended that the "Okanagan people" were unable to locate, or were unable to contact, Ernie Smith's son, Don Smith, "for a number of years". It must be recalled that the defendant was represented by counsel throughout this time. The offer to purchase made on behalf of the plaintiffs in 1981 for $65,000 to $75,000 was summarily rejected, and information passed on by then-counsel for the defendant that clearly indicated the land was valued by the Smith family "in the Millions".

[28] There is no indication that the plaintiffs made any serious efforts to negotiate with the Smith family throughout

the balance of the 1980s, or indeed the 1990s. Yet it is contended on the part of the plaintiffs that it was their desire to resolve the matter in a respectful and peaceful and acceptable manner not fraught by the conflict which would be brought about by litigation.

[29] The affidavit of Jeanette Armstrong does not disclose the names of all of those present at the meetings which took place with Ernie Smith. It is clear, however, that one of the participants, William Armstrong, the father of Jeanette Armstrong, has been dead for some eight years. He was present at the meeting.

[30] The discussions which the plaintiffs contend lead to the trust took place in 1978 and 1979. That is to say, 22 and 21 years ago, respectively. It is apparent that an appraisal of the property was completed and presumably in the hands of the plaintiffs in January of 1997, and yet there is no indication that it was even discussed or disclosed to the defendant until November 2000.

[31] It is clear that the plaintiffs made a conscious decision to leave the *lis pendens* on the properties owned by Ernie Smith and to take no steps in relation to the action.

[32] Twenty years have passed. It is contended on behalf of the plaintiffs that the delay has been acquiesced in by the defendant, and indeed that the defendant has not filed a statement of defence. Significant reliance is placed by the plaintiffs on ***Allen v. Sir Alfred McAlpine & Sons Ltd. et al*** [1968], W.L.R. 366 (C.A.). In particular, reference is made to page 369, para. D; 374, para. H; 386, para. D; and 393, para. H. There are no indications in the material before me that the defendant was in any way responsible for any delays by its own conduct, or that it in any way lulled the plaintiffs into any false sense of security, so far as the position being taken on behalf of the defendant is concerned.

[33] It was contended on the part of the plaintiffs that the plaintiffs and defendant could benefit from court processes relating to settlement conferences, and the like, with a view to an agreement reached between the parties resolving this matter.

[34] The plaintiffs have taken deliberate steps which have had the effect of prohibiting the defendant from dealing with its land. It has used the legal process to accomplish this end. It has done virtually nothing since doing so in 1979 to proceed with the action, other than amending its writ of summons in 1981.

[35] There is no explanation or excuse for what I can only conclude to be inordinate delay. It is contended by the plaintiffs that they sought to negotiate to achieve a peaceful and amicable resolution of the matter. The evidence, however, is that whatever efforts were made to negotiate were inconsequential and completely inadequate. It is clear from the material that no serious discussions ever took place, and it is clear on the material that the plaintiffs well must have known the position of the defendant that its land was worth “Millions”, following the offer made for at most $75,000 in 1981. There can be no question but that the delay has caused serious prejudice. In none of the cases referred to by either counsel has there been a delay in excess of 10 years, much less 20 years. Both Ernie Smith and his son have died in the meantime, as has at least one of those who attended one or more of the meetings, which apparently took place in 1978 or 1979, that being William Armstrong.

[36] There has been inordinate delay. No reasonable explanation or excuse have been offered to explain the delay. There has been actual real prejudice to the defendant as a result of the delay. There is no basis for the action to be continued. Justice demands that the action be dismissed.

[37] The claim of the plaintiffs is dismissed. The defendant will have its costs.

"Master Donaldson"