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THE BRITISH COLUMBIA COURT OF APPEAL REJECTS THE TERRITORIAL THEORY OF ABORIGINAL TITLE AND DISMISSES THE APPEAL BY THE TSILHQOT'IN NATION

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ON JUNE 27, 2012 THE BRITISH COLUMBIA COURT OF APPEAL ISSUED ITS HIGHLY ANTICIPATED DECISION IN THE CASE *WILLIAM V. BRITISH COLUMBIA*.[1] IN A UNANIMOUS DECISION, THE COURT AFFIRMED MANY OF THE TRIAL JUDGE'S HOLDINGS REGARDING THE CLAIMS TO ABORIGINAL RIGHTS AND TITLE BROUGHT BY THE TSILHQOT'IN NATION AND THE XENI GWET'IN FIRST NATIONS GOVERNMENT. HOWEVER, THE MOST IMPORTANT ISSUE ON WHICH THE COURT OF APPEAL AND THE TRIAL JUDGE DISAGREED RELATED TO THE TYPE OF OCCUPANCY NECESSARY TO SUSTAIN A CLAIM TO ABORIGINAL TITLE: THE COURT REJECTED THE "TERRITORIAL THEORY" AND HELD THAT ABORIGINAL TITLE CAN ONLY BE PROVEN BY EVIDENCE OF INTENSIVE PHYSICAL OCCUPATION OF SPECIFIC SITES.

FACTS

This appeal concerns Aboriginal rights and Aboriginal title claims brought on behalf of the Xeni Gwet'in First Nations Government (Xeni Gwet'in) and the Tsilhqot'in Nation (Tsilhqot'in) in an area comprising approximately 4,380 km^2 in the Chilcotin region of the west central interior of British Columbia ("Claim Area"). The Xeni Gwet'in is a band under the *Indian Act*, formerly known as the Nemiah Valley Indian Band, which, along with five other First Nations, makes up part of the Tsilhqot'in Nation. The Tsilhqot'in considers their traditional territory to include a vast tract of the west central interior of British Columbia. The Claim Area comprises two areas: Tachelach'ed (the Brittany Triangle) and the "Trapline Territory", excluding the reserves forming part thereof. It comprises only about five percent of what the Tsilhqot'in regard as their traditional territory and is mostly made up of undeveloped land with over forty per cent being provincial park land.[2]

It was proposed forestry activities and the granting of cutting permits in the Claim Area that instigated the litigation. The case, which originally began in 1989, underwent several amendments and different iterations. When the action proceeded to trial in 2002, the plaintiff sought, among others, a declaration that the Tsilhqot'in Nation has Aboriginal title to the Claim Area and a declaration that the Xeni Gwet'in has Aboriginal rights to hunt and trap in the Claim Area as well as declarations of infringement of those rights by British Columbia and corresponding relief and damages.[3]

[1] 2012 BCCA 285 (CanLII) http://www.canlii.org/en/bc/bcca/doc/2012/2012bcca285/2012bcca285.html (hereinafter "Roger William BCCA").

[2] *Ibid.* at paragraphs 4-9.

[3] *Ibid.* at paragraph 37.

THE TRIAL JUDGE'S DECISION

On November 20, 2007 Justice Vickers of the British Columbia Supreme Court rendered his decision after a trial that lasted 339 court days over the period of five years.[4] Justice Vickers ruled that the Tsilhqot'in Nation, as the proper rights holder, has Aboriginal rights to trap and hunt birds and animals for specified purposes[5], to trade in skins and pelts taken from the Claim Area "as a means of securing a moderate livelihood"[6] as well as to capture and use horses[7]. He also held that forestry activities in the Claim Area unjustifiably infringed those rights.[8] However, Justice Vickers dismissed the claim to Aboriginal title, though he did so without prejudice to the plaintiff's ability to bring a new claim for title to smaller tracts of land within the Claim Area. He concluded that he could not issue a declaration of title to those areas because the case was pleaded as an "all or nothing claim", namely that either title is established over all of the Claim Area or title cannot be established at all. However, Justice Vickers issued an opinion that there was sufficient evidence to establish Aboriginal title to certain parts of the Claim Area.[9]

THE COURT OF APPEAL'S DECISION

All three parties appealed various parts of the decision of the trial judge. The most important issues under appeal and the most significant parts of the Court of Appeal's decision concern the Aboriginal title claim, in particular whether it was an "all or nothing" claim and the extent of occupation necessary to establish title as well as the issue of the proper holders of Aboriginal rights.

ABORIGINAL TITLE

Justice Vickers concluded that the Aboriginal title claim brought by the plaintiff was an "all or nothing" claim, which obliged him to render a decision over the whole Claim Area and prevented him from rendering a declaration over smaller parts of the Claim Area. The Court of Appeal, however, disagreed with him, holding that the real issue is whether the parties are prejudiced by the way in which a case proceeds and that it is open to a court to grant a declaration that is less sweeping than the ones sought by a plaintiff.[10] The Court reached this conclusion based on the decision of the Supreme Court of Canada in the *Lax Kw'alaams* case.[11]

The lack of evidence of prejudice to the defendants and the presence of a "basket clause" allowed the Court to conclude that it was open to the trial judge to issue a declaration of title to only certain parts of the Claim Area.[12] The Court was also swayed by the plaintiff's reminder of the special nature of Aboriginal rights and title claims and the need for flexibility in such cases.[13] The way that the case was pleaded, therefore, did not prohibit a declaration over smaller portions of the Claim Area.

However, the major point on which the Court disagreed with Justice Vickers' decision related to the proper theory and necessary proof for Aboriginal title. The Court defined the parties' competing theories as the "territorial theory" as espoused by the plaintiff, whereby a group's presence and movement throughout a general area is sufficient to prove Aboriginal title[14], as opposed to the "site-specific" theory as put forth by the defendants, whereby Aboriginal title can only be established over smaller tracts of land based on intensive, exclusive and regular or continuous occupation of particular sites.[15] The Court concluded that Justice Vickers erroneously accepted and adopted the plaintiff's territorial theory when rendering his decision as well as his opinion.

4 *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 (CanLII) at paragraph 97, http://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc1700/2007bcsc1700.html (hereinafter "Roger William BCSC").

5 *Ibid.* at paragraph 1041.

6 *Ibid.* at paragraph 1041.

7 *Ibid.* see "executive summary".

8 Roger William BCCA, *supra* note 1 at paragraph 94.

9 Roger William BCSC, *supra* note 4 at paragraph 959-960.

10 Roger William BCCA, *supra* note 1 at paragraph 114.

11 *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535. See also our summary and discussion of this decision: "The Supreme Court Confirms that Not All Aboriginal Practices are Protected by section 35 of the Constitution Act, 1982".

12 Roger William BCCA, *supra* note 1 at paragraph 107 and 116-117.

13 *Ibid.* at paragraph 118.

14 *Ibid.* at paragraphs 122, 206 and 214.

15 Ibid. see paragraphs 123, 125 and 211.

The Court determined that the site-specific theory of Aboriginal title is the correct one for three reasons: First, the Court held that the test for Aboriginal title set out in *Delgamuukw*[16] and *Marshall;Bernard*[17] is based on the site-specific theory.[18] Therefore, Aboriginal title can only be established on definite tracts of land with boundaries that can be reasonably defined.[19] Furthermore, the Court held that the territorial theory of title has no place when one considers the purpose behind s.35 of the *Constitution Act, 1982* and the rationale for the common law's recognition of Aboriginal title, which, according to the Court, is to preserve an Aboriginal group's culture and allow its members to pursue a traditional lifestyle.[20] According to the Court, other tools, such as Aboriginal rights, are available to serve this role without the necessity of Aboriginal title on a broad territorial basis.[21] Finally, the territorial theory of Aboriginal title does not, according to the Court, serve the goal of reconciliation of Aboriginal and non-Aboriginal aspirations and unnecessarily limits Crown sovereignty.[22]

The Court, therefore, held that Justice Vickers was correct in dismissing the claim to Aboriginal title. Furthermore, the Court held that it was not open to Justice Vickers to issue a declaration of title in regards to a more limited territory because that would, likewise, have been premised on the plaintiff's erroneous "territorial theory" of title. Finally, it was also not open to Justice Vickers to render a declaration of title based on the correct "site-specific" theory because it was not put forth by the plaintiff in support of the larger claim to the whole Claim Area. As a result, the Court concluded that the plaintiff may bring a new claim to Aboriginal title based on the correct theory as this would be an entirely new and different claim not covered by the doctrine of *res judicata*.[23]

ABORIGINAL RIGHTS

The Court upheld all of Justice Vickers' conclusions regarding the claims to Aboriginal rights other than title. Furthermore, the Court also dismissed British Columbia's appeal on the issue of infringement and justification and upheld Justice Vickers' conclusion that the proposed forestry activities infringed these rights and did not meet the required justification analysis.

PROPER RIGHTS HOLDER

Another highly contentious issue is the question of which group or collective is the proper holder of Aboriginal rights. It is well established that Aboriginal rights are collective and not individual rights. However, it is not always clear, and there is often debate regarding, which collective is the holder of such rights. The issue arose in this case at the trial level, wherein the plaintiff originally claimed Aboriginal rights on behalf of the Xeni Gwet'in and Aboriginal title on behalf of the Tsilhqot'in Nation before amending the claim into one on behalf only of the Tsilhqot'in Nation. Justice Vickers ultimately held that the proper holder of Aboriginal rights in this case is the Tsilhqot'in Nation.

On appeal, British Columbia reiterated its argument that the Xeni Gwet'in is the proper rights holder. In particular, it argued that the larger Nation has no governing or decision-making body that can designate authorized spokespersons, as opposed to the Xeni Gwet'in, which is a recognized *Indian Act* band with a clear political structure. As a result, it is preferable on a real and practical level for the Xeni Gwet'in to be the rights holder. The province argued that this would allow it to properly identify individuals who are entitled to exercise Aboriginal rights as well as to allow it and other governments to engage in proper consultation.[24] Furthermore, British Columbia argued that the jurisprudence on Aboriginal rights requires that the present-day rights holders be the modern counterpart to the collective that traditionally exercised decision-making power. In the case at hand, decision-making was held by Justice Vickers to occur at the localized level of the family or encampment groupings, more akin to a band, and not at the level of the Tsilhqot'in Nation.

[16] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[17] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43.

[18] Roger William BCCA, *supra* note 1 at paragraph 219.

[19] *Ibid.* at paragraph 230.

[20] *Ibid.* at paragraph 219 and 231.

[21] *Ibid.* at paragraphs 231-237.

[22] *Ibid.* at paragraph 219, 239.

[23] *Ibid.* at paragraphs 129-131.

[24] *Ibid.* at paragraphs 138-141.

The Court expressed "considerable sympathy" for British Columbia's position and the real practical challenges that it, and other governments, face on this issue. In particular, the Court appears to be sensitive to how this issue can be a practical barrier to consultation and negotiation, which are the preferred routes to reconciliation. Ultimately, however, the Court gave greater weight to the importance of the Aboriginal perspective on this issue. In this case, the Aboriginal perspective and the evidence established that the holder of Aboriginal rights within the Claim Area, both traditionally as well as in the present, is the Tsilhqot'in Nation.

DISCUSSION

The most important part of the Court's decision, and which caused much anticipation, related to the title claim. This case was the first case involving a claim to Aboriginal title since the Supreme Court of Canada decision in *Marshall;Bernard*[25] in 2005. Moreover, the Xeni Gwet'in and the Tsilhqot'in came close to establishing Aboriginal title before the trial judge. However, absent a new trial or a successful appeal to the Supreme Court of Canada, the Court of Appeal closed that window of opportunity for the Xeni Gwet'in and the Tsilhqot'in Nation in regards to the Claim Area as well as any smaller parts thereof. In doing so, the Court iterated a theory of occupation necessary to establish Aboriginal title that, if upheld by the Supreme Court of Canada in a possible appeal or followed in other jurisdictions, seriously limits the ability of Aboriginal groups to establish title. Nomadic or semi-nomadic groups, especially, will find it difficult, if not impossible, to demonstrate the level of occupation required by the site-specific theory. Furthermore, the Court's decision means that where title may be proven, it will be limited to small tracts of land.

The Court's decision regarding the proper holders of Aboriginal rights, including title, provides less certainty going forward. It was open to the Court to prefer British Columbia's argument and conclude that the proper holder of Aboriginal rights, at least in this case, is the band (First Nation) and not the nation as a whole. Such a conclusion would facilitate Aboriginal relations between the Xeni Gwet'in as well as the Tsilhqot'in and the various levels of government, as it would provide the latter with clear organizations and spokespersons with whom to consult and negotiate, for example. Despite this important consideration, the Court gave more weight to the Aboriginal perspective on this issue. If this decision is followed, it will be difficult for governments or other actors to argue for such practical considerations and it will be necessary to pose the question and ask what the Aboriginal perspective requires in each case.

There are many other interesting aspects in the Court's decision, including the appropriate rights analysis, infringement and justification of Aboriginal rights and the right to trade, among others. A thorough read of the entire decision is highly recommended.

The Xeni Gwet'in intends to appeal this decision to the Supreme Court of Canada.[26] However, no applications have been filed as at the time of publication of this bulletin.

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[25] *Supra*, note 17.

[26] See press release dated June 27, 2012.

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