CASE SUMMARY

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ALBERTA COURT ENDS PROJECT BLOCKADE

Siksika Nation v. Crowchief

In *Siksika Nation v. Crowchief*, the Alberta Court of Queen's Bench granted a request for an interlocutory injunction after a blockade stopped construction on site for over 300 days.

In 2013, many homes on the Siksika Nation reserve were damaged or destroyed due to extensive flooding of the Bow River. In November 2013, Siksika Nation and the Government of Alberta entered into a Memorandum of Understanding which set out a plan to rebuild the homes affected by the flood (2013 Flood Rebuild Plan). Under the terms of the MOU, the Province committed approximately $45 million to reimburse Siksika Nation for the costs associated with rebuilding the homes and for the remainder of the 2013 Flood Rebuild Plan. The funds are only available until March 31, 2018.

In September 2015, Siksika Nation contracted with Whissel Contracting Ltd. for the construction of these homes. Under the contract, Whissel was to provide all materials, equipment, products, labour and transportation necessary to perform the work described on or before October 31, 2015.

On November 4, 2015, when Whissel's work was 80 per cent complete, a group of individual members of the Nation attended the project site and erected a blockade. The blockade physically prevented the contractor and its employees and subcontractors from accessing the site. As a result of the blockade, Whissel was also unable to retrieve its equipment from the site until early December 2015. Whissel estimated that it incurred damages in the amount of $568,669 for loss of opportunity and costs associated with ongoing security.

The blockade arose as a result of concerns about Siksika Nation's ability to manage and carry out the project, specifically because of the "[Nation's] failure, inaction and inability to explain and account for alleged delays, vanishing funds, and misappropriate of funds received and expended related to the 2013 Flood Rebuild Plan".

To address the protesters' concerns, Siksika Nation provided access to financial records and materials requested by the protesters, including bank account information, balance sheets, copies of the 2013 Flood Recovery Funding Contracts and Reimbursement Records. The protesters were not satisfied by the financial disclosure and submitted to the court that the information was superficial at best.

In March 2016, Siksika Nation was advised by Whissel that during a visit to the work site, Whissel's employees were physically threatened and told not to return. Shortly after, a Whissel employee also received a threatening phone call. As a result, Whissel did not attend the site to perform any of the remaining work. The blockade remained in place as of the date of the court hearing.

Siksika Nation sought an order for an interim and interlocutory injunction strictly enjoining, restraining and prohibiting the protesters or any other person acting under any of their control from physically obstructing, impeding, or interfering with the project, creating a nuisance at the access point to the site, or interfering with Whissel's employees, subcontractors or agents in any way.

> *Editor's Note*: An interlocutory injunction is an order restraining a party from doing something until trial or other disposition of the action.

In considering the request for an interlocutory injunction, the court applied the test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, which placed the onus on Siksika Nation to demonstrate that:

a) it had a serious issue to be tried or, in some cases, a strong *prima facie* case;

b) it would suffer irreparable harm before trial if the injunction is refused; and
c) the balance of convenience favoured granting the injunction.

> *Editor's Note*: *prima facie* is a fact presumed to be true unless it is disproved.

The first step of the *RJR* test generally requires an applicant to show that it has a serious issue to be tried. In applying this stage of the test, a judge is not to engage in an extensive review of the merits. There are two exceptions to this general rule: the first exception, applicable in cases of picketing in the labour context, arises when the "result of the interlocutory motion will in effect amount to a final determination of the action". While noting the imperfect analogy between picketing cases and protestors, the court held the exception to be applicable in this case and found that Siksika Nation had to demonstrate a strong *prima facie* case.

Siksika Nation argued that the actions of the protesters gave rise to causes of action in tort, including nuisance and unlawful interference with economic relations. As set out in *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, a claim in private nuisance requires an applicant to show a substantial interference with the owner's use and enjoyment of the land that is unreasonable in all of the circumstances.

In this case, the court found Siksika Nation had met its burden to show a strong *prima facie* case for nuisance. In doing so, the court relied on the Manitoba Court of Appeal's decision in *Hudson Bay Mining & Smelting Co. v. Dumas*, in which the court found the tactic of blockading to be a "substantial and unreasonable interference" with the use and enjoyment of the land. In *Hudson Bay*, protestors peacefully protested on the access road for Hudson Bay's Lalor project, which interrupted unrestricted access to the project site.

Similarly, the court in this case held the blockade to be a substantial and unreasonable interference with Siksika Nation's use and enjoyment of the land, noting:

> There is ample evidence that the Respondents' interference with the Applicant's and the Evacuees' use and enjoyment of the land is substantial. No Work had been done on the Cluny Subdivision Project for 325 days (as of the date of the hearing of this Application) as a result of the Blockade, which continues. The Contractor has suffered significant Standby Costs. The Applicant may be liable for the Standby Costs and any other costs associated with the breach the Agreement. As well, the Blockade is causing a serious security and safety issue in the form of alleged threats made to persons attending the Work Site for legitimate purposes and by leaving unfinished Work exposed. Finally, while all of this is happening, some of the Evacuees are displaced and they are living in temporary housing under difficult conditions; they are at risk of losing the permanent housing that they have been promised.

The court also found Siksika Nation had demonstrated that it has a strong *prima facie* case for unlawful interference with economic relations. In doing so, the court found the Siksika Nation has met its burden to show that the protesters intended to injure Siksika Nation, that they interfered with the Nation's business using unlawful means, and that the interference caused them economic loss. The court held that the protesters had actual knowledge of and intention to injure or cause loss to Siksika Nation, particularly given that they had access to copies of the 2013 Flood Recovery Funding Contracts and Reimbursement Records as well as the Nation's bank account information and balance sheets.

Having satisfied the first part of the *RJR* test, the court considered whether the Siksika Nation had shown that it would suffer irreparable harm before trial if the injunction were refused. The court relied on *Hudson Bay* and found that, to be successful, the Nation need only show "a meaningful risk of irreparable harm". The court noted that while the Siksika Nation had not yet incurred any economic consequences, it had received threats of litigation from Whissel to recover its costs. In addition,

Siksika Nation faced a looming deadline for the advance of funds, which demonstrates a real risk of irreparable harm. Lastly, the residents of Siksika Nation were relying on the Nation to provide permanent housing; if the Nation were unable to do so, the losses suffered by those affected would be immeasurable.

The final step of the *RJR* test required the court to determine "which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction". On this issue, the protesters argued that many members of the Siksika Nation had been misled and cheated by the Siksika Nation in its handling of the 2013 Flood Rebuild Plan, and that granting this injunction would amount to an injustice that would cause the protesters to lose hope in the system. While sympathetic to the protesters' submission, the court held it had to grant the order sought by the Siksika Nation. In addition, the court noted that the Siksika Nation supported the protesters' freedom to lawfully protest and to seek other democratic means to express its dissent.

The protesters also argued that the interlocutory injunction sought by the Nation would violate their freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. While noting that the issue of the application of s. 32(1) of the Charter in cases where private parties commence actions relying on the common law was somewhat unsettled, the court nevertheless found that the Charter did not apply to the actions of the Nation in this case. In any event, the court turned to s. 1 of the Charter and found any infringement of protesters' rights, by the order sought, to be justified in the circumstances.

Alberta Court of Queen's Bench

Siksika Nation v. Crowchief

S.L. Hunt McDonald J.

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GUEST ARTICLE

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ARE CONSTRUCTION DEFECTS COVERED PROPERTY DAMAGE IN AN INSURANCE CONTRACT?

Much commentary was published in the wake of the Supreme Court of Canada's 2010 decision, *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, in which construction defects that caused unexpected and unintended damage to tangible property were held to potentially constitute an "accident" resulting in "property damage" such that the insurer's duty to defend under a commercial general liability policy (CGL policy) was engaged.

CGL policies typically contain a "work performed" exclusion, which precludes coverage for damage to the insured's own work once it is completed. Since *Progressive Homes*, a number of courts have held that a claim for consequential damage caused by defective construction can give rise to a duty to defend under a CGL policy, despite the presence of a "work performed" exclusion. In doing so, courts have begun to apply heuristic methods of analysis in order to reach the same conclusions as those reached in *Progressive Homes*.

In *Progressive Homes*, Justice Rothstein observed:

> While this point was not contested and nothing turns on it in this appeal, it is not obvious to me that defective property cannot also be "property damage". In particular, it may be open to argument that a defect could not amount to a "physical injury", especially where the harm to the property is "physical" in the sense that it is visible or apparent […]. Moreover, where a defect renders the property entirely useless it may be arguable that defective property may be covered under "loss of