IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Metlakatla First Nation v. Prince Rupert Port Authority*, 2026 BCSC 152

Date: 20260130
Docket: S245056
Registry: Vancouver

Between:

Metlakatla First Nation, as represented by Robert Nelson, Chief Councilor of Metlakatla First Nation

Plaintiff

And

Prince Rupert Port Authority

Defendant

Before: The Honourable Justice Laurie

Reasons for Judgment

Counsel for the Plaintiff:	D.R. Eyford, K.C.
Counsel for the Defendant:	T.F. Issac J. Enns
Place and Date of Trial/Hearing:	Vancouver, B.C. May 7, 2025
Place and Date of Judgment:	Vancouver, B.C. January 30, 2026

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INTRODUCTION

[1] The plaintiff Metlakatla First Nation ("Metlakatla") filed a notice of civil claim in which it seeks declaratory and prerogative relief as well as damages against the defendant Prince Rupert Port Authority ("PRPA") related to alleged infringements of Metlakatla's Aboriginal rights. The plaintiff alleges that PRPA withheld a material fact while purporting to consult with Metlakatla regarding a project for the construction and operation of a bulk liquids storage facility and jetty on Ridley Island in the Port of Prince Rupert (the "Project"). The Project subsequently received Crown approval to proceed pursuant to federal legislation (the "Crown Approval").

[2] PRPA contends that pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7 [*FCA*] the Federal Court has exclusive jurisdiction to grant the declaratory and prerogative relief sought by the plaintiff. Further, it contends that in substance the plaintiff's claims are a collateral attack on the Crown Approval.

[3] Therefore, PRPA applies for an order, pursuant to Rule 21-8(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] striking the plaintiff's claim on the basis that it does not allege facts that, if true, would establish that this Court has jurisdiction over PRPA in respect of the claim against it. In the alternative, PRPA seeks an order dismissing or permanently staying the claim pursuant to Rule 21-8(1)(b) on the basis that the Court does not have jurisdiction over PRPA in respect of the claim against it.

BACKGROUND

[4] On July 30, 2024, Metlakatla filed a notice of civil claim (the "Claim") against PRPA seeking declaratory relief and an order quashing, setting aside, or alternatively, suspending the effect of the Crown Approval. In addition, it sought damages alleging that PRPA misrepresented aspects of the Project during the consultation process and breached its fiduciary duty to Metlakatla.

[5] On August 20, 2024, PRPA filed the present application to strike the Claim.

[6] On August 29, 2024, the plaintiff filed an amended notice of civil claim (the "Amended Claim"). The Amended Claim no longer sought to quash, set aside or suspend the Crown Approval.

[7] The Amended Claim alleges that:

a) Metlakatla is a community of Aboriginal people and recognized as a band under the *Indian Act*, R.S.C. 1985, c. I-5. Metlakatla's members are "Aboriginal peoples" within the meaning of s. 35(1) of the *Constitution Act*, *1982*. Metlakatla holds unextinguished aboriginal rights, including title, within its traditional territory which includes the lands and waters within the Port of Prince Rupert (Part 1, paras. 11, 13, and 17).

b) PRPA is a federal port authority established by Letters Patent issued under federal legislation. It operates and manages port facilities on lands and navigable waters within the Port of Prince Rupert (Part 1, paras. 14 and 15).

c) There is an inescapable economic component to Metlakatla's aboriginal rights, given that aboriginal title encompasses the right to exclusive use and occupation of land and the right to choose what uses land can be put (Part 1, para. 18).

d) PRPA had knowledge of Metlakatla's *prima facie* case for unextinguished aboriginal rights to that portion of its traditional territory that is under PRPA's administration and control, including Ridley Island. Further, both PRPA and the Government of Canada have acknowledged and affirmed Metlakatla's aboriginal rights in various agreements and protocols (Part 1, paras. 5 and 19).

e) In 2015, PRPA entered into a development agreement with Vopak Development Canada Inc. ("Vopak") in respect of the Project (Part 1, paras. 4, 27-28).

f) PRPA granted Vopak exclusive rights within the Port of Prince Rupert to receive, store, and load certain products for export including liquefied petroleum gas and other products (the "Export Monopoly") (Part 1, para. 4).

g) Beginning in 2018, PRPA purported to consult Metlakatla about the Project. The parties engaged in Project-related consultations which culminated in Metlakatla completing a mutual benefits agreement with Vopak in April 2023 (Part 1, paras. 38-48).

h) PRPA failed to consult with Metlakatla about the Export Monopoly and did not disclose to Metlakatla that it had granted the Export Monopoly before Metlakatla completed the benefits agreement with Vopak. Consequently, PRPA failed to take any steps to assess how the Export Monopoly would potentially affect Metlakatla's aboriginal interests (Part 1, paras. 6, 38-40).

i) In November 2022, the Project received Crown Approval (Part 1, para. 30).

j) In December 2022, PRPA entered into a ground and water lot lease with Vopak covering an area within the Port of Prince Rupert of approximately 272.6 acres (Part 1, para. 31).

k) Metlakatla holds an ownership interest in Trigon Pacific Terminals Limited ("Trigon") which operates a bulk commodities marine terminal on Ridley Island. Trigon has a commercial interest in expanding its operations on Ridley Island to receive, handle, store and load liquified petroleum gas and other bulk liquids (Part 1, para. 20).

l) In September 2023, Trigon requested, but PRPA refused, to allow Trigon to receive, handle, store, and load liquefied petroleum gas from its facility on Ridley Island (Part 1, para. 24).

m) By granting the Export Monopoly, PRPA has lessened the value of Metlakatla's ownership interest in Trigon (Part 1, para. 24).

n) The Export Monopoly also limits Metlakatla's use of its traditional territory within the Port of Prince Rupert and prevents Metlakatla from entering into agreements with other proponents for the range of products that are the subject of the Export Monopoly. Through the Export Monopoly, PRPA has diminished the economic value of Metlakatla's Aboriginal rights (Part 1, paras. 25-26).

o) At all material times, PRPA was aware of Metlakatla's derivative economic rights.

[8] The Amended Claim alleges that:

a) PRPA failed to adequately consult with Metlakatla with respect to the Project (Part 1, paras. 38-41);

b) PRPA breached its fiduciary duty to Metlakatla resulting in loss and damage to Metlakatla (Part 1, paras. 42-46);

c) PRPA negligently misrepresented material facts which Metlakatla reasonably relied upon in agreeing to the terms of the benefits agreement with Vopak, causing Metlakatla to suffer loss and damage (Part 1, paras. 47-56); and

d) By entering into the Export Monopoly, PRPA has been unjustly enriched by the terms of its commercial agreement with Vopak (Part 1, para. 57).

[9] The relief sought in Part 2 of the Amended Claim are:

a) A declaration that Metlakatla possesses a *prima facie* case for unextinguished aboriginal rights within the Port of Prince Rupert;

b) A declaration that the Project unjustifiably infringes Metlakatla's aboriginal rights and the economic rights and benefits closely related to and derivative from the aboriginal rights;

c) A declaration that PRPA has a constitutional duty to consult with Metlakatla in good faith regarding the potential impacts of the Project on Metlakatla's aboriginal and economic rights;

d) A declaration that PRPA breached its constitutional duty to Metlakatla prior to making the Crown Approval by denying Metlakatla meaningful consultation in respect of the Project;

e) An order requiring PRPA to forthwith engage in consultations with Metlakatla to assess, determine, and develop accommodation measures in relation to the potential impacts arising from the Crown Approval;

f) General damages;

g) Restitution for unjust enrichment;

h) An accounting of the profits made and those which will accrue to PRPA as a result of the PRPA's breach of its duties and obligations; and

i) Special and aggravated damages.

DISCUSSION

Does the Federal Court have Exclusive Jurisdiction over Metlakatla's Claims?

Law

[10] By virtue of s. 17 of the *FCA,* the ordinary rule is that provincial superior courts and the Federal Court share concurrent jurisdiction in cases in which relief is claimed against the Federal Crown, unless that provincial court jurisdiction is ousted by express provisions: *Canada (Attorney General) v. TeleZone Inc.,* 2010 SCC 62 at para. 3 [*TeleZone*] at paras. 4–6; *Squamish Nation v. Mathias*, 2023 BCCA 285 [*Mathias*] at para. 50.

[11] Section 18 of the *FCA* provides that the Federal Court has exclusive jurisdiction over the judicial review of decisions by federal boards, commissions, or other tribunals. It provides:

> 18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> …
>
> (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

[12] Thus, the granting of exclusive jurisdiction to the Federal Court is a subtraction from what is otherwise a comprehensive grant of concurrent jurisdiction by s. 17 of the *FCA*: *TeleZone* at para. 5; *Mathias* at para. 50. Put simply, this Court does not have inherent jurisdiction to hear a proceeding where s. 18 of the *FCA* says that the Federal Court has exclusive jurisdiction: *Mathias* at para. 72.

[13] The definition of "federal board, commission or other tribunal" in the *FCA* is sweeping. It includes "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown", with certain exceptions, e.g., decisions of Tax Court judges: *FCA,* s. 2. In determining whether a person or a body is a "federal board, commission or other tribunal", one looks to the source of the person's authority: *Mathias* at para. 54; *Mikisew Cree First Nation v. Canada (Governor General in Council),* 2018 SCC 40 at para. 109. The federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between: *TeleZone* at para. 3.

[14] Section 18 of the *FCA* specifies the remedies available, which include prerogative writs and declaratory and injunctive relief, but does not include an award of damages. Further, pursuant to s. 18(3), these remedies may be obtained only on an application for judicial review. As a result, s. 18 does not preclude an action to be brought in a provincial superior court for damages arising from a decision by a federal tribunal or other authority: *TeleZone*.

[15] Prior to *Telezone*, pursuant to the Federal Court of Appeal's decision in *Canada v. Grenier,* 2005 FCA 348 [*Grenier*]*,* a private law claim regarding a public decision or order by a federal board, commission, or other tribunal was seen as a "collateral attack" on the judicial review process enshrined in s. 18 of the *FCA*. Under *Grenier,* a decision of a federal board, commission, or other tribunal was legally binding until the Federal Court invalidated the decision and thus it could not be "indirectly" challenged through an action for damages until judicial review had been brought: *Grenier* at paras. 34–35.

[16] The Supreme Court of Canada ("SCC") in *TeleZone* rejected the approach in *Grenier,* concluding that provincial superior courts had jurisdiction to determine private law claims for damages in respect of public decisions or orders where the claim does not challenge the legal force and effect of the decision or order. The SCC confirmed that the *FCA* did not oust the jurisdiction of the provincial superior courts to deal with common law and equitable claims: para. 6. The SCC also recognized the importance of access to justice and held that it was not Parliament's intent to create an awkward and duplicative two-court procedure with respect to damages claims that directly or indirectly challenge the validity or lawfulness of federal decisions: paras. 19, 23. As explained by Justice Binnie:

> [27] The question must therefore be asked: What is the practical benefit to a litigant who wants compensation rather than a reversal of a government decision to undergo the Grenier two-court procedure? TeleZone, for example, would acquire no practical benefit from a judicial review application. Its primary complaint is for damages arising from the breach of an alleged tendering contract. It no longer seeks the benefit of the contract (or the PCS licence). It seeks compensation for substantial costs thrown away and lost profits. The Crown does not argue that the tendering contract (if it was made) was ultra vires, or that the alleged breach (if it occurred) was

> mandated by statutory authority. The argument, instead, is that TeleZone's claim constitutes a collateral attack on the ministerial order under the Radiocommunication Act that failed to award it a PCS licence. But in TeleZone's circumstances, judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay.

[17] In *Strickland v. Canada (Attorney General),* 2015 SCC 37*,* the SCC further affirmed that provincial superior courts have jurisdiction to address the legality of actions by federal boards, commissions, and other tribunals, where doing so is a necessary step to determine a claim properly before them: paras. 9, 33.

[18] Even where the issue of unlawfulness of the administrative action is an element of the private cause of action pleaded, this does not render it a collateral attack: *Myers v. Canada,* 2022 BCCA 160 at para. 42; *Greengen Holdings Ltd v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations),* 2018 BCCA 214 at para. 50, *TeleZone* at paras. 66–67. Thus, in *Myers,* where the appellants were not seeking to avoid the legal effect of the tax assessments at issue, but were instead relying on their unlawfulness as a material fact supporting their claims in misfeasance in public office, negligence, and abuse of process, the Court refused to grant a stay: paras. 33–35. While plaintiffs must be content to accept the *legal force and effect* of the governmental decision in order to pursue a private action rather than judicial review, this should be distinguished from the *lawfulness* of the decision: *Myers* at para. 32.

[19] *TeleZone* preserved one aspect of the *Grenier* principle: "[i]f a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held": para. 19. The SCC confirmed a "residual discretion in the inherent jurisdiction of the provincial superior court….to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong": *TeleZone* at para. 78.

[20] The court must therefore consider whether the plaintiff's claims "[allege] the elements of a private cause of action" or whether the "essential character" of those claims mirror an application for judicial review: *Northern Cross (Yukon) Ltd. v. Yukon*

(Energy, Mines and Resources), 2021 YKCA 6 at para. 68. To do so, a judge "must look beyond the words used in the pleading, the facts alleged, and the remedy sought to be satisfied that the claim is not an "artfully pleaded" but thinly disguised attempt to pursue a claim in an inappropriate forum": *Canada (Attorney General) v. Scow,* 2022 BCCA 275 at para. 74. If it is, the claim must be struck: see e.g. *Stewart v. Clark*, 2013 BCCA 359; *Weisenburger v. College of Naturopathic Physicians of British Columbia*, 2024 BCSC 1047.

[21] In *Greengen,* our Court of Appeal considered the collateral attack rule in the context of an alleged misfeasance of public office arising from decisions regarding a water licence and land tenure for a hydro project. The Court stated that a civil action will not be a collateral attack only because it alleges that a government decision is unlawful: para. 32. Based on *TeleZone,* a civil action may constitute a collateral attack when it:

a) Seeks to invalidate or avoid the consequences of the decision; or

b) Fails to plead a valid private law cause of action for damages: *Greengen* at para. 33.

[22] The "plain and obvious" test applies in the context of assessing whether a plaintiff's claim is a collateral attack within the principles of *TeleZone*: *Greengen* at para. 26.

[23] In *TeleZone*, the SCC emphasized that the fundamental issue is whether the claimant has pleaded a reasonable private cause of action for damages. If so, they should generally be allowed to get on with it: para. 78.

Application to this Case

[24] The parties agree that based on the facts pleaded in the Amended Claim, PRPA is a "federal board, commission or other tribunal" as defined in s. 2 of the *FCA*.

[25] The primary issue here is whether the Court's jurisdiction over the subject matter of the litigation is ousted by s.18 of the *FCA*. As the Supreme Court stated in *TeleZone*, the issue turns on whether Metlakatla has pleaded a reasonable private cause of action for damages.

[26] PRPA argues that at its core, the essence of Metlakatla's claim is a collateral attack on the Crown Approval with only a thin pretence to a private wrong. While it acknowledges that the Amended Claim no longer seeks to reverse, set aside, or suspend the Crown Approval, it maintains that the Federal Court has exclusive jurisdiction over the matters raised in Metlakatla's claim because Metlakatla seeks various declaratory and prerogative relief against the PRPA in its capacity as a "federal board, commission or other tribunal". PRPA contends that the declaratory relief sought against PRPA can only be obtained on an application for judicial review under s.18.1 of the *FCA*.

[27] For the reasons that follow, I do not agree with the PRPA *except* with respect to the order sought by Metlakatla in Part 2, para. 5 of the Amended Claim requiring PRPA to engage in consultations with Metlakatla to assess, determine, and develop accommodation measures regarding the potential impacts of the Crown Approval to Metlakatla's aboriginal and economic rights. In oral submissions, Metlakatla did not attempt to justify this order. Instead, it submits that the order could be struck from the relief sought pursuant to Rule 9-5 without impacting the entire claim.

[28] As Justice Fenlon (then of this Court) held in *Matsqui First Nation v. Canada (Attorney General)*, 2012 BCSC 492 at paras. 16-18 with respect to a similar order sought, this is an order for *mandamus* directing the PRPA to take future action which falls within the exclusive jurisdiction of the Federal Court. Therefore, as in *Matsqui*, I would strike Part 2, para. 5 of the Amended Claim.

[29] Turning to the remainder of Metlakatla's claim, in my view, its essential character is an action for damages. The Amended Claim does not seek to invalidate or avoid the consequences of the Crown Approval. It pleads the implications of PRPA's alleged conduct in not disclosing the existence of the Export Monopoly to

Metlakatla and it seeks compensation for alleged losses incurred as a result. In this connection, Metlakatla seeks an accounting to determine the extent of its losses.

[30] I agree with Metlakatla that its claimed losses are directed at PRPA's decision-making in respect of Metlakatla itself. A judicial review would not address Metlakatla's claimed losses. Although Metlakatla's claim raises public law issues, these are incidental to Metlakatla's claim for damages. Further, a civil action does not constitute a collateral attack only because it alleges that a government decision is unlawful: *Greengen* at para. 50.

[31] Metlakatla raises the following causes of action: breach of fiduciary duty, breach of duty to consult, negligent misrepresentation and unjust enrichment. Where multiple causes of action are pleaded, it is necessary to consider the fundamental nature of each cause of action. That is, whether the plaintiff properly pleaded material facts to support each cause of action, or whether they are "thinly veiled attempts" to avoid the effects of the underlying governmental decision: *Mowi Canada West Inc v. Canada (Attorney General),* 2025 BCSC 634 at para. 137.

[32] I consider each of Metlakatla's causes of action below.

Breach of Fiduciary Duty

[33] A fiduciary duty will not arise in every circumstance involving a First Nation. Rather, a fiduciary duty may arise in two situations: *Manitoba Métis Federation Inc. v. Canada (AG*), 2013 SCC 14 at paras. 49–50; *Ontario (Attorney General) v. Restoule,* 2024 SCC 27 at paras. 228–234 [*Restoule*]. First, it may arise as a result of the Crown assuming discretionary control over specific Aboriginal interests: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 18; *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 83. The duty arises if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest: *Wewaykum* at paras. 79–83; *Haida Nation* at para. 18; *Manitoba Métis Federation Inc.* at para. 51. This has been referred to as a *sui generis* fiduciary duty: *Restoule* at para. 234.

[34] Second, a fiduciary duty may arise as a matter of private law. This requires the following conditions to be met: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control: *Manitoba Métis Federation Inc.* at para. 60, citing *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 36. This has been referred to as an *ad hoc* fiduciary duty: *Restoule* at para. 231.

[35] Case authorities have recognized that equitable damages are an available remedy in favour of a First Nation for breach of fiduciary duty: see for example *Southwind v. Canada,* 2021 SCC 28; *Whitefish Lake Band of Indians v. Canada (Attorney General),* 2007 ONCA 744; *Beardy's & Okemasis Band #96 and #97 v. Her Majesty the Queen in Right of Canada*, 2016 SCTC 15; *Huu-ay-aht First Nations v. Her Majesty the Queen in Right of Canada*, 2016 SCTC 14.

[36] PRPA argues that both categories of fiduciary duty require an undertaking by the Crown and no such undertaking has been pleaded in the Amended Claim, therefore Metlakatla has not properly pleaded material facts in support of this cause of action.

[37] In my view, the Amended Claim sufficiently pleads a cause of action based on a breach of fiduciary duty. The pleadings include:

a) that PRPA exercises discretionary control over a specific and cognizable interest being Metlakatla's unextinguished claim to aboriginal rights and title within its traditional territory (para. 42);

b) that Metlakatla's aboriginal interests stood to be adversely affected by PRPA's exercise of discretion and control over lands and waters within Metlakatla's traditional territory (para. 43); and

c) that Metlakatla was subject to a peculiar vulnerability to the exercise of PRPA's discretion or power (para. 44).

[38] In my view, implicit in the pleading that PRPA assumed and exercised discretion, control, and power over Metlakatla's aboriginal interests is the Crown's undertaking to do so. Whether the evidence ultimately establishes the existence of such undertaking is not an issue at this stage of the proceeding. Further, the availability of a defence, such as an absence of undertaking, in my view, does not inform the present jurisdictional issue.

[39] For the purpose of the application before me, assuming the facts pleaded in the Amended Claim are true, it is not plain and obvious that the plaintiff's claim of breach of fiduciary duty constitutes a collateral attack against the Crown Approval.

Breach of Duty to Consult

[40] Damages are an available remedy for a breach of duty to consult: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 56. A duty to consult arises from the honour of the Crown in cases of asserted aboriginal rights: *Haida Nation*.

[41] The Amended Claim pleads that beginning in 2018, PRPA purported to consult with Metlakatla regarding the Project. Further, Metlakatla was entitled to the deepest possible level of consultation in respect of the Project given PRPA's exercise of discretionary control over the lands that are within Metlakatla's traditional territory.

[42] The Amended Claim also pleads that the consultation by PRPA was inadequate and/or defective because PRPA did not inform Metlakatla that it had granted the Export Monopoly. Therefore, PRPA failed to take any steps to assess how that arrangement potentially affects Metlakatla's aboriginal interests.

[43] In my view, the Amended Claim pleads material facts to support a cause of action based on a breach of duty to consult. Assuming the facts in the pleadings are

true, it is not plain and obvious that the plaintiff's claim based on a breach of duty to consult constitutes a collateral attack on the Crown Approval.

Negligent Misrepresentation

[44] Negligent misrepresentation is a specific subset of negligence and is comprised of the same elements required in a negligence claim. Both torts require a plaintiff to establish that they are owed a private law duty of care: *BC1178980 v. British Columbia*, 2023 BCSC 1641 at para. 26.

[45] However, in cases of negligent misrepresentation, a duty of care stems from a representation that the defendant makes to the plaintiff that the plaintiff relies on. In *Queen v. Cognos Inc.,* [1993] 1 SCR 87, 1993 CanLII 146 (SCC), the Supreme Court lists the five general requirements at 110:

a) there must be a duty of care based on a "special relationship" between the representor and the representee;

b) the representation in question must be untrue, inaccurate, or misleading;

c) the representor must have acted negligently in making said misrepresentation;

d) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

e) the reliance must have been detrimental to the representee in the sense that damages resulted.

[46] In the context of a motion to strike, courts have found that determining whether the plaintiff relied on a representation depends on the circumstances of the case at hand, and, as a result, it may be "premature to foreclose the consideration of this issue…beyond the pleading stage": *Mowi* at para. 238, citing *Menegon v. Philip Services Corp.* (2003), 31 B.L.R. (3d) 29, 2003 CanLII 36468 (ON CA) at para. 14.

[47] PRPA argues that Metlakatla's claim of negligent representation is an improper shareholder complaint. Relying on *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.,* 2018 SCC 55, PRPA asserts that Metlakatla, as a shareholder of Trigon, is barred from seeking damages for faults committed against Trigon. It submits that Trigon has initiated litigation against PRPA in respect of the same or similar facts pleaded in the Amended Claim and it would be unjust to permit a shareholder of Trigon to advance a claim for its losses as a shareholder. PRPA also submits that Metlakatla is not a direct shareholder of Trigon and therefore has no standing to bring this claim. Further, based on the pleadings, Metlakatla did not have an ownership interest in Trigon when the Export Monopoly was granted in 2015.

[48] In my view, PRPA mischaracterizes or narrowly construes Metlakatla's claim. Fundamentally, Metlakatla's claim alleges that PRPA failed to disclose a material fact regarding an agreement that was going to impact the way that lands within Metlakatla's traditional territory were going to be administered. This resulted in economic loss to Metlakatla including a diminishment of the economic value of its aboriginal rights.

[49] The Amended Claim pleads that while purporting to engage in a process of consultation and accommodation with Metlakatla with respect to the Project, PRPA failed to disclose the existence of the Export Monopoly. Further, as part of the Project-related consultation process, Metlakatla engaged in negotiations with Vopak which culminated in a mutual benefits agreement in which Metlakatla supported the Project and relinquished any present or future claim against Vopak for any infringement on Metlakatla's aboriginal rights. Throughout this process, Metlakatla was not informed of the Export Monopoly.

[50] The Amended Claim pleads that the Export Monopoly limits Metlakatla's use of its traditional territory within the Port of Prince Rupert and prevents Metlakatla from entering into agreements with other proponents for the range of products that are the subject of the Export Monopoly.

[51] In my view, Metlakatla has pleaded material facts to support a claim of negligent representation. To the extent that PRPA asserts lack of clarity regarding aspects of Metlakatla's claim, this could be addressed by way of a request for particulars. Further, the availability of a defence of improper shareholder complaint on the merits of the claim does not inform the jurisdictional issue before me.

[52] For the purpose of the present application, assuming the facts pleaded are true, it is not plain and obvious that Metlakatla's claim for damages based on negligent misrepresentation is a collateral attack on the Crown Approval.

Unjust Enrichment

[53] The Amended Claim pleads that by entering into the Export Monopoly: PRPA has been unjustly enriched by the terms of the commercial agreement with Vopak; the enrichment has caused Metlakatla a corresponding detriment; and there is no juristic reason for PRPA's enrichment.

[54] PRPA essentially raises the same arguments with respect to Metlakatla's claims for negligent misrepresentation and unjust enrichment. As such, the above discussion also applies to this section. Reading the pleadings as a whole, in my view, the plaintiff has pleaded sufficient material facts to support a cause of action for unjust enrichment.

[55] For the purpose of the application before me, assuming the facts pleaded are true, it is not plain and obvious that Metlakatla's claim for unjust enrichment is a collateral attack on the Crown Approval.

Declaratory Relief Sought by the Plaintiff

[56] PRPA argues that the essential character of Metlakatla's claim is directed at the legality of PRPA's decision to issue the Crown Approval in the exercise of its statutory powers and obligations, therefore it mirrors an application for judicial review. Further, it contends that the declaratory relief sought by Metlakatla is only available on a judicial review application.

[57] PRPA also submits that the effect of declaratory relief would be to prejudice or otherwise frustrate the Crown Approval. It submits that although Metlakatla has removed the specific request for an order quashing the Crown Approval, as a public and statutory body, PRPA would be duty-bound to implement and abide by declarations that it breached its constitutional duty to consult.

[58] In my view, PRPA's argument fails to distinguish between a challenge to the lawfulness of a government decision, and a challenge to its legal force and effect, in the manner discussed by Fenlon J.A. in *Myers*. Her comments below apply equally to PRPA's position:

> [32] In my respectful view, the judge misread *TeleZone* because she failed to distinguish between a challenge to the lawfulness of a government decision, and a challenge to its legal force and effect. The distinction is a critical one, but is easily missed because of imprecise terminology in the jurisprudence. Judges use "validity of a decision" to refer to both the lawfulness of decisions and the legal force of decisions—two distinct concepts. An example may assist. If a judge makes an order which, on appeal, is subsequently determined to be based on a legal error—in plain speech, to be "wrong"—the order nonetheless has legal force and effect from the moment it is made and must be obeyed unless and until it is challenged in the correct forum and set aside. The order in this example is unlawful—wrong—from the moment it is made, but it nonetheless is valid, having legal force and effect, until it is set aside on appeal.
>
> [33] When *TeleZone* speaks of a party being content to "let the decision stand", it refers to a party who accepts the legal force of the decision in the sense that they accept that they are bound to abide by the decision and *do not seek in the provincial superior court to overturn the decision or nullify its effects*. But *TeleZone* does not say that the party may not, as part of a properly framed civil cause of action, seek to prove the unlawfulness of that federal decision as a material fact supporting their claim for damages.
>
> [Emphasis in original.]

[59] The Amended Claim does not seek the reversal of the Crown Approval, rather it seeks compensation for losses. To the extent that it alleges unlawful conduct by PRPA or unlawfulness of the Crown Approval, it does so as a material fact supporting Metlakatla's claim for damages.

[60] Nor do I agree with PRPA's contention that the declaratory relief sought by Metlakatla is only available on an application for judicial review. In *Matsqui*, this

Court concluded that it had jurisdiction over the plaintiff's claim which sought declaratory relief in respect of the plaintiff's aboriginal right to fish, as well as damages.

[61] In *Manuge v. Canada*, 2010 SCC 67, [2010] 3 S.C.R. 672, where the plaintiff brought a class action in Federal Court seeking constitutional remedies, declaratory relief, and damages for alleged breaches of s.15(1) of the *Canadian Charter of Rights and Freedoms* related to the provision of disability benefits, the SCC, in applying the principles from *TeleZone,* concluded that the action need not be stayed in favour of an application for judicial review. The SCC stated that the question is not just whether some aspects of the plaintiff's pleadings could be addressed under sections 18 and 18.1 of the *FCA*, but what, in their essential character, the claims are for: *Manuge* at para. 19.

[62] Further, it appears that the declaratory relief that Metlakatla seeks, which includes a finding that the Project unjustifiably infringes Metlakatla's aboriginal rights within the Port of Prince Rupert, would first require a finding that Metlakatla possesses those aboriginal rights: see for example *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1990 CanLII 104 (SCC).

[63] A declaration of aboriginal rights or title cannot be obtained by way of a judicial review. As the SCC explained in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54:

> [84] The Ktunaxa's petition asked the chambers judge to issue a declaration that Qat'muk is sacred to the Ktunaxa and that permanent construction is banned from that site. In effect, they ask the courts, in the guise of judicial review of an administrative decision, to pronounce on the validity of their claim to a sacred site and associated spiritual practices. This declaration cannot be made by a court sitting in judicial review of an administrative decision to approve a development. In judicial proceedings, such a declaration can only be made after a trial of the issue and with the benefit of pleadings, discovery, evidence and submissions. Aboriginal rights must be proven by tested evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation. To permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes. Aboriginal rights claims require that proper evidence be marshalled to meet specific legal tests in the context of a trial: *R. v. Van der Peet*, 1996 CanLII

> 216 (SCC), [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, at paras. 109 and 143; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 26; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 26.
>
> [85] Without specifically delegated authority, administrative decision makers cannot themselves pronounce upon the existence or scope of Aboriginal rights, although they may be called upon to assess the prima facie strength of unproven Aboriginal claims and the adverse impact of proposed government actions on those claims in order to determine the depth of consultation required. Indeed, in this case, the duty to consult arises regarding rights that remain unproven: *Haida Nation*, at para. 37.

[64] In addition, a declaration that Metlakatla possesses those aboriginal rights in the Port of Prince Rupert is not a declaration to be sought against the PRPA as a federal agency, but against the Crown, as it is the Crown's radical or underlying title that is burdened by the pre-existing legal rights of Aboriginal people based on their use and occupation of the land prior to European arrival: *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 at para. 12; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 379–82; 1984 CanLII 25 (SCC), (concurring opinion of Justice Dickson (later Chief Justice).

[65] Metlakatla has not added the provincial or federal Crown as a defendant. This may be the subject of future applications. It does not, however, in my view, alter the essential character of its claim.

[66] For the purposes of this application, which is focused on the jurisdictional issue, given what I have found to be the essential character of Metlakatla's claim, this is not a case in which I would exercise the Court's discretion to stay the action.

[67] The plaintiff has pleaded a reasonable cause of action for damages. As the Court in *TeleZone* stated, the plaintiff should be allowed to get on with it.

CONCLUSION

[68] In summary:

a) PRPA's application is dismissed with the following exception: Part 2, para. 5 of the Amended Claim will be struck.

b) PRPA may file and serve a response to the Amended Claim within 21 days following final determination of this application, including appeals.

"Laurie J."