Can’t get no Dissatisfaction: BC Court Reverses Award of Damages Against Crown for First Nation Blockade

Authors: John Stefaniuk, K.C.

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On February 26, 2015 the British Columbia Court of Appeal reversed a $1.75 million damage award granted in 2013 to Moulton Contracting Ltd. against the B.C. Government in respect of losses suffered by Moulton as a result of a road blockade.

Moulton’s claim was the result of a blockade set up by members of the Fort Nelson First Nation that prevented access to harvesting sites granted to Moulton under B.C. Timber Sales Licences. The Province had been warned by members of the First Nation that it would not permit this logging in its traditional territory. After suffering losses as a result of the blockade, Moulton sued the Province, claiming that the Province had breached terms of the Licences that allowed access to the logging sites. Moulton also claimed that the Province had represented that adequate consultation had been completed with the First Nation. Moulton also issued claims against the First Nation.

The trial judge did not accept the argument that the Licences contained an implied warranty from the Province as to rights of access. The trial judge did agree that there was an implied warranty that the Province had properly discharged its duty to consult, but then found that any failure on the part of the Province here did not cause the damages - - - the members of the First Nation would have staged the blockade regardless.

Where the trial judge did find liability was for the Province’s breach of an implied representation that it was not aware of any First Nations expressing dissatisfaction with the consultation. The Province had not warned Moulton of the blockade threat that had been communicated. The trial judge found that if Moulton had been made aware of the threat, it could have made alternate arrangements to harvest timber. This was referred to by the Court of Appeal as the “Dissatisfaction Term”.

The Court of Appeal rejected inclusion of the “Dissatisfaction Term”. It determined that the judge erred in finding that there was an implied duty on the part the Province to inform Moulton of the dissatisfaction on the part of the First Nation. It found that there were no facts established before the trial court to indicate that such a representation was intended by the parties at the time the contract was made. There was also no finding that implying the unwritten term was necessary to give business efficacy to the transaction. It also held that the trial judge failed to consider and give effect to the limitations on liability in favour of the

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Province contained in the Licences and the bid documents.

The Court of Appeal found it unnecessary to consider whether there was, at law, an implied representation in the Licences that the Province had conducted all necessary consultations.

The Court then considered whether the Province had breached a duty of good faith to Moulton in its failure to warn Moulton. It looked at the Supreme Court of Canada's recent decision in *Bhasin v. Hrynew* (the subject of a previous article in this magazine). The Court of Appeal determined that the failure of the Province to disclose to Moulton the First Nation threat to disrupt the logging operations was not enough to say that the Province acted in bad faith. There was no proof that the Province had acted dishonestly, unreasonably, capriciously or arbitrarily.

What does this all mean? Well first, parties who rely upon resource harvesting or extraction permits should make themselves aware of any limitations on the ability to exercise the rights that may be granted. This involves more than a little due diligence in terms of understanding any limitation that may be contained in the bidding process, the authorization itself and any legislation pursuant to which the authorization is issued.

Second, there is a need for the developer to exercise a certain amount of "due diligence". If Moulton had spoken with representatives of the First Nation it would have most likely become aware of the probability that there would be interference with its ability to harvest the timber and it could have taken appropriate action. After all, it was not the Province that blockaded access.

Last, the duties of "good faith" that apply to parties in a contractual relationship require the parties to act in a way that does not deprive the other party of the benefits of the arrangement. The duty to act in good faith does not impose additional terms in a contract like a duty to warn of a change in circumstances.

There are other interesting cases to follow, including the $110 million dollar claim by Northern Superior Resources Inc. against Ontario for failure to consult and the similar claim being pursued in *Campbell v. Manitoba*. Time will reveal the extent to which governments may be found to have a duty to developers for satisfying Aboriginal consultation obligations. In the meantime, you can expect that government lawyers are already revising contracts, bid invitations and legislation to further limit government's exposure to these claims.

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