Court of Queen's Bench of Alberta

Citation: Orr v Alook, 2017 ABQB 458

Date:
Docket: 1103 20205
Registry: Edmonton

Between:

Andrew Orr

Plaintiff

- and -

James Alook, Sharon Laboucan, Emil Houle, William Houle, Garry Noskiye and Peerless Trout First Nation

Defendants

Reasons for Judgment of the Honourable Mr. Justice B.R. Burrows

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[1] James Alook and his co-defendants object to Andrew Orr's application for judgment by way of summary trial in this action. They invoke Rule 7.8(1):

> The respondent to an application for judgment by way of summary trial may object to the application at or before the hearing of the application on either of both of the following grounds:
>
> (a) the issue or question raised in the claim, or the claim generally, is not suitable for a summary trial;
>
> (b) a summary trial will not facilitate resolution of the claim or any part of it.

[2] Rule 7.8(3) provides:

> The judge must dismiss the objection if, in the judge's opinion,
>
> (a) the issue or question raised in the claim, or the claim generally, is suitable for a summary trial, and
>
> (b) the summary trial will facilitate resolution of the claim or part of it.

[3] In my opinion, Mr. Orr's claim is suitable for a summary trial and a summary trial will facilitate resolution of the claim. I therefore dismiss Mr. Alook's objection.

[4] The summary trial is scheduled for two days starting on September 21, 2017, two months from now.

[5] Mr. Orr's claim arises from a contract he entered on October 1, 1991, as one of five persons who were collectively referred to as the "Land Claim Committee". The other parties to the contract were The Unincorporated Hamlet of Peerless Lake, Alberta, and The Peerless Lake Band. The individual members of the Land Claim Committee agreed to:

> use their best efforts to represent the residents of Peerless Lake and the future members of the Band in the work connected with assisting the professional consultants retained by the Land Claim Committee in their negotiations with the Government of Canada with respect to the formation of the Band and in the Consultant's negotiations with governmental authorities and regulatory bodies with respect to a Specific Claim on behalf of the future members of the Band and Peerless Lake.

[6] The Agreement provided that the individual members of the Land Claim Committee, including Mr. Orr, would be paid $35.00 per hour for the work they performed and that they would be reimbursed for expenses and disbursements they incurred. The agreement provided that it would be binding on the parties "and their successors, assigns, heirs, executors and administrators."

[7] The Agreement was signed by:

a. five persons as representing The Unincorporated Hamlet of Peerless Lake, Alberta, including both Mr. Orr and Mr. Alook;
b. the same five persons as members of the Land Claim Committee, again including both Mr. Orr and Mr. Alook; and
c. the same five persons as representing the Peerless Lake Indian Band, again including both Mr. Orr and Mr. Alook.

[8] On December 18, 2010, a land claim settlement agreement was entered between the governments of Canada and Alberta and several indigenous groups including the Peerless Lake Band. On May 19, 2010, the Government of Canada "constituted" the Peerless Trout First Nation pursuant to the *Indian Act*.

[9] In 2011, Mr. Orr commenced this action against:

a. Mr. Alook, who had been elected Chief of Peerless Trout First Nation in 2010;
b. the other individual Defendants who had been elected Councillors; and
c. the Peerless Trout First Nation.

[10] Mr. Orr claimed that pursuant to the 1991 agreement, he was owed $1,437,320. He also claimed $70,000 for work he did before the agreement, between 1985 and 1991 as a quantum

meruit. He acknowledged receipt of $40,000 which the Chief and Council of the Bigstone Cree Nation paid to each of the Councillors involved in the settlement agreement. The Statement of Claim also included claims for defamation and for "misuse of corporation" and refusal to hand over records.

[11] The Statement of Defence was filed on February 10, 2012. With respect to the breach of contract claim, the Defendants pled that none of them was a party to the October 1, 1991, agreement and that they were therefore not liable for anything that might be payable under the agreement, or for the quantum meruit Mr. Orr claimed. They also pled that the $40,000 Mr. Orr was paid by the Bigstone Cree First Nation was full payment for his expenses and services.

[12] In early 2013, the Defendants applied for summary dismissal of Mr. Orr's claims. Master Schlosser summarily dismissed the defamation and "misuse of corporation" claims but not the claim for breach of contract. In his Reasons for Decision (2013 ABQB 86), Master Schlosser closely examined the question of whether the Peerless Trout First Nation could be liable for an obligation undertaken by the Peerless Lake Band. He considered the applicability of the law relating to pre-incorporation contracts to this context. He concluded at para 42:

> It strikes me that there must be some mechanism by which a community of Aboriginal persons, who collectively seek formal recognition under the *Indian Act* can bind themselves to pay for services and assistance to seek that status. Based on the foregoing principles of interpretation, the Court ought to be reluctant to apply a corporate analogy to frustrate that end.

And at paras. 49 and 50:

> The pre-incorporation argument raised by the Defendants has at least four strikes against it. Though a Band is a distinct legal entity, it is very different from a corporation. Band members are not like shareholders. Band status, under the *Indian Act*, does not "create" that group, but instead provides a state-designed and sanctioned mechanism for the administration of that community, as well as an "interface" for the Crown and others to interact with the community. A Band may have some corporate elements but it lacks the well defined separation of entity and membership.
>
> Given this state of the law, it cannot be said that it is plain and obvious that the corporate analogy argument dooms the Plaintiffs' claim for compensation based on a 'pre-incorporation' agreement. [At the time of the application there were two Plaintiffs. Now there is only one, Mr. Orr.] That is not to say that the Plaintiffs have a watertight case. I am only finding that the Defendants' position falls short of what is required for summary judgment. Given the unique and somewhat undefined state of the law, it would not be impossible even to go so far as to envision a law of obligations within the community that was based on the collective good. But these arguments are for trial.

[13] The Defendants' submit that the issues are too complex for determination at a summary trial. I accept that the issue in relation to the applicability of the law concerning pre-incorporation obligations may be difficult. I accept that the factual background to the issue may be complicated. But it does not appear that those facts, though complicated, are in dispute. It appears that no credibility findings will be required. The issue is one of law which will be

resolved on the basis of legal argument. Though perhaps difficult, the difficulty is not, in my view, a feature that makes the issue unsuitable for determination in a summary trial.

[14] The pre-incorporation obligations issue is not the only issue to be resolved in this action. If any of the Defendants are liable to Mr. Orr under the agreement, the question of the quantum Mr. Orr is owed will arise. Neither the Statement of Defence nor the Defendants' materials on this application suggest that Mr. Orr did not perform the services or incur the expenses for which he claims. The only issue raised is whether or not the $40,000 payment he received from the Bigstone Cree First Nation fully discharged the obligations of the Defendants under the 1991 agreement, if there are any. There is no issue as to whether or not the $40,000 payment was made or, so far as the materials indicate, as to the circumstances in which it was made. In my view, the question of its legal effect in the context of the 1991 Agreement is also suitable for determination on a summary trial.

[15] As neither the Statement of Defence nor the materials on this application raise any other issue concerning the calculation of Mr. Orr's entitlement, if he has one, I see no foundation on that basis for objection to a summary trial.

[16] This litigation was commenced more than six years ago. I gather that progress has been slow, not because the parties have neglected this action but because their attention has been diverted to another and related action concerning the limitation of Mr. Orr's right to run for the office of Chief of the Peerless Trout First Nation because he is, in this action, suing that First Nation. That issue was addressed in proceedings in this court and in the Federal Court, the Federal Court of Canada, and the Supreme Court of Canada.

[17] Nevertheless, this action has been outstanding and unresolved for far too long. In my view, the use of the summary trial procedure to attempt to resolve it is, in these circumstances, appropriate.

[18] As I have said, I am of the opinion that the action is suitable for summary trial. That, however, does not bind the judge assigned to hear the summary trial. Under Rule 7.9(2)(b) and (c), that judge may decide after they have heard the summary trial, that they are not able to make findings of fact necessary to decide the issues of fact or law, or that it would for some other reason be unjust to decide the issues on the basis of a summary trial.

[19] In my view, given the nature of the issues raised, the positions taken by the parties in the pleadings, the materials filed on this objection application, and the fact that the action is more than six years old, the situation is one where the use of the summary trial procedure is appropriate.

[20] The Defendants' Rule 7.8(1) objection is dismissed.

[21] I also dismiss Mr. Orr's application to strike the affidavits' filed by the Defendants on this objection application. I believe my reasons for doing so were sufficiently stated at the hearing of the application.

[22] Costs of this application will be in the discretion of the judge who hears the summary trial.

Heard on the 20th day of July, 2017.
Dated at the City of Edmonton, Alberta this 21st day of July, 2017.

B.R. Burrows
J.C.Q.B.A.

Appearances:

Mark G. Underhill and Bram Rogachevsky
for the Plaintiff

Daniel MacDermid
for the Defendants