Supreme Court of British Columbia
Peters v. British Columbia
Date: 1983-01-31

J. Woodward, for petitioners.

J. J. Arvay, for the Crown and Minister of Lands, Parks and Housing.

(Vancouver No. A822865)

[1] 31st January 1983. ESSON J.:— The respondents apply to strike out the petition under R. 19(24)(*a*) on the ground that it discloses no reasonable claim. The petition, which is brought under the Judicial Review Procedure Act, R.S.B.C. 1979, c. 209, seeks certain declarations designed to prevent the respondent minister from granting a licence of certain Crown lands to the respondents Dunsmore.

The petition is based upon the following sections of the Constitution Act, 1982.

> PART II
>
> RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA
>
> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed …
>
> PART IV
>
> CONSTITUTIONAL CONFERENCE
>
> 37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.
>
> (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item …
>
> PART VII
>
> GENERAL
>
> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[2] The petitioners are members of the Ohiaht Indian Band living on its reserves in the Barkley Sound area on the west coast of Vancouver Island. They say that, from time immemorial, an important part of their diet has been clams gathered from a beach on Santa Maria Island, which is a short distance offshore from Vancouver Island, close to one of the band's reserves. The respondents Dunsmore have applied to the minister under the Land Act, R.S.B.C. 1979, c. 214, to grant a licence to use the foreshore of that beach for the purpose of using it as an experimental area for commercial clam production through

artificial feeding. Such use, the petitioners say, would prevent the band members from using the beach as they always have and would interfere with their traditional form of conservation, i.e., never taking so many clams as to deplete the stocks. The right to use the beach in that way is asserted to be an aboriginal right within the meaning of s. 35(1) of the Constitution, which the petitioners expect will be identified and defined by the conference to be held pursuant to s. 37 and thus will, beyond question, then be protected by the Constitution. The minister has given tentative approval to the application and has indicated his intention to grant the licence but has agreed to withhold such grant pending the determination of these proceedings.

[3] The declarations sought are to the effect that the proposed disposition of Crown land prior to the conference would be inconsistent with s. 37 of the Constitution and is therefore ultra vires the province.

[4] The petition and affidavit set out the facts upon which the claim to aboriginal rights is based in much greater detail than is outlined here. The respondents, as they must, concede for the purposes of this motion the truth of those facts but say that, as a matter of law, neither those facts nor any others which the petitioners could conceivably bring forward can establish an aboriginal right.

[5] The argument in support of the application to strike out is put in many different forms but all, I think, are variations of three principal submissions:

1. The law, as stated in cases of binding authority upon this court, is that no aboriginal title or rights can exist in British Columbia.

2. That, as what is sought here is essentially an interim declaration of invalidity pending final resolution of the petitioners' claim at the conference under s. 37, this court has no jurisdiction to grant such a declaration.

3. The conference to be held under s. 37 is not required to come to any conclusion on the subject. Even if it does, that will have no legal force unless and until the Constitution is amended as provided for in s. 52. The declarations sought should therefore be refused on the ground that they can have no legal or practical consequences.

[6] The submission that no aboriginal rights or title can exist in British Columbia is based upon the authority of the decision of the Court of Appeal in the Nishga case: *Calder v. A.G.B.C.*, 74 W.W.R. 481, 13 D.L.R. (3d) 64. All three members of the court who sat on the case concurred in upholding the dismissal of the action at trial on the ground that the

plaintiffs could establish no aboriginal title. The plaintiffs appealed to the Supreme Court of Canada, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145. The Court of Appeal judgments, it is suggested, are binding on this court because there was an equal division on the question amongst the six judges of the Supreme Court who dealt with it. Three of the seven judges held that the plaintiffs had established aboriginal rights; three held that any aboriginal rights of the Nishgas had been extinguished.

[7] The case was not, of course, decided on the question whether the plaintiff had enforceable rights. The majority judgment was that written by the seventh member of the court, Pigeon J., and concurred in by the same three members of the court who held against the plaintiffs on the question of rights. Pigeon J. did not consider that question but held that the action failed because, under the Crown Procedure Act, R.S.B.C. 1960, c. 89 [now the Crown Proceeding Act, R.S.B.C. 1979, c. 86], as it then stood, a fiat was required for such an action and had not been granted. The sole ground of decision was, therefore, that the action was not properly brought. In view of that outcome, the reasons for judgment on the question of the existence of aboriginal rights must be treated as dicta — of persuasive but not binding authority.

[8] In support of the contention that the equal division in the Supreme Court of Canada leaves the judgment of the Court of Appeal as binding authority, the applicants rely on *A.G. v. Dean and Canons of Windsor* (1860), 8 H.L.C. 369, 11 E.R. 472. That case, however, deals with a different situation, viz., one in which an equal number of judges sat in the court of last resort and divided equally as to the outcome of the appeal. The result then is to affirm the judgment of the lower court.

[9] That case would have applied had an even number of judges sat in the Supreme Court of Canada and divided equally on the question of the existence of aboriginal rights. Such outcomes, it may be noted, occurred frequently in the Court of Appeal of this province in the 1920's and 1930's when that court habitually sat with four judges and some examples of such an outcome can be found in the history of the Supreme Court of Canada. But it can arise only where an equal number of judges sit in the highest court to which an appeal is taken in the given case.

[10] The second point taken by the respondents is that what the petitioners seek is an interim declaration and that there is no power in the court to grant such a declaration. Reliance is placed upon: *Shaw v. R. in Right of B.C.*, 40 B.C.L.R. 290, [1982] 6 W.W.R. 718, 140 D.L.R. (3d) 178 (S.C.) (Callaghan J.); *Underhill v. Ministry of Food*, [1950] W.N.

133, [1950] 1 All E.R. 591; *Int. Gen. Elec. Co. of New York v. Customs and Excise Commrs*., [1962] Ch. 784, [1962] 2 All E.R. 398 (C.A.); *MacLean v. Liquor Licence Bd. of Ont*. (1975), 5 O.R. (2d) 580, 51 D.L.R. (3d) 64, affirmed 9 O.R. (2d) 597, 61 D.L.R. (3d) 237 (Div. Ct.).

[11] Those cases hold that, in an action in which a declaration of right is sought against the Crown, no interim declaration can be made. "Interim" in that context means pending a final decision in the action. The petitioner here has not sought such an order but, rather, seeks an order which will be final in the proceeding but will be interim in the sense that it will be effective until a final determination is made by the conference. The respondents may be right in contending that the same principle should apply but that, in itself, is a serious question of general importance upon which I have been referred to no authority clearly in point. It is a question which, by its nature, should be decided only with full knowledge of the facts and after full argument.

[12] Even if the petitioner was seeking interim relief in this proceeding, there are two considerations which might make the line of cases relied on by the respondents inapplicable and which might justify granting such relief.

[13] One is that this proceeding is brought under the Judicial Review Procedure Act, s. 10 of which empowers the court to "make such interim order as it considers appropriate pending the final determination of the application". That section was applied in *Gloucester Properties Ltd. v. R. in Right of B.C*., 20 B.C.L.R. 169, [1980] 6 W.W.R. 30, 110 D.L.R. (3d) 247 (S.C.) (Macfarlane J.). An interim order was made declaring that, until the final determination of the petitioner's application to set aside an order of the land commission, the commission did not have any right or power to hold a public hearing to deal with the same subject matter.

[14] The second consideration is that all of the cases referred to, including *Gloucester Properties*, are ones in which no question arose as to the constitutional validity or enforceability on constitutional grounds of legislation. In each case, the challenge was to a specific step taken by the Crown under admittedly valid legislation. The power to grant interim relief may be wider where the challenge is based on constitutional grounds. In *B.C. Power Corp. v. B.C. Elec. Co*., [1962] S.C.R. 642, 38 W.W.R. 701, 34 D.L.R. (2d) 196 at 274, a receiver was appointed over the assets of a company which had been expropriated under provincial legislation, the validity of which was challenged. Kerwin C.J.C., speaking for the court, said at pp. 644-45:

> … it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a resonable doubt as to whether such legislation is constitutionally valid … the Court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself.

[15] It would not be appropriate on this application to attempt to define the limits of the power to grant interim relief. But it may be that, in principle, a limitation should be placed upon Crown immunity pending the resolution of a challenge to legislation based upon the supreme law of Canada.

[16] The third major argument put forward by the respondents, and the one pressed most strongly, is that the declarations sought by the petitioner should be refused because, even if granted, they would have no practical effect. That argument is based upon the wording of s. 37(2), which requires only that the conference to be convened within one year of April 1982 shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples including the identification and definition of the rights "to be included in the Constitution of Canada". So, it is said, nothing need be done except convene a conference. The conference need not complete its work within any particular time or reach any conclusion. Even if there is a concensus or agreement by the requisite number of first ministers, that would merely be a basis for a possible future amendment of the constitution.

[17] The petitioners put forward a different view of the significance of the conference. They submit, in effect, that the conference must reach a conclusion on aboriginal rights and that any such conclusion, once published, will without more entrench in the constitution those rights identified and defined by it. They find some support for that view in the words of Lord Denning M.R. in *R. v. Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Assn. of Alta*. [1982] 2 All E.R. 118 (C.A.). In dismissing the application by the Indian organizations for declarations that the treaty obligations entered into by the Crown with the Indian people of Canada are still obligations of Her Majesty in right of her government in the United Kingdom, Lord Denning referred to ss. 35 and 37 of what was then the Canada Bill [now the Canada Act, 1982 (Eng.), c. 11], Sched. B. [now The Constitution Act, 1982] and stated his conclusion at p. 129:

> It seems to me that the Canada Bill itself does all that can be done to protect the rights and freedoms of the aboriginal peoples of Canada. It entrenches them as part of the constitution, so that they cannot be diminished or reduced except by the prescribed procedure and by the prescribed majorities. In addition, it provides for a

> conference at the highest level to be held so as to settle exactly what their rights are. That is most important, for they are very ill-defined at the moment.

[18] It is not necessary, at this stage, to decide which view is more nearly correct. Looking only at the words of s. 37, there are obvious difficulties with the petitioner's proposed interpretation. But that section contemplates future political action and so the question as to what will come out of the conference cannot be answered merely by reading it. Even if the petitioners are wrong in their view as to the final effect of a decision by the conference, it does not follow that they have nothing to preserve in the meantime. An order which will preserve the status quo until that point is reached may well have a useful practical effect. It is a matter of discretion whether to grant a declaration which will have no legal effect but may have some practical effect: *Landreville v. R*., [1977] 2 F.C. 726 at 760, 75 D.L.R. (3d) 380 (Collier J.).

[19] If that discretion is to be exercised against the petitioners, that should be done only after a full hearing and in light of all the circumstances, not on a summary application based on the pleadings.

[20] The respondents' submissions as to the defects in the petitioners' case may all ultimately succeed. All that I am called on to decide now, to adopt the language of one of the leading cases on the former O.25 r.4, is whether the petition, as it stands or as it may be amended before trial, discloses a question fit to be tried or whether it is a case "absolutely beyond doubt": *Minnes v. Minnes* (1962), 39 W.W.R. 112, 34 D.L.R. (2d) 497 (B.C.C.A.), per Tysoe J.A. at pp. 122-23.

[21] The issue is novel, arising under a constitutional law which is new and untested. Those are circumstances which mitigate against a summary disposition. It may be that, by the time that this proceeding is tried, some of the uncertainties will have been removed. The possibility of strengthening the basis of claim by amendment is another factor to be considered.

[22] I cannot find that the case is absolutely beyond doubt or that there is no question fit to be tried. The application is therefore dismissed.

Application dismissed.