

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jackman v. Giesbrecht*,  
2016 BCSC 229

Date: 20160216  
Docket: S169675  
Registry: New Westminster

Between:

**Ron Jackman on his own behalf and in his individual capacity as a member of  
the Kwikwetlem First Nation**

Plaintiff

And

**Ronald Giesbrecht in his individual capacity and in his representative capacity  
as Chief of the Kwikwetlem First Nation**

Defendant

Before: The Honourable Mr. Justice Truscott

In Chambers

## Reasons for Judgment

Counsel for Plaintiff: T. Hunter

Counsel for Defendant: M. Underhill

Counsel for Kwikwetlem First Nation (KFN),  
as an intervenor: K. Brooks

Place and Date of Hearing: New Westminster, B.C.  
November 9-10, 2015

Place and Date of Judgment: New Westminster, B.C.  
February 16, 2016

[1] Mr. Underhill, for the defendant, Mr. Giesbrecht, brings application for orders:

1. That the whole of the Amended Notice of Civil Claim be struck as disclosing no reasonable claim.
2. Further, or in the alternative, an order that the whole of the Amended Notice of Civil Claim be struck as constituting an abuse of process.

[2] In his Application Response, Mr. Jackman says he is a student and non-elected member of the KFN, that the defendant Ronald Giesbrecht has been an elected Chief since 2009, that Chief Ronald Giesbrecht was instrumental in his position as Chief up to the year 2013 when he negotiated with the Provincial Government of British Columbia an agreement related to Burke Mountain, that Mr. Jackman did not become aware of that decision having been made until after the agreement was executed by the parties as the agreement was treated as confidential, and no public meeting or duly called assembly of the KFN was held prior to or when the agreement was made.

[3] It is alleged that Mr. Giesbrecht participated in his capacity as a Chief in setting out how the Burke Mountain settlement monies would be spent, without obtaining the majority consent of Band members and Mr. Jackman's private right to vote on the Burke Mountain agreement in accordance with the provisions of the *Indian Act*, R.S.C., 1985, c. I-5 did not occur, nor did his private right to vote occur on how the settlement funds would be used.

[4] It is alleged the Federal Government of Canada was not a party to and did not ratify the agreement made between the KFN and the Province of British Columbia in respect of Burke Mountain.

[5] Mr. Jackman says he found out that Chief Ronald Giesbrecht received 10% of the \$8,000,000 settlement monies on account of his claim that he is responsible for the agreement being made and this was compensation supposedly owed to him.

[6] Mr. Jackman says he became concerned that Chief Giesbrecht may have extinguished the KFN's Aboriginal title in relation to Burke Mountain and so he filed the Amended Notice of Civil Claim, on March 31, 2015 with the original having been filed a day earlier on March 30, 2015. Mr. Jackman also applies for an order giving him leave to file and serve a further Amended Notice of Civil Claim.

[7] The intervener, the KFN, seeks an order that it be granted standing to make submissions on the application of Mr. Giesbrecht to strike out the Amended Notice of Civil Claim. Neither Mr. Hunter, for Mr. Jackman, nor Mr. Underhill, for Mr. Giesbrecht, raises any objection to the intervener status of KFN, as long as their clients do not have to pay costs to the KFN. The Court grants standing to KFN to make submissions to the Court as an intervener.

### **Background facts**

[8] The affidavit of Dale Lessoway for the KFN deposes as follows:

1. He/she is the senior administrative officer of the KFN.
2. The KFN is an Indian Band as defined under the *Indian Act*, whose 85 members are Aboriginal people within the meaning of s. 35 of the *Constitution Act*, 1982 and which is governed by a Chief and Council in accordance with the provisions of the *Indian Act*.
3. Chief Giesbrecht is both the elected Chief of the KFN and its economic development officer.
4. On December 4, 2013 after months of negotiation, the KFN reached a tentative agreement with the Province whereby the Province would pay \$8,000,000 to the KFN in order to obtain some certainty with respect to its obligations of consultation and accommodation of the Aboriginal rights and title asserted by the KFN over lands owned by the Province and which land the Province wished to sell or otherwise dispose (the Benefits Agreement).

5. Council for the KFN held a meeting of the Community Advisory Community on December 19, 2013 to inform them of the terms of the tentative Benefits Agreement and to receive their feedback and input. The Community Advisory Community is a standing committee of the KFN made up of a cross section of the community, including elders, youth and other community members.
6. The Community Advisory Committee is mandated to provide community input to Chief and Council on issues of importance to the Nation. At the December 19, 2013 meeting the Community Advisory Committee reviewed the tentative agreement, and approved its content.
7. Based on this feedback, the Chief and council of the KFN signed the Benefits Agreement which was fully executed by all parties on January 16, 2014.
8. After the execution of the Benefits Agreement, the Chief and council informed the community members of the content of the agreement and the use to which the settlement funds would be put.
9. Mr. Giesbrecht's Employment Agreement is dated for reference as of September 16, 2013. It is an agreement between the KFN as employer and Mr. Giesbrecht as the economic development officer and manager.
10. In that agreement, under the subheading "Compensation and Benefits" in s. 3, the following requirements are set out:
  - 3.1 The Manager shall receive an annual wage of \$80,000.00, which is inclusive of vacation pay and holiday pay, less all statutory and agreed to deductions.
  - 3.2 The Manager shall receive a Bonus Opportunity on Capital projects and business opportunities secured on behalf of Kwikwetlem First Nation for ten percent (10%) of Gross Profit generated from projects the Manager successfully retains.
  - 3.3 The Manager shall be entitled to enroll in any benefits program that the Employer provides to its staff member, the conditions of which will be set by the insurer. This includes full participation in the Employer's pension plan.
  - 3.4 The Manager shall also receive a paid vacation in the amount of four weeks, which may be taken during the first 12 months of employment.

Vacation may not be rolled over from year to year without the written permission of the Band Administrator.

- 3.5 The Manager is entitled to a sick leave benefit of 1.25 days per month. Sick days may not be carried forward from year to year.

11. The Benefits Agreement is dated for reference January 16, 2014. It is between Her Majesty the Queen in right of the Province of British Columbia (the Province) and the KFN as represented by its Chief and Council (the KFN).

12. The agreement opens with the following paragraphs under the heading “Whereas”:

- A. The Province is proposing to dispose of the Lands under the Release of Assets for Economic Generation project and has consulted with Kwikwetlem with respect to the Proposed Disposition.
- B. Kwikwetlem asserts aboriginal rights, including aboriginal title in its traditional territory, which includes areas encompassed by the Lands.
- C. The Province and Kwikwetlem wish to enter into this Agreement to establish certainty with respect to the fulfilment of any obligations that the Province may have to consult and accommodate Kwikwetlem for any Infringements that may arise as a result of the Proposed Disposition or any related statutory approvals on Kwikwetlem’s asserted aboriginal rights, including aboriginal title, whether or not substantiated in law, on the terms and conditions set out in this Agreement.

13. “Proposed Disposition” is defined in the agreement as:

means the sale or disposition of the Lands, including the granting of any interest in the Lands, any future construction, development, maintenance, access, operation or regulation of the Lands or the future disposition of any interest in the Lands by the Province or BCTFA, requests to provide statutory approval for the disposition of the Lands, any related statutory approvals, and all other matters incidental to any of these activities.

14. “Resolution” is defined as:

means a resolution passed by Kwikwetlem at a duly convened meeting of Kwikwetlem Chief and Council.

15. Under the subheading “Certainty” is stated:

- 2.1 In consideration of the payment to be made by the Province under section 3.1 Kwikwetlem acknowledges and agrees that:
- (a) the consultation undertaken by the Province and accommodation set out in this Agreement are acceptable to Kwikwetlem and constitutes full and sufficient consultation and accommodation for all infringement of the aboriginal rights and title asserted by Kwikwetlem, whether or not substantiated in law, that may result from the Proposed Disposition,
  - (b) Kwikwetlem will not challenge or impede, directly or indirectly or otherwise, the Proposed Disposition; and
  - (c) any action taken by Kwikwetlem to frustrate, delay, stop or otherwise impede the Proposed Disposition will cause loss and damage to the Province and the BCTFA which cannot be adequately compensated for by an award of damages and that an Injunction to restrain such action would be the only adequate remedy.,
- 2.2 Kwikwetlem acknowledges that it has entered into this Agreement on its own behalf, and on behalf of its Members.
- ...
- 2.7 This Agreement does not:
- (a) constitute a treaty or land claims agreement within the meaning of sections 25 or 35 of the *Constitution Act, 1982* and is separate and apart from the British Columbia treaty process;
  - (b) abrogate or derogate from the aboriginal rights and aboriginal title of Kwikwetlem, except as expressly contemplated by this Agreement;
  - (c) create, recognize, define, deny, limit or amend any of the rights and responsibilities of the Parties except as contemplated by this Agreement; or
  - (d) limit any position either Party may take in present or future negotiations or any legal proceedings, except as contemplated by this Agreement.
- 2.8 This Agreement is intended to be binding upon the Parties from the time of its signing.
- 2.9 Kwikwetlem agrees to deliver a Resolution to the Province, on or before the execution date of this Agreement, authorizing Kwikwetlem's representative to sign this Agreement.
- 2.9 This Agreement is binding upon the Parties from the time of its signing.

#### PAYMENT

- 3.1 The Province will, within sixty (60) days of executing this Agreement, deliver a payment in the sum of eight million dollars (\$8,000,000.00) to Kwikwetlem by delivering a cheque to Kwikwetlem at its address provided in paragraph 5.13.

NO PREJUDICE AND NO ADMISSIONS

4.2 Nothing in this Agreement constitutes an admission of the existence of aboriginal rights or title in respect of the Proposed Disposition or the Lands or that the Proposed Disposition will result in any unjustified infringement of any aboriginal rights, including aboriginal title that may exist.

ADDITIONAL PROVISIONS

- 5.1 Kwikwetlem warrants and represents to the Province that it:
- (i) has sought and received independent legal advice with respect to the legal nature and effect of this Agreement and that it has the full authority to sign this Agreement;
  - (ii) enters into this Agreement on its own behalf, and on behalf of its Members and
  - (iii) has the legal power, capacity and authority to enter into this Agreement and to carry out its obligations set out in this Agreement.

...

**Amended Notice of Civil Claim**

[9] The Amended Notice of Civil Claim alleges a number of matters that apply only to the KFN and not Mr. Jackman personally. Apart from his claims against Chief Ron Giesbrecht for taking too much compensation for his part in arranging this agreement with the Province, all of the allegations are those that refer to the KFN as a group and not to Mr. Jackman personally.

[10] One of the claims is that the KFN holds Aboriginal rights and title to the whole of the Coquitlam and Pitt River watershed and surrounds, and its core territory, to which it says it has Aboriginal title and throughout which it has Aboriginal rights, is the whole of the Coquitlam River watershed and includes Burke Mountain.

[11] The claim includes recognition of Mr. Giesbrecht in his capacity as Chief of the KFN and alleges that in his capacity as Chief he participated in negotiations and consultations in relation to the KFN Aboriginal title and rights claim to Burke Mountain.

[12] It is acknowledged that on January 16, 2014, Chief Giesbrecht on behalf of the KFN and its band members accepted that \$8,000,000 to be provided by the

Province fully and sufficiently met and discharged the Province and others from all claims of KFN for infringement of its Aboriginal rights or title, as a result of the proposed disposition.

[13] It is alleged that Chief Giesbrecht did not seek community consultation with respect to this intended disposition by the Province of British Columbia and did not have any authority to extinguish Aboriginal title claims held or claimed collectively by the members of the KFN.

[14] Although it is agreed the KFN received \$8,000,000 from the Province of British Columbia under the Benefits Agreement, it is alleged that this was for the practical extinguishment of Aboriginal rights and title in certain parcels of land located on Burke Mountain.

[15] It is alleged the Aboriginal rights and titles are held by the collective members of the KFN.

[16] It is further alleged that Chief Giesbrecht received 10% of the \$8,000,000 which he took for his own use and benefit but was not acting in the best interest of the KFN in doing so, although it appears to be agreed that his compensation as Aboriginal Economic Development Officer was to receive a 10% bonus or commission.

[17] However, it is alleged that this was outside the normal range of compensation for an economic development officer within First Nations and Aboriginal organizations, that he should have known that, and did not consult with the KFN members nor receive permission to personally obtain this bonus of \$800,000.

[18] In addition, it is alleged he did not seek informed consent nor consult with the KFN band members that he was going to sign the Benefits Agreement to extinguish part of their land claim on Burke Mountain, and he acted in a conflict of interest in extinguishing those rights at Burke Mountain, acted in bad faith, and breached his fiduciary duty to the members of the KFN.

### Analysis and decision

[19] Section 35.(1) of the *Constitution Act, 1982* states as follows:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[20] In this Court it has been decided in *Tla'Amin Elders Against Treaty v. British Columbia Treaty Commission*, 2013 BCSC 965 by Mr. Justice Savage (as he then was) that:

[13] The plaintiffs seek to amend the pleadings to raise matters related to their view of the flaws in the treaty process. The test on whether to allow an amendment to pleadings is the same as the test to strike existing pleadings: if it is plain and obvious that a claim raises no reasonable cause of action, and that it is certain to fail, the court should not grant leave to make the proposed amendments: *Dempsey v. Envision Credit Union*, 2006 BCSC 750 at para. 17.

[14] With regard to the amendments as they relate to the Commission, the Commission says that insofar as the amendments rely on the assertion by the plaintiffs of claims to aboriginal rights, the plaintiffs have no standing to raise these issues, relying on the such decisions as *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 115, and *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, at para. 20-31.

[15] The *Delgamuukw* and *Behn* decisions, by which I am bound, say that s. 35 rights are rights belonging to Aboriginal groups and are collective in nature. Such proceedings are representative in nature. In the absence of an agreement authorizing an individual or an organization to represent the aboriginal group, those rights cannot be asserted by individuals or organizations in legal proceedings. In the result, I agree with the Commission that the plaintiffs here have no authority to assert these rights.

[21] Further, in *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227 at para. 30 it was said:

[30] The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature: *Beckman*, at para. 35; Woodward, at p. 5-55. But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights: see e.g. *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517, 55 Admin. L.R. (4th) 236.

[22] As Mr. Justice Parrett of this Court said in the case of *Kiapilanoq v. British Columbia*, 2008 BCSC 54 at para. 25:

[25] In my respectful view, the elected Council representing the Squamish Nation is the proper party with the authority of this defined class of people to conduct a case which is aimed at determining the questions of Aboriginal rights and title. The collective nature of these rights requires an authority from the people who are, in this case, collectively represented by their elected Council.

[23] Chief Giesbrecht as Chief of the KFN owes all his duties, including fiduciary duties, to the Aboriginal group as a whole, and not to any particular individuals. It is for the Aboriginal group as a whole to make any claim for breach of duties by the Chief, including fiduciary duties.

[24] Mr. Jackman has received no authority from the KFN to bring this proceeding and therefore has no standing at law to be seeking relief that could only be for the benefit of the KFN as an Aboriginal group.

[25] The Benefits Agreement executed by the Province and the KFN as of January 16, 2014 does not deal with any established Aboriginal rights of the KFN.

[26] Rather the agreement only deals with any asserted claims by the KFN to Aboriginal rights, including Aboriginal title, whether or not substantiated in law.

[27] This is confirmed in the preamble to the agreement on its face.

[28] Under the subheading of “Certainty” in s. 2(a) the parties again agree that the agreement constitutes full and sufficient consultation and accommodation for all the infringement of the Aboriginal rights and title asserted by the KFN, whether or not substantiated in law.

[29] Section 2.7 confirms that the agreement does not constitute an agreement within s. 25 or 35 of the *Constitution Act, 1982*, and does not abrogate or derogate from the Aboriginal rights to title of KFN, except as expressly contemplated by the agreement.

[30] I agree with counsel for Chief Giesbrecht that by law subsequent to s. 35(1) of the *Constitution Act, 1982*, Aboriginal rights cannot be extinguished and can only be regulated or infringed (para. 28 of *R. v. Van der Peet*, [1996] 2 S.C.R. 507).

[31] In any event a Province is not able to extinguish Aboriginal title as the jurisdiction to do so lies with the Federal Government (*Delgamuukw v. British Columbia*).

[32] Further, in *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257 at para. 97 [*Tsilhqot'in Nation*]:

Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

[33] The Benefits Agreement is not a surrender or extinguishment of Aboriginal title as it cannot be by law. Rather it is at most an infringement of Aboriginal title as the KFN is entitled to agree to, on the authority of the *Tsilhqot'in Nation*.

[34] The *Indian Act*, R.S.C., 1985, c. I-5 covers reserves set apart for the use and benefit of a Band. It does not apply to non-reserve lands such as is involved in this application.

[35] With respect to the compensation paid to Chief Giesbrecht in particular, he was entitled to this compensation by the terms of the Employment Agreement he entered into with KFN as of September 16, 2013. If there was anything improper about the terms of this agreement, it is for the KFN to seek redress and not Mr. Jackman personally.

[36] For all of these reasons, the whole of the Amended Notice of Civil is struck as disclosing no reasonable claim and constitutes an abuse of process as it constitutes a collateral attack on the decision of the council of the KFN and is brought for an improper purpose.

“The Honourable Mr. Justice Truscott”