Federal Court Cour fédérale

Date: 20260213

Docket: T-605-16

Toronto, Ontario, February 13, 2026

PRESENT: Mr. Associate Judge Michael D. Crinson

BETWEEN:

PASQUA FIRST NATION

Plaintiff

and

**WATER SECURITY AGENCY,
THE GOVERNMENT OF SASKATCHEWAN AND
HIS MAJESTY THE KING AS REPRESENTED BY
THE ATTORNEY GENERAL OF CANADA**

Defendants

ORDER

[1] A series of events relating to two parcels of land adjacent to Echo Lake (the "Echo Lake Lands") underlie the dispute giving rise to the Amended Statement of Claim (the "Claim") in this proceeding. The Claim seeks relief declaring each of Her Majesty the Queen in Right of Canada, now His Majesty the King ("Canada"), the Government of Saskatchewan ("Saskatchewan") and the Water Security Agency ("WSA") breached obligations they owed to the Plaintiff, Pasqua First Nation ("PFN").

[2] Saskatchewan has brought a motion to strike the Claim in whole or in part, without leave to amend pursuant to Rules 208 and 221 of the *Federal Courts Rules* SOR/98-106 (the "Rules"). Similarly, WSA has brought a motion to strike the Claim in whole or in part as against it on largely the same grounds as Saskatchewan with an added allegation that the Claim is moot and discretion should not be exercised to hear that Claim. The third Defendant, Canada, has not brought a motion and seeks no specific order other than asking that costs not be awarded against it on the motion.

[3] In the context of these motions to strike, those facts in the Claim capable of being proved shall be presumed to be true for the purpose of this motion to strike. The following pleaded facts explain the context of two agreements, the Framework Agreement and the Settlement Agreement, which are central in the context of this proceeding.

[4] PFN and Canada entered into Treaty No. 4 ("Treaty 4") in 1874. Treaty 4 promised PFN would receive a certain quantum of land. PFN did not receive its entitlement such that there was a shortfall. In September 1992, twenty-two Indian bands in Saskatchewan, including PFN, entered into a Framework Agreement with Canada and Saskatchewan for the purpose of resolving outstanding treaty land entitlement. Canada and PFN entered into negotiation in 2005 as PFN was seeking compensation for the acreage it should have received under Treaty 4. Those negotiations led to the Settlement Agreement in 2008. The Framework Agreement and the Settlement Agreement will be collectively referred to as Treaty Land Entitlement Agreements or TLE Agreements.

[5] Some lands bordering Echo Lake (the "Echo Lake Lands") were owned by Canada and used by the WSA for operating a water control structure. In 2014, the WSA and Canada entered into an agreement which transferred ownership of the Echo Lake Lands to the WSA in 2015. Shortly thereafter, Saskatchewan notified PFN that a third party, Abaco Energy Services Ltd. ("Abaco") had made an offer for the sale to it of the Echo Lake Lands. The proposed sale of these lands to Abaco ultimately fell through due to the risk of flooding. PFN had throughout objected to the sale of the Echo Lake Lands as PFN was interested in acquiring that land pursuant to the Settlement Agreement. The WSA rejected the offer to purchase from PFN. It is this refusal to sell the Echo Lake Lands that is at the centre of this proceeding.

I. The Issues on these Motions

[6] The issues on these motions are whether any paragraphs of the Claim should be struck on the basis that:

1. the allegations of a breach of constitutional and fiduciary obligations owed by Saskatchewan and WSA to PFN are beyond this Court's jurisdiction;

2. the Claim discloses no reasonable cause of action with respect to contractual claims;

3. the Claim is an abuse of process in light of prior and parallel proceedings; and

4. the issues in the Claim are moot as against the WSA and this Court should not exercise its discretion to hear that Claim.

II. Jurisdiction Over Constitutional and Fiduciary Obligations

[7] PFN took the position that this Court has the jurisdiction over alleged breaches of the TLE Agreements. PFN admitted the Federal Court does not have jurisdiction over alleged breaches of constitutional, fiduciary and honourable duties and obligations. This admission is consistent with the finding of the Court in *Ochapowace v. Canada*, 2019 FC 1288 at para. 20. Accordingly, the following paragraphs alleging breach of constitutional and fiduciary obligations shall be struck: paragraphs 1(c), 1(d), 1(e), 1(g), 29, 58, 61, 62, 63, 64 and 65.

III. No Reasonable Cause of Action

[8] Both parties acknowledge and rely upon *R v. Imperial Tobacco Canada*, 2011 SCC 42 at para. 17, for the proposition that "A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action". This statement was made in the context of a motion to strike for disclosing no reasonable cause of action. The approach to a motion to strike on the basis that it discloses no reasonable cause of action is as follows:

> Assuming the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discuses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgement seat".
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> *Hunt v T&N plc*, [1990] 2 SCR 959 at para 36

[9] The Supreme Court of Canada recently confirmed the purpose and application for any motion to strike:

> [26] There is no dispute on the proper test to be applied on a motion to strike in this context. A court seized of a motion to strike assumes the allegations of fact set forth in the application to be true and an application for judicial review will be struck where it is bereft of any possibility of success (*JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557, at para. 47). It is understood to be a high threshold and will only be granted in the "clearest of cases" (*Ghazi v. Canada (National Revenue)*, 2019 FC 860, 70 Admin L.R. (6th) 216, at para. 10)
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> *Iris Technologies Inc. v. Canada*, 2024 SCC 24 at para. 26

[10] A motion to strike a pleading is not a place to deny a party the opportunity to have their case heard on the merits, assuming the pleadings have some merit. There may be other summary proceedings, such as a summary trial or summary judgment, available to resolve proceedings where no credible evidence is in dispute, or a single issue may be determinative if supported by evidence. The purpose of a motion to strike is distinct.

[11] A motion to strike is intended to perform a gatekeeping function where the pleadings show the proceeding in issue is "bereft of any possibility of success". A statement of claim should not be struck merely because the pleadings reveal arguable, difficult or important points of law (*Edell v. Canada Revenue Agency*, 2010 FCA 26 at para. 14). The burden lies on the moving party, is very high, and the Court should exercise its discretion only in the clearest of cases.

[12] Saskatchewan and the WSA rely on and quote at length the decision of the Federal Court of Appeal in *Saskatchewan (Attorney General) v. Witchekan Lake First Nation*, 2023 FCA 105 ("*Witchekan Lake*") as the basis for establishing the Claim discloses no reasonable cause of action. That case was an appeal from a refusal to grant summary judgment in a land claims

dispute between Witchekan Lake First Nation (WLFN) and Saskatchewan. The focus of that decision was upon interpretation of the Framework Agreement, the same Framework Agreement that is referenced in the Claim in the present action. However, in *Witchekan Lake*, the Court had the benefit of a factual record as befits a motion for summary judgment. Notably, in *Witchekan Lake* the Court did not address the band specific Settlement Agreement pleaded by PFN.

[13] As stated by the Federal Court of Appeal in *Witchekan Lake* at para. 92, "Article 20.12 provides that the Agreement shall not be varied, modified, amended, supplemented or replaced except by written agreement executed by all parties to the Agreement." The Claim when read holistically is referring to rights afforded to PFN by the Framework Agreement as varied, modified, amended, supplemented or replaced by PFN's band specific Settlement Agreement.

[14] The interpretation of rights as a result of the combination of these contracts (the Framework Agreement and PFN's Settlement Agreement) invokes rules of contractual interpretation, the doctrine of implied terms and the duty to act in good faith. (*Ochapowace v. Canada*, 2019 FC 1288 at paras. 25-31). Such rules of contractual interpretation rely on more than the mere wording of contracts to discern their scope; they require a factual context, which the Federal Court of Appeal had in *Witchekan Lake*.

[15] Saskatchewan attempts to provide some of the factual context in the affidavit of Susan Carani filed on this motion. For example, paragraph 6 of the Carani affidavit provides opinion evidence comparing Pasqua's Settlement Agreement with the settlement agreements signed by

other Bands. This is the type of evidence explicitly prohibited by Rule 221 (2) of the Rules, and that paragraph shall not be considered on these motions.

[16] It is consistent with this need for a factual context and doctrines of contractual interpretation that such issues do not always lend themselves to a decision on a motion to strike. *Witchekan Lake* was an appeal of a summary judgment motion in which evidence of factual issues is permitted. This is distinct from a motion to strike where the evidence to strike for failing to show a reasonable cause of action is limited and such limitation is reflected in Rule 221 (2) of the *Federal Courts Rules*.

[17] The words of Justice Grammond in *Ochapowace* (*supra*) resonate and are applicable here:

> Courts have been reluctant to dismiss claims raising issues of contractual interpretation, implication of terms or good faith on a motion to strike: *Valenti v The Equitable Trust Company*, 2012 ONCA 93, *Hamburger v Fung*, 2014 BCSC 1625 at paragraph 28, aff'd 2015 BCCA 444; *Venture Construction Inc v Saskatchewan (Highways and Infrastructure)*, 2015 SKQB 70 at paragraphs 38-44; *Comstock Canada v Potash Corporation of Saskatchewan*, 2015 NBQB 80 at paragraphs 39-46; *McDowell v Fortress Real Capital Inc*, 2019 ONCA 71 at paragraph 83. In refusing to strike claims raising such issues, courts have recognized that an evidentiary background is often necessary to determine how a contract applies to a specific fact situation.
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> *Ochapowace v. Canada*, 2019 FC 1288 at para. 31

[18] While Saskatchewan and the WSA have not satisfied the high burden required to strike the pleading or shown this is the clearest of cases for such relief, this does not preclude other summary proceedings in which evidence is fully permitted.

IV. Abuse of Process

[19] Saskatchewan and the WSA have been successful in their motions to strike portions of the Claim on the basis that those issues are beyond the jurisdiction of this Court. Notwithstanding multiple prior decisions on the same issue, the Claim added new allegations which PFN acknowledged were beyond the jurisdiction of the Court. Such acknowledgement was only made after this motion to strike had been brought and the expense of preparing such motion had already been incurred by Saskatchewan and the WSA. This is a circumstance that will be reflected in costs award for this motion.

V. Mootness

[20] The WSA includes in its motion as a ground to strike the Claim that the "specific issues that are raised against the WSA concerning the offers which have been made by the PFN to purchase the lands are moot and there is no purpose or utility in the Court rendering a decision on such issues".

[21] The policy basis for the doctrine of mootness was laid out by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at para. 16, as follows:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision… (emphasis added)

[22] The Court goes on at para. 17 to outline the two-step analysis for assessing mootness:

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[23] As to the issue whether there is a live controversy between the WSA and PFN, the WSA frames the issue in the action to be whether the PFN has a right to purchase the Echo Lake Lands. The WSA then argues that any declaratory relief permitted pursuant to section 17(3) of the *Federal Courts Act*, RSC 1985 c. F-7, cannot declare that the PFN is entitled, as a matter of right, to purchase the Echo Lake Lands from the WSA. The WSA takes the position that any declaratory relief will be equally ineffective, must be an advisory opinion and cannot impugn the WSA's past decisions to reject two offers by PFN to purchase the Echo Lake Lands from the WSA. As the WSA puts it "a declaration of right will only be effective insofar as it has an impact and effect in the future".

[24] PFN argues that there has been no intervening event to change the controversy between the parties which both the WSA and PFN agree is an adversarial context. PFN points out that:

A. The Echo Lake Lands have not been sold to a third party and are available for selection by PFN;

B. The Settlement Agreement remains in effect and is binding on the parties; and

C. The parties continue to dispute whether the WSA and Saskatchewan violated the Settlement Agreement in the process of refusing to sell the Echo Lake Lands to PFN.

[25] It is a live issue between the WSA and PFN what are their obligations pursuant to the TLE Agreements and have those obligations have been fulfilled or breached, specifically with respect to the Echo Lake Lands. A declaration from this Court as to the fulfillment or breach of any of those obligations may affect the rights of the parties, which is sufficient to establish the existence of a live controversy.

[26] As I have concluded the Claim is not moot, I need not address the second element of the mootness analysis.

[27] The WSA has not met its burden on this motion to strike of establishing that the pleaded issues as between the WSA and PFN are moot.

VI. Costs

[28] The success on this motion has been divided. However, the aspect of this motion relating to striking portions of the Claim on the basis that those issues are beyond the jurisdiction of this Court should not have been required in light of previous decisions on this same issue of jurisdiction involving PFN. Accordingly, costs of these motions shall be payable by PFN to Saskatchewan and the WSA in the cause.

THIS COURT ORDERS that:

1. Paragraphs 1(c), 1(d), 1(e), 1(g), 29, 58, 61, 62, 63, 64 and 65 of the Amended Statement of Claim are struck with leave to amend limited to grammatical corrections.

2. Any Further Amended Statement of Claim in compliance with these reasons and paragraph 1 of this Order shall be served and filed by March 13, 2026.

3. The Government of Saskatchewan and the Water Security Agency Defendants' motions to strike are otherwise dismissed.

4. Costs shall be payable by Pasqua First Nation to the Government of Saskatchewan and the Water Security Agency in the cause.

"Michael D. Crinson"
Associate Judge