Court of Queen's Bench of Alberta

Citation: Stoney Tribal Council v HMTQ, 2021 ABQB 519

Date: 20210707
Docket: 9901 03798
Registry: Calgary

Between:

Stoney Tribal Council, Representing the Chiefs, Councils and Members of the Bearspaw, Chiniki and Wesley Bands

Plaintiff/Respondent

- and -

Her Majesty the Queen in Right of Canada

Defendant/Applicant

-and-

Ovintiv Corporation (formerly Encana Corporation and formerly PanCanadian Petroleum Limited)

Defendant

- and -

Canadian Pacific Railway Company, Canadian Pacific Railway Limited, Canadian Pacific Limited and Ovintiv Corporation (formerly Encana Corporation and formerly PanCanadian Petroleum Limited)

Third Parties

- and -

The Attorney General of Alberta

Intervenor

Ruling on Application for Leave to Amend
of the
Honourable Mr. Justice P.R. Jeffrey

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[1] Her Majesty the Queen in Right of Canada ("**Canada**") applies for leave to amend its Statement of Defence that it filed 19 years ago, on June 4, 2002. The case remains subject to case management.

[2] Canada does not propose just a few changes to its Statement of Defence; it has completely overhauled the pleading. "The classic rule is that an amendment should be allowed, no matter how careless or late, unless there is prejudice to the other side, and even that is no obstacle if it is repaired": *Milfive Inv v Sefel* (1998) 216 AR 196 (CA); cited with approval in *Balm v 3512061 Canada Ltd*, 2003 ABCA 98 at para 43. See also: *Attila Dogan Construction Installation Co Inc v AMEC Americas Limited*, 2014 ABCA 74 at paras 23 – 26.

[3] Except for two matters of concern to the Plaintiffs, no objection is taken by any party to Canada making such a wholesale change to its Statement of Defence. It appears that, among other things, Canada's approach to all such first nations claims has evolved since Canada filed its first Statement of Defence – or at least its tone has evolved – and of course much has been learned since 2002 about the claims in this law suit, by all parties, through the litigation steps completed to date.

[4] Therefore, and subject to my conclusions about those two issues of concern to the Plaintiffs, which constitute the bulk of this ruling, I permit the replacement Statement of Defence by Canada to be filed as an Amended Statement of Defence in place of the earlier Statement of Defence, and without the necessity of underlining and other highlighting of specific changes.

[5] Further, pursuant to Rule 3.65(2), Canada must file and serve its Amended Statement of Defence no later than July 30, 2021, or such later date agreed to by all parties.

[6] However, the Plaintiffs say that by its amending its Statement of Defence, Canada has withdrawn two admissions. The Plaintiffs oppose Canada being permitted to do so and to that extent object to the Amended Statement of Defence.

[7] The Plaintiffs say that Canada's original Statement of Defence admits the following two things that it has removed by its Amended Defence:

> 1. First, that CPR obtained from Canada a fee simple determinable interest in the "Railway Lands" – that is – subject to a statutory reversionary interest in favour of Canada for any Railway Lands that ceased to be used for railway purposes; and
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> 2. Second, that CPR could not and did not acquire the mines and minerals as a matter of law and that none were required for railway purposes.

[8] The Plaintiffs ask that Canada be held to these two admissions. Absent the Court's permitting the withdrawal these admissions, Canada says it would have to proceed to trial "saddled with an inaccurate position".

[9] Canada disagrees that it has withdrawn any admissions. Canada says the points of concern to the Plaintiffs are, if anything, merely changes in legal position.

[10] Canada also says that it has not actually withdrawn its position on CPR having acquired fee simple determinable property rights, since it remains in Canada's Statement of Defence in the alternative. Canada says:

> … with respect to statutory interest, it's not a withdrawal at all. It's just a re-characterization from being the primary statement to an alternative … at minimum [it was] fee simple determinable

[11] Canada's intended amendment now alleges CPR acquired fee simple absolute property rights, but the original position remains as a fallback. Pleading in the alternative is permissible in keeping with Rules 1.2(2)(a) and 13.8(1)(a).

[12] For purposes of this application I am treating the two assertions as, or akin to, admissions of fact being withdrawn. I agree with the Plaintiffs that they are framed in Canada's pleading as allegations of fact -- albeit facts determined by application of statutes to the events of the day, long, long ago.

Legal Test

[13] The Court will permit a party to withdraw an admission if it is in the interests of justice overall.

[14] The Alberta Court of Appeal in *Stringer v Empire Life Insurance Company*, 2015 ABCA 349, at para 12, lists the established overlapping considerations to such decisions. Those 5 considerations are:

1. Was the admission intentionally made, or was it inadvertently made, or inadvertently permitted to arise by operation of the Rules?
2. What is the explanation for permitting the admission to arise, or for having made an admission which is now said to be inaccurate?
3. If there has been any delay in moving to withdraw the admission, what is the explanation for that delay?
4. Has the applicant provided sufficient evidence to demonstrate that the admitted fact may not be true, and that there is a genuine issue about an important enough fact to warrant sending the disputed fact to trial?
5. Would the withdrawal of the admission cause prejudice to the other party that cannot be remedied by costs or other terms: R 1.5(4)?

The appeal court then added:

> None of these considerations is overriding or determinative of the issue: *Hamilton v Ahmed* (1999), 28 CPC (4th) 139 at para. 11 (BC Master). The relevant factors must be balanced, and, in the end, the judge or Master has a discretion whether to allow withdrawal of the admission: *Goundar v Nguyen*, 2013 BCCA 251 at para. 28, 45 BCLR (5th) 68, 37 CPC (7th) 259. Where withdrawal of an admission is permitted, it will generally be done on terms as to costs or otherwise.

Application of the Legal Test

[15] On the first consideration, the two admissions were not inadvertently made. They were deliberate, though not the result of any attempt to mislead the Plaintiffs or of any other improper motive. Canada's earlier positions derived from its assessments of the information available to at the time.

[16] On the second and fourth considerations, regarding an explanation for the changes and evidence in support, the Plaintiffs suggest Canada's request to withdraw the two admissions must fail because it offered no evidence to explain its changed position. The Plaintiffs said:

> … the legal test no matter what still requires evidence of some nature on the part of Canada to justify an amendment even if it isn't a withdrawal of an admission… But simply asking after the close of pleadings to amend a Statement of Defence without providing, like, a single shred of evidence -- and again, the Courts have not suggested that the -- that it's an onerous exercise, but the Courts have certainly said that something is still required.

[17] With respect, that overstates the importance of these considerations. The Court of Appeal in *Stringer*, at para 12 (quoted in part at para 13 above), said that none of the five considerations are alone determinative; rather, they must all be weighed in the course of ascertaining what best serves the interests of justice.

[18] Not all amendments require supporting evidence: *Balm* at para 9. I agree with Canada that the two points in issue here do not lend themselves to supporting evidence. The changes in Canada's position derive from its interpretations of historic statutes, therefore to explain its change Canada would have to disclose its legal analysis. This should not be a prerequisite to gaining permission to revise conclusions of law in a statement of defence, even if they are framed as allegations of fact.

[19] Canada's explanation for the changes is that the earlier positions "are not entirely accurate" based on what it now understands, some 19 years after crafting its initial Statement of Defence. Canada says "looking at the interpretation of the 1881 *CPR Act* and applying its interpretation to the facts of this litigation" compels its new legal conclusions.

[20] A litigant reflecting on its legal positions and litigation strategies is not uncommon between the start of an action and its trial. In this case, the Plaintiffs have completed their Replies to Demands for Particulars, some of the Plaintiffs' claims have been dismissed summarily, document production is largely concluded, Ovintiv has filed its defence, and the Plaintiffs have conducted some questioning of Canada's main deponent. This is not an unusual time for a litigant like Canada

to come to understand the facts in a different way than it originally did, or to take stock of its initial pleading and ensure, before the completion of any further litigation steps, that all parties know accurately where issue is joined.

[21] The third consideration, any delay on Canada's part, is not a factor here. This is a lawsuit with great breadth and complexity, complicated further by the best sources of evidence having long since passed away. The claims involve events dating back to the 1800's, through the mid- to late-1900's, with the alleged harms continuing to this day, the Plaintiffs will seek to quantify at trial. The claims commenced in Court just before the start of the 2000's. They have not been prosecuted with any aggressive urgency (nor have the Plaintiffs been dilatory).

[22] I note further that Canada initiated its process of amending its Defence some time ago, but was impeded by the imposition of restrictions in response to the COVID-19 outbreak. I am advised the Plaintiffs were apprised of Canada's positions in its revised Defence as early as April 2020. In context, Canada is not guilty of delay on proceeding with its amendments.

[23] Regarding the fifth consideration, that of prejudice, the onus is upon Canada as applicant to show the Plaintiffs are not prejudiced by the withdrawal of the admissions. The concern is not for *any* prejudice, but for any "substantial prejudice": *Dwyer v 303554 Alberta Ltd*, 1996 ABCA 95 at para 17.

[24] I find Canada has met this burden, by showing on balance that (i) the Plaintiffs knew of the contents of the proposed Amended Statement of Defence before commencing any of its questioning of a representative for Canada; and (ii) the positions on the two issues now espoused by Canada having already been the positions of Ovintiv. The situation here is the same as this Court addressed in *Iozzo v Weir*, 2007 ABQB 567, where another defendant had already taken the position the applicant was amending to newly assert. At para 18 of *Iozzo* the Court said:

> … the issue will be live in relation to the defence advanced by Zenon Communications so that the matter will be fully canvassed at trial in any event; little time or effort will be saved in that respect by binding the Defendants to their admission.

[25] The Plaintiffs say there are different causes of action between them and Ovintiv than between them and Canada, so Ovintiv already taking these positions is not duplicative or the same for trial purposes.

[26] I agree with Ovintiv and Canada, that regardless of the causes of action the determinations may relate to, there will only be one determination of the property interest acquired by CPR and only one determination of whether or not those property interests acquired included the mines and minerals.

[27] In addition to their arguments on the *Stringer* considerations, the Plaintiffs also object to Canada withdrawing the admission that CPR acquired fee simple determinable interests in the Railway Lands at issue because (i) the issue has already been decided in other cases and (ii) Canada taking this stance in this case, contrary to the stance it has taken in other cases on the very same issue, will constitute an abuse of process.

[28] The Plaintiffs say the BC Court of Appeal has twice ruled that a fee simple determinable property interest was conveyed to CPR. They note that the second time it was by a panel of five appeal justices of that Court.

[29] Even if the Plaintiffs are correct in that regard, those conclusions are not binding on any comparable question of fact in this case. The decisions referred to involved unrelated litigation, involved other Indigenous parties, and arose in another jurisdiction. To accede to the Plaintiffs' argument that a finding of fact in a prior decision between different parties and on a different record is binding in this action would deny parties in this action the opportunity to be heard and would misunderstand the limits of the precedential effect of findings of fact. See in this regard: *Allen v Alberta*, 2014 ABQB 184, affirmed on appeal at *Allen v Alberta*, 2015 ABCA 277. The Plaintiffs have asked that I treat Canada's changes of position as the withdrawal of admissions of fact.

[30] The second aspect of the Plaintiffs' objection, however, has more *gravitas* – regarding the alleged inconsistent position on the facts Canada is now taking purely to suit its own self-interests. In this case Canada does not "approbate and reprobate the same transaction", as the Plaintiffs' characterize it by reliance on *Chevron Canada Resources v Canada (Indian Oil and Gas Canada)*, 2006 ABQB 945, or pursue "an incompatible claim" by arguing for irreconcilable findings of fact within the same litigation, as the Plaintiffs' imply by reliance on *Mystar Holdings Ltd v 247037 Alberta Ltd*, 2009 ABQB 480. But Canada does appear to be arguing for a different conclusion, on what the Plaintiffs say is the very same point that Canada pursued to its advantage in prior litigation.

[31] On the nature of abuse of process, the Court's fuller comments in *Mystar* are instructive, from paras 62 – 64:

> The doctrine of abuse of process assists in promoting the "integrity of the administration of justice". On the facts before me, 247, with full knowledge of the facts, should not be able to advance a claim that is diametrically opposed to its earlier position. In these circumstances, the integrity of the justice system would be no less compromised simply because the initial claim was not followed though to judgment.
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> This does not mean, as the Respondent suggests, that a factual pleading will forever and irrevocably bind a party in all subsequent pleadings. Rather, it means that, if a party, with full knowledge of the facts (thus distinguishing itself from a Potter scenario) chooses to argue irreconcilable facts in its pleadings, and where such pleadings are clearly not made in the alternative, allowing such a party to continue pursuing an incompatible claim may constitute an abuse of process.
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> Of course, my above conclusion obviously presupposes that the pleadings are, in fact, inconsistent. A review of the Amended Statement of Claim in the present action and the Statement of Claim in the Bad Faith Action does not necessarily show that the positions taken in each are "diametrically inconsistent".

[32] The record before me does not permit an adequate assessment of whether the prerequisites to a finding of abuse of process by Canada exists here. It remains open to the Plaintiffs to press

Canada on the matter at trial, including to argue that Canada should be barred in the circumstances from taking any position on the issue inconsistent with its earlier position(s) in the earlier actions. However, at this stage of the action it would not be just to deny Canada opportunity to advance its current position in respect of this litigation towards trial and then, if permitted, also at the trial.

[33] In my view, the only satisfactory means of resolving the issue is by determination of the truth at trial, not on an interlocutory motion. See in this regard: *Gardiner v Minister of National Revenue*, [1964] SCR 66 at p 68, as cited with approval in *Norlympia Seafoods Limited v Dale & Company Limited*, 1982 CanLII 491 (BCCA) at para 11.

[34] In sum, the relevant considerations favour the conclusion that it is in the interests of justice to permit Canada to withdraw the admissions. At the end of the day, the issue will have to be determined at trial regardless of Canada's being held to the admissions in its first Statement of Defence. By my permitting the withdrawal, the parties will be saved the risk of further dispute in determining the scope of the resulting limitations on Canada through many of the remaining pre-trial steps and the trial judge will benefit from Canada's unfettered engagement on the issue at trial.

[35] Having been case manager of this action for about a decade now, I am also aware of the significant degree to which the Plaintiff's claims in its pleading have evolved through its Replies to Demands for Particulars and through the involvement of two levels of the province's Courts. Against this backdrop, to now hold Canada to its very first positions would seem an inconsistent application of the rules and their purposes. For this further reason I also consider the Plaintiffs' position contrary to the interests of justice.

Conclusion

[36] Therefore, I grant Canada's application to amend, including permitting it to withdraw the two 'admissions', in accordance with paragraph 5 above.

[37] I accept that an effect of this ruling may cause some incremental litigation cost for the Plaintiffs. They have not demonstrated that to be the case, but I am prepared to give them that opportunity, now or later (but only prior to the matter transferring to a trial judge, to establish they have incurred any such throw away costs caused by Canada's changes in position and to persuade the Court that they ought to be reimbursed to them by Canada.

[38] Canada is entitled to its party and party costs of this application.

Heard on the 10th day of June, 2021.
Dated at Calgary, Alberta this 7th day of July, 2021.

P.R. Jeffrey, JCQBA

Appearances:

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