Federal Court of Appeal  Cour d'appel fédérale

Date: 20180726

Docket: A-327-17

Citation: 2018 FCA 141

CORAM: **WEBB J.A.**
NEAR J.A.
LASKIN J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF SASKATCHEWAN AS REPRESENTED BY THE ATTORNEY GENERAL OF SASKATCHEWAN

Appellant

and

CHIEF M. TODD PEIGAN
on behalf of himself and all other members of the Pasqua First Nation and
THE PASQUA FIRST NATION

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Toronto, Ontario, on June 25, 2018.

Judgment delivered at Ottawa, Ontario, on July 26, 2018.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: WEBB J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] Her Majesty the Queen in Right of Saskatchewan (Saskatchewan) appeals an order of the Federal Court (*per* Boswell J.) dated October 19, 2017 (Federal Court Order T-1437-14). The Federal Court granted in part Saskatchewan's motion to strike the claim of the respondents, Chief M. Todd Peigan and the Pasqua First Nation. Saskatchewan asks this Court to strike the rest of these respondents' claims except for one that it concedes discloses a reasonable cause of action. The respondents, Chief M. Todd Peigan and the Pasqua First Nation, cross-appeal from the decision of the Federal Court and ask this Court to restore the paragraphs struck by the Federal Court.

II. Background

[2] The respondents filed a Statement of Claim including various allegations against the appellant, Saskatchewan, arising out of the *Pasqua Band Treaty Land Entitlement Settlement Agreement* (Settlement Agreement) that was signed by Her Majesty the Queen in Right of Canada (Canada), Saskatchewan, and the Pasqua First Nation in 2008.

[3] The Statement of Claim alleged that both Canada and Saskatchewan had violated their obligations under the Settlement Agreement and had failed to fulfill their duty to consult with the respondents before selling certain lands in Saskatchewan in 2014. Saskatchewan commenced a motion to strike the claim, alleging that the Federal Courts do not have jurisdiction to hear the respondents' claims. This motion was successful in part, and the decision was confirmed by this

Court on appeal (*Canada v. Peigan*, 2016 FCA 133, [2017] 3 F.C.R. 3 (*Peigan 1*)). In that decision, this Court found that the Federal Courts have jurisdiction insofar as a claim is grounded in the Settlement Agreement. This Court held that the Federal Court has jurisdiction under paragraph 17(3)(*b*) of the *Federal Courts Act* (R.S.C., 1985, c. F-7), which gives the Federal Court jurisdiction to "hear and determine":

(*b*) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.	*b*) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.

The parties attorned to the jurisdiction of the Federal Courts in article 20.19 of the Settlement Agreement. Thus the Federal Court of Appeal refused to strike certain claims that are grounded in the Settlement Agreement and allowed the respondents leave to amend other claims.

[4] The respondents filed an Amended Statement of Claim in 2017 and Saskatchewan again filed a motion to strike.

III. Federal Court Order

[5] In its order dated October 19, 2017, the Federal Court allowed the appellant's motion to strike in part. It accepted three categories of claims. First, it found that "insofar as those portions of PFN's [Pasqua First Nation's] Claim ask the Court to interpret and enforce the Settlement Agreement, they should stand as alleged and not be struck". Second, it found that the

respondents' "general allegation that Saskatchewan unreasonably refused the sale of certain lands or failed to give PFN's requests favourable consideration discloses a reasonable cause of action, since this directly engages … the *Settlement Agreement*". Finally, the Federal Court did not strike paragraph 1 of the claim, explaining that:

> While some of the requested declarations extend to matters or raise issues beyond what might be appropriate or necessary in interpreting and enforcing the *Settlement Agreement* …, the nature and extent of any declarations requested by PFN should, in my view, be left to be determined by the trial judge who hears the evidence adduced at trial and who will be best positioned to assess what, if any, discretionary declaratory relief should be granted.
>
> (Order at para. 14)

[6] The Federal Court did not, however, accept the respondents' claims challenging the validity of the *Natural Resources Transfer Agreement, 1930*, Schedule 2 of the *Constitution Act*, 1930, being Item 16 of the Schedule to the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (NRTA), that are substantially the same as those struck by this Court in *Peigan 1*, and that do not directly relate to or require the interpretation or enforcement of the Settlement Agreement. These struck claims are the subject matter of the cross-appeal.

[7] Saskatchewan filed a Notice of Appeal in this Court on October 17, 2017.

IV. Issues

[8] I would characterize the issues on appeal as follows:

1. Did the Federal Court err in failing to construe the Amended Statement of Claim according to the jurisdictional limit imposed by this Court in *Peigan 1*?

2. Is the respondents' claim an abuse of process?

[9] I would characterize the issue on cross-appeal as follows:

1. Did the Federal Court err in striking the portions of the Amended Statement of Claim that form the basis of the cross-appeal?

V. Standard of Review

[10] Questions of law are reviewable on a standard of correctness while questions of mixed fact and law are reviewable on a standard of palpable and overriding error. (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 64, [2017] 1 F.C.R. 331). The interpretation of the jurisdictional limit imposed by this Court in *Peigan 1* is a question of law and so the applicable standard of review is correctness.

VI. Analysis

A. *Did the Federal Court err in failing to construe the Amended Statement of Claim according to the jurisdictional limit imposed by this Court in Peigan 1?*

[11] The starting point in this matter is the finding by the majority of this Court in *Peigan 1* that, with respect to Saskatchewan, the Federal Court's jurisdiction is founded upon and limited to the interpretation and implementation of the terms of the Settlement Agreement:

> [90] We would therefore strike paragraphs 41 to 56 of the Statement of Claim, with leave to amend them to clarify how the grant of mineral rights to third parties in connection with the Legacy Mining Project constitutes a breach of the *PFN Settlement Agreement*. We would also strike paragraph 1, with leave to amend, as the claims in the prayer for relief that are within the Federal Court's jurisdiction are intertwined with those that are not. The easiest course is therefore to strike the paragraph and provide the PFN with the opportunity to amend the prayer for relief so it seeks the remedies flowing from the interpretation and enforcement of the *PFN Settlement Agreement* against Saskatchewan and Canada and seeks the balance of the remedies against only Canada.
>
> (*Peigan 1* at para. 90)

Given that the Federal Court's jurisdiction is founded upon and limited to the interpretation and implementation of the terms of the agreement between the parties, it is necessary to examine whether the pleadings have a sufficient nexus to the agreement in order to found jurisdiction and proceed in the Federal Court.

[12] The honour of the Crown as it relates to this agreement requires that the terms of the agreement be implemented in a fair and forthright manner (*Peigan 1* at para. 64; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 (*Wewaykum*)). Indeed, the basis upon which the majority in *Peigan 1* established jurisdiction in the Federal Court was a finding that the clear terms of the agreement and the honour of the Crown required that Saskatchewan live up to the specific term that disputes related to the agreement would be dealt with by the Federal Court. This does not mean that the terms of the agreement are to be ignored or require that important aspects of the agreement be re-written or interpreted in a manner both at odds with

the terms of the agreement and as expressly contemplated by the parties to the agreement. The respondents are, in effect, asking the Court to re-write the agreement through a series of constitutionally based declarations. The agreement is not a treaty nor was it meant to determine all aspects of treaty land entitlements that may be outstanding as between the Crown and the respondents. Rather, it is an important tool in settling these outstanding treaty land entitlements in an orderly and fair way as agreed by the parties to the agreement.

[13] Counsel for the respondents repeated several times that the Crown cannot contract out of constitutional and treaty rights. This is not disputed. However, in my view it follows that one cannot later "contract in" constitutional and treaty rights arguments into every term of a modern agreement between the parties even where the parties agreed on specific terms to address outstanding issues, in a way that fundamentally changes the terms of the agreement retrospectively. Rather, the honour of the Crown requires that the Crown adhere to and implement the terms of the agreement in an open and fair manner (*Wewaykum*). In addition, the terms of the agreement are the foundation of Federal Court jurisdiction. Straying beyond the terms of the agreement into an assertion of constitutional obligations largely untethered to the agreement also strays beyond the jurisdiction of the Federal Court as established in *Peigan 1* with respect to Saskatchewan. Before this Court, counsel for the respondents submitted that they were putting forward a "novel" case. Asserting a novel position does not make the matter free from jurisdictional confines or the requirements of proper pleadings.

[14] It is also important to note that *Peigan 1* struck paragraph 1 of the first Statement of Claim in its entirety with leave to amend given the limits of Federal Court jurisdiction.

[15] I turn now to the Amended Statement of Claim.

B. *Paragraph 1 of the Amended Statement of Claim*

[16] In my view, the Federal Court erred in law by not confining the claims in the Amended Statement of Claim according to the jurisdictional limit imposed by this Court in *Peigan 1*.

[17] Paragraph 1 was struck in its entirety with leave to amend in *Peigan 1*. It follows that those subparagraphs not amended remain struck. Thus, subparagraphs 1 a), c), o), p), r), u), and y) fall into this category and remain struck as against Saskatchewan as determined in *Peigan 1* at paragraph 90 as these unamended subparagraphs clearly do not distinguish between the remedies that are within the Federal Court's jurisdiction and those that are not as required by the Court in *Peigan 1*.

[18] Other claims found in paragraph 1 seek declarations based on the assertion of constitutional and fiduciary duties related to the NRTA and treaty land entitlements thereunder. Such assertions are outside the parameters of jurisdiction set out in *Peigan 1*. Subparagraphs 1 e), f), h), j), and k) fall into this category and should be struck in their entirety as against Saskatchewan. Subparagraph g) may remain though the words after "and/or consistent with the obligations…" should be struck. Subparagraphs 1 v) and w) may be retained though the words "and breach of fiduciary duty to the Pasqua First Nation" should be struck in both of these paragraphs.

[19] Other subparagraphs in paragraph 1 are simply unrelated to the agreement. These include subparagraphs 1 m), q), t), and x). These should be struck in their entirety as against Saskatchewan.

C. *Paragraphs 2 and following*

[20] The Federal Court, in its decision, struck paragraphs 39 to 48, 14 and 15, and 77 to 84. I agree with the Federal Court and its reasons provided for striking these paragraphs. I would also strike paragraphs 75 and 76 as these are bare assertions with no factual basis. Finally, I would strike the words "and breach of Treaty, fiduciary" and "constitutional" in paragraph 85 but leave the remainder of the paragraph unaltered.

[21] Finally, in my view, the Federal Court erred in law by not keeping the Amended Statement of Claim within the jurisdictional limit imposed by this Court in *Peigan 1*. Given this finding, it is not necessary to deal with issue 2, namely, whether there is an abuse of process.

VII. Cross-Appeal

[22] The respondents also filed a cross-appeal alleging that the Federal Court erred in striking claims (1) questioning the validity of the NRTA itself, (2) alleging that the grant of leases breached the Settlement Agreement, and (3) making a series of other broad allegations. They largely argue, however, that these claims are simply relevant and pertinent background information and do not articulate how the Federal Court might have erred in law in striking them.

In my view, the Federal Court did not err in striking these claims for the reasons provided and with which I agree. I would dismiss the cross-appeal.

VIII. Conclusion

[23] I would allow the appeal, in part, in accordance with these reasons and dismiss the cross appeal with each party to bear its own costs.

"D G. Near"
J.A.

“I agree
Wyman W. Webb J.A.”

“I agree
J.B. Laskin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE KEITH M. BOSWELL DATED OCTOBER 19, 2017, DOCKET NUMBER T-1437-14

DOCKET:	A-327-17
STYLE OF CAUSE:	HMTQ IN RIGHT OF SASKATCHEWAN AS REPRESENTED BY THE AG OF SASKATCHEWAN v. CHIEF M. TODD PEIGAN on behalf of himself and all other members of the Pasqua First Nation and THE PASQUA FIRST NATION et al.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 25, 2018
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	WEBB J.A. LASKIN J.A.
DATED:	JULY 26, 2018

APPEARANCES:

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