IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:	*The Council of the Haida Nation v. British Columbia,* 2017 BCSC 1665

Date: 20170920
Docket: L020662
Registry: Vancouver

Between:

The Council of the Haida Nation and Peter Lantin, suing on his own behalf and on behalf of all citizens of the Haida Nation

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada

Defendants

Before: The Honourable Madam Justice Fisher

Reasons for Judgment

Counsel for the Plaintiffs:	D. Paterson T. Williams-Davidson
Counsel for Her Majesty The Queen of the Province of British Columbia:	P.G. Foy, Q.C. E. Christie K.J. Tyler
Counsel for the Attorney General of Canada	M. Doherty R. Enoch
Place and Date of Hearing:	Vancouver, B.C. September 5-6, 2017
Place and Date of Judgment:	Vancouver, B.C. September 20, 2017

[1] In this action, the plaintiffs seek a declaration that the Haida Nation has aboriginal title and rights to Haida Gwaii, including “the land, inland waters, seabed, archipelagic waters, air space, and everything contained thereon and therein.” They claim damages and compensation against the Crown defendants for unlawful occupation and appropriation of Haida Gwaii, unjustifiable infringement of the Haida Nation’s aboriginal title and rights, as well as trespass

and nuisance for unlawful interference with its title and use and enjoyment of the lands.

[2] The declaration of aboriginal title includes all lands on Haida Gwaii, including private land held in fee simple and land subject to Crown granted tenures, permits and licences.

[3] There are two applications before me as case management judge:

1. British Columbia seeks an order staying the proceedings until the plaintiffs either (a) unequivocally elect not to seek to disturb the tenures, permits and licences of third parties not named in this action in this or any future litigation, or (b) join as defendants all third parties against whom they intend to claim; and

2. Canada seeks an order that the plaintiffs deliver notice to the registered owners of fee simple lands within Haida Gwaii that their interests may be adversely affected by the declaration of aboriginal title sought by the plaintiffs in this proceeding.

[4] The plaintiffs oppose both motions on the basis that they are not seeking any relief against third parties in this proceeding, it is premature to address what, if any, impact a declaration of aboriginal title and rights may have on third parties, and the participation of third parties in this litigation would render an already complex case unmanageable.

[5] While aboriginal law has developed considerably since *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313 and later *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, a declaration of aboriginal title has not yet been made in respect of lands that include privately held lands. In *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, the Tsilhqot'in did not seek a declaration of title over privately owned or underwater lands and the declaration ultimately granted by the Supreme Court of Canada included only publicly held land as designated by the trial judge.

[6] While British Columbia's application is broader than Canada's, both share an essential concern that a declaration of aboriginal title is inconsistent with fee simple title, as both accord the holder a right to exclusive use and occupation. Neither British Columbia nor Canada purport to represent private interests in this litigation and they are concerned about the effect a declaration of aboriginal title may have on private interests in land.

[7] The plaintiffs say that aboriginal title can co-exist with fee simple title, and if they elect to pursue remedies against any third parties in subsequent litigation, the interests of such parties will be properly protected in the context of that litigation.

[8] The fundamental issue at play here concerns the meaning and scope of a declaration of

aboriginal title and rights over lands that include those held by private interests. This is a complex issue that will be determined much later in the course of this litigation. Any comments made in this decision that pertain to this issue are intended only to highlight the questions raised by the parties in the context of these applications.

[9] I will deal with the applications in the order in which they were presented.

1. British Columbia's application

[10] British Columbia submitted that the *sui generis* nature of aboriginal title does not eliminate the need to be fair, and fairness requires the plaintiffs to (a) unequivocally elect to seek compensation only against the Crown, or (b) name now the third parties against whom they wish to make claims. It says that the plaintiffs should not be able to later use a declaration of aboriginal title that they may secure in this litigation against those who are not parties to this action.

(a) Unequivocal election

[11] In their original Notice of Civil Claim, the plaintiffs sought, in addition to compensation and damages against the Crown defendants, orders quashing various tenures, permits and licences issued by them without accommodation, and orders of ejectment and for recovery of land from British Columbia for tenures issued subsequent to the date of the filing of this action. Apparently acknowledging that such relief would adversely affect third parties, the plaintiffs amended their Notice of Civil Claim on April 7, 2017, and removed those prayers for relief.

[12] British Columbia initially interpreted this amendment to mean that the plaintiffs had elected to seek relief only against the Crown defendants and were precluded from seeking orders quashing tenures or ejecting landowners in this or any future litigation. However, the plaintiffs say that, in respect of infringements found to be unjustified, they may elect to claim compensation for future infringements against the Crown in this action, or to later commence proceedings against those third parties who rely on infringing tenures. British Columbia equates this with an attempt to pursue inconsistent rights, citing *Chevron Canada Resources v. Canada (Indian Oil and Gas Canada)*, 2006 ABQB 945, and submitted that it ought not to be permitted.

[13] In my view, the plaintiffs have elected in this litigation, by their amended pleading, to seek relief only against the Crown defendants in the form of declarations of aboriginal title and rights, and rights to compensation and damages. Their claims form a *lis* between them and the Crown defendants only. They are precluded in this claim, as now pleaded, from seeking any form of direct relief from third parties.

[14] Whether the plaintiffs are, or should be, precluded from commencing future proceedings against others is another matter.

[15] The plaintiffs' position is that they would only commence future proceedings against third parties if they decide not to claim compensation for future infringements against the Crown defendants in this litigation. They submitted that this involves an election of remedies, not of rights:

> Should the Haida Nation elect to claim compensation from the Crown for future infringements, they would be foreclosed from any remedy against a third party relying on a tenure in respect of which such compensation has been paid. On the other hand, and admittedly there is no precedent for this, should the Haida Nation determine not to pursue a claim for future losses from the Crown in respect of certain infringing tenures, it remains open to them to commence proceedings against those third parties who rely on tenures found to have unjustifiably infringed Haida title. Those parties may, themselves, have a claim over against the Crown for damages for failure to deliver clear title.
>
> (Speaking notes of the plaintiffs, para. 26)

[16] I do not see the plaintiffs' position as strictly involving the pursuit of inconsistent rights. As acknowledged by British Columbia in its oral submissions, common law principles can only be applied by analogy with respect to claims of aboriginal title and rights. In *Tsilhqot'in*, the Court made it clear, at para. 90, that where aboriginal title has been established, "[t]he usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title."

[17] Moreover, the claims here are very different from those in *Chevron*, where the plaintiffs had elected to treat a lease and underlying surrender as valid for the purposes of one piece of litigation and to attack those same instruments in another.

[18] Unlike *Chevron,* the issues in this case do not involve simply treating a Crown grant as valid or invalid. Briefly, the Haida Nation claims aboriginal title based on exclusive occupation of Haida Gwaii prior to the assertion of European sovereignty in 1846 (Notice of Civil Claim, Part 1, para. 10). The claim for compensation is based, *inter alia,* on assertions that the Crown defendants "have unlawfully issued tenures, permits and licences which interfere with Haida occupation and enjoyment of Haida Gwaii", and "[f]urther, and in the alternative," have infringed the aboriginal title and rights in various ways that include issuing tenures, permits and licences to third parties and conveying land to themselves and to third parties, without proper consideration and accommodation (Notice of Civil Claim, Part 1, paras. 16, 17). The relief claimed includes a declaration entitling the Haida Nation to "compensation for unlawful occupation and appropriation of Haida Gwaii, and for unjustifiable infringement of Aboriginal Title and Rights" (Notice of Civil Claim, Part 2, para. 2(a)). These assertions do not appear to be mutually exclusive; they may flow one from the other.

[19] Interestingly, the plaintiffs rely on common law principles to support the proposition that the election of alternative remedies need not be made at the outset and may be pursued throughout a trial. In *United Australia Ltd. v. Barclays Bank Ltd*. [1941] A.C. 1 (H.L.), it was held that a plaintiff must elect its remedy by the stage at which it applies for judgment (per Viscount Simon at 19). At 30, Lord Atkin explained why the question of election of remedies does not arise until one or the other claim has been brought to judgment:

> Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other; but he can take judgment only for the one, and his cause of action on both will then be merged in the one.

[20] The plaintiffs acknowledge that if they are successful in obtaining the declarations sought in this action for title, rights and compensation, they will be precluded from pursuing any third parties who hold tenures in respect of which compensation from the Crown has been paid. They seek to leave open only claims that involve future infringements on some not yet identified parcels of land on the assumption that they may later elect not to seek compensation, or take judgment, in respect of those parcels against the Crown defendants.

[21] In my view, it is premature to decide in this application if the plaintiffs would or should be precluded from bringing other litigation in the future to seek remedies against other parties for ongoing or future infringements. This action is still in its early stages and the parties are considering ways to sever issues to make it more manageable. It is not clear if or how the common law principles cited by the plaintiffs will assist them. I also do not consider it appropriate to require the plaintiffs to make an unequivocal election in this litigation because it remains open to them to seek to further amend their pleadings if circumstances change.

(b) Joinder of third parties as defendants

[22] On the face of the pleadings as they now stand, there is no basis on which to require the plaintiffs to join as defendants any third parties against whom they may wish in the future to make other claims for relief (unless they seek to do so by further amending their Notice of Civil Claim). I consider this case to be distinguishable from *Chippewas of Sarnia Band v. Canada (Attorney General)*, 51 O.R. (3d) 641, [2000] O.J. No. 4804, cited by British Columbia. There, the Chippewas of Sarnia brought an action seeking a declaration that they retained their interest in a parcel of land that had never been properly surrendered. The claim clearly affected the rights of everyone with an interest in the land, some 2000 title holders, each of whose title could be traced to the original conveyance by Crown patent. There was no dispute that the individual landowners were proper defendants in the action.

[23] Despite the limitations of the relief sought in this action, British Columbia remains concerned that a declaration of aboriginal title and rights will nonetheless affect the interests of

third parties. It submitted that this Court does not have jurisdiction to make such an *in rem* declaration in respect of lands subject to tenures vested in third parties who are not parties to this proceeding: *Hughes v. Fredericton (City)*, 165 D.L.R. (4th) 597; *Cook et al. v. Saskatchewan et al.*, 1990 CanLII 7817 (SK CA). Therefore, those third parties ought to be added as defendants.

[24] The plaintiffs submitted that common law concepts regarding *in rem* judgments cannot be imported into the consideration of aboriginal title given its *sui generis* nature, and suggested that "the simple fact that all potentially affected persons are not parties means that the judgment in this case is not *in rem* at all, 'but a declaration of ownership as against the named Defendants'." This latter quote stems from *Hughes*, where the Court's declaration was held not to bind a person who was not made a party or given notice.

[25] *Hughes* involved a claim to title by adverse possession. The court discussed the effect of an *in rem* judgment at 601-602:

> A judgment *in rem* is notice to all who deal with a person or a thing on which the Court has pronounced itself regarding the status of that person or that thing. Where real estate is the subject of a proceeding in which a declaration *in rem* is sought, all persons allegedly having an interest in that real estate must be either served with notice of the proceeding or, in some cases, public advertising of the proceeding must be carried out. A Court does not have jurisdiction to make a Declaration *in rem* as to land against a third party who is not a party to the proceedings, except where a statute provides otherwise.

[26] Similar principles were expressed in *Cook*, which involved a dispute about whether an Indian reserve had been created on lands, some of which were held by the Crown and some by others. In vacating caveats which had been filed against land owned by third parties, the court held (at para. 18) that "the law will not permit a person's rights to be affected by any legal proceedings to which he was not a party, of which he has had no formal notice, and at which he has had and will have no opportunity to make representations".

[27] In *Willson v. British Columbia (Attorney General)*, 2007 BCSC 1324, Johnston J. held that a declaration setting out a boundary of land encompassed in Treaty 8 would result in a decision *in rem*, good against all persons whether or not parties to the action. However, he also acknowledged that notice to non-parties with an interest in the boundary would make the declaration sought binding on them (see paras. 43, 60).

[28] In *The Ahousaht Indian Band et al. v. The Attorney General of Canada et al.*, 2006 BCSC 646, Garson J. (as she then was) concluded that a judgment in an action claiming aboriginal title would not bind other aboriginal groups with overlapping claims who were non-participants in the litigation, assuming (but without deciding) that an aboriginal title claim is an *in rem* claim. She refused to order that notice be given due to her concern that the other

groups, on receiving it, “would be put to a harsh choice” either to intervene in the action or forever give up their overlapping claims (see paras. 27, 29).

[29] The law is unsettled as to whether a declaration of aboriginal title is equivalent to a judgment *in rem*, but the principles in these cases support the proposition that such a declaration made in this action would only be binding on non-parties with an interest in the lands affected if they had received formal notice of the claim. In the absence of such notice, third parties would be free to raise all defences should the plaintiffs later elect to make claims against them. Moreover, if a declaration of aboriginal title is equivalent to a declaration of ownership as against the named defendants only, as suggested by the plaintiffs, it would follow that its scope would be limited.

[30] Overriding all of this is that the submissions of both British Columbia and the plaintiffs go to one of the ultimate issues to be decided in this case: the meaning and scope of a declaration of aboriginal title and rights over lands that include those held by private interests, particularly lands held in fee simple. This occupied considerable discussion in the course of this application, as the law has not yet clarified the relationship between aboriginal title and fee simple title.

[31] Aboriginal title “confers ownership rights similar to those associated with fee simple”, including rights of enjoyment, occupancy and possession, the right to decide how the land will be used, the right to proactively use and manage the land, and the right to its economic benefits: *Tsilhqot’in* at para. 73. However, aboriginal title clearly has unique characteristics such as its collective nature and its inalienability except to the Crown, and is not the same as fee simple ownership. As the Chief Justice said in *Tsilhqot’in* at para. 72:

> Analogies to other forms of property ownership – for example, fee simple – may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title “is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts”.

[32] British Columbia argued that there can be no co-existence of the right to exclusive possession conferred by both aboriginal title and fee simple title in the same lands. The plaintiffs submitted that both rights can co-exist given the *sui generis* nature of aboriginal title, which confers rights in addition to exclusive possession, such as the ability to regulate land use or the ability to tax. While there is no authority that aboriginal title ousts fee simple title, or *vice versa*, the plaintiffs say that any Crown grant of fee simple does not extinguish aboriginal title.

[33] This is a thorny question that underlies British Columbia’s (and Canada’s) concern that

private landowners should have the opportunity to participate in this litigation. They each raise a possible argument, which neither government will be advancing, about possible extinguishment by Crown grant - articulated by Canada as a Crown grant of title by the colonial government of British Columbia before 1871 or by the government of Canada between 1871 and 1982. Whether there are any grants of title in Haida Gwaii that would meet those criteria is unknown at this point.

[34] While I recognize and acknowledge the concerns of the Crown defendants, I am not satisfied that the solution lies in requiring the plaintiffs to identify those private land and tenure holders against whom ejectment and other remedies may be sought in the future and join them as defendants in this action. Requiring private parties to join such a daunting lawsuit would impose an undue burden on them and I fail to see how they could meaningfully participate in it. This would also negatively affect the ability of the Haida Nation to effect the kind of reconciliation with the non-aboriginal community that is the fundamental objective of aboriginal rights litigation: see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 1.

[35] My view is that there are other ways to ensure that the potential effect of a declaration of aboriginal title on privately held lands and other tenures will be fairly considered by this Court. I will come back to this after I deal with Canada's application.

[36] For all of these reasons, British Columbia's application is dismissed.

2. Canada's application

[37] Canada seeks an order requiring the plaintiffs to give formal notice to private landowners as it is concerned that any declaration of aboriginal title that includes privately held land may have an adverse effect on their legal and financial interests. Canada also says that a judgment declaring aboriginal title would be a judgment *in rem*, and suggested that, as the law stands now, such a declaration may call into question the validity of fee simple interests. Upon receiving notice, these landowners could then decide whether or not to seek to join this litigation in order to protect their interests.

[38] In Canada's submission, notice will ensure that this litigation proceeds in a manner that is fair to all stakeholders, reduce the risk of multiple proceedings, and promote reconciliation by providing finality and certainty on an issue of significant constitutional importance.

[39] Similar applications for notice were made and dismissed in *Calder v. British Columbia (Attorney General)*, 8 D.L.R. (3d) 59, 1969 CanLII 713 (BC SC); *William v. Riverside Forest Products Ltd.*, 2002 BCSC 1199; *Ahousaht, Willson* (in part), and recently in *Cowichan Tribes v. Canada (Attorney General)*, 2017 BCSC 1575.

[40] The court in *Calder* considered that notice to "all the parties having any interest in or over any of the said lands" would involve many hundreds of defendants in a way that would preclude the litigation from going forward. Vickers J. expressed similar concerns in *William*, where he refused to require the plaintiff to give notice to land or resource use tenure holders or applicants for tenure whose interests may have been affected by the claims for declarations of aboriginal title. At para. 14:

> There is implicit in any notice, a notion that the court is inviting participation in the action to the person or firm receiving such notice. If, by R.15, tenure holders applied to be added to the action then the court could consider, in the context of such an application, whether it is just and convenient to do so. There is nothing to preclude British Columbia, if it is so advised, from advertising the fact of these proceedings. However if all parties having an interest in the subject lands were to seek to be added as parties in the action, it would, for practical purposes, put a halt to these proceedings. Such a process is not in the interests of the administration of justice.

[41] Vickers J. was also of the view that any remedies available to the tenure holders did not lie in joining the plaintiff's action, and he expressed concern about arguments against the interests of the plaintiff being repeated by parties against whom no claim was advanced.

[42] *William* was followed in *Ahousaht*, *Willson* and *Cowichan Tribes*.

[43] The court in *Ahousaht* refused to order that notice be given to aboriginal groups with overlapping claims of aboriginal rights and title. As noted above, the judge expressed concern that the other groups, on receiving notice, "would be put to a harsh choice – either intervene in this action and become embroiled in complex, expensive litigation, or forever give up their claims to overlapping areas". This arises from the principle expressed in *Hughes* that an *in rem* judgment would be binding on those with an interest in the *rem* who received notice. The judge was also concerned that adding the other aboriginal groups' claims for aboriginal title would expand the length of the trial, increase the cost to the plaintiffs, and impose financial hardship on the other groups who did not wish to be involved in litigation.

[44] *Willson* involved a dispute over the western boundary of Treaty 8. Johnston J. directed that notice be given to all signatories and adherents to Treaty 8 as privies to the existing plaintiffs, in order that they be bound by the result. However, he refused to give notice to the signatories of Treaty 11 "for the reasons given by Vickers J." in *William*.

[45] *Cowichan Tribes*, similar to this case, concerned an application by Canada to require the plaintiffs to give notice to the registered owners of fee simple lands in the claim area, as the declaration of aboriginal title sought in the action included private lands. Power J. considered that the uncertainty in the law about the consequences of a declaration of aboriginal title in relation to private interests weighed against court-ordered notice, stating at para. 24:

> Private landowners will have an opportunity to make all arguments, including that they were not given formal notice, in any subsequent proceedings against them if any such proceedings are brought.

[46] She did, however, consider this kind of decision to be discretionary in nature, to be made with due regard to the unique circumstances of each case, such that her conclusion should be of little consequence in other cases such as this one (see para. 7).

[47] I agree with this latter comment, especially in the context of complex aboriginal rights litigation. However, these prior cases demonstrate that requiring notice is rarely ordered because of concerns about unduly complicating the litigation and imposing hardship on those to whom notice would be given. Both of those concerns exist here.

[48] If notice is given to all private landowners in Haida Gwaii, there is a real possibility that many of them will seek to participate in this proceeding. The evidence before me in this application shows that there are 3,285 private property folios in Haida Gwaii, having an assessed total property value of $458,500,480. While there may be ways to streamline the procedure with representative parties, it would be difficult not to frustrate the progress of this case given the potential number of landowners.

[49] I am cognizant that the requirements for giving notice are not the same as the requirements under the Rules of Court for joining parties (specifically Rule 6-2(7) of the *Supreme Court Civil Rules*). Those rules require that a person ought to have been joined or is a necessary participant, and that the court is satisfied that joinder would be just and convenient. The “just and convenient” analysis is not required unless and until those to whom notice has been given seek to be added as parties. Despite this, the decisions referred to above have considered this analysis to some extent in relation to the consequences of ordering that notice be given. In my view, such consideration is important where notice is sanctioned by the court. I share the view expressed by Vickers J. in *William* that implicit in such notice is a notion that the court is inviting participation in the action. Should the court eventually deny the participation of those who seek to be added, reasonable persons may rightly question why they received notice in the first place.

[50] Importantly, the giving of notice - especially court-ordered notice - could jeopardize the ability of any landowners who choose not to respond to later defend a claim particular to their interests. This was of concern to the court in *Ahousaht* and it is of great concern to me in the context here. Moreover, as I noted above, I fail to see how individual landowners could meaningfully participate in an action that seeks a declaration of aboriginal title where no relief is claimed against them, and in the absence of issues specific to the land held by each owner. I agree with the plaintiffs that private landowners would be better able to defend their interests in

litigation that is limited to a claim against a discrete piece of property. That said, whether or not that occurs in the future is very uncertain at this stage. I share the view of Power J. in *Cowichan Tribes* that private landowners will be able to make all arguments, including that they were not given formal notice, in any subsequent proceedings against them, if any such proceedings are brought.

[51] Ultimately, requiring the plaintiffs to give the notice sought would, in my view, create unnecessary fear in the non-aboriginal community in Haida Gwaii given that actions for ejectment may never actually be brought. Moreover, similar to requiring private landowners to join the action, giving notice would have a negative effect on the objective of reconciliation. This is especially so here, where the Haida Nation has in the past largely focused on reconciliation, as evidenced by their agreement with the Crown defendants to formally protect 52% of the land base of Haida Gwaii and to share and jointly manage almost the entire land base (per the Notice of Civil Claim, Part 1, para. 13(g)).

Therefore, Canada’s application is also dismissed.

<u>Conclusion</u>

[52] I share the concerns expressed by both Canada and British Columbia about the potential for multiple proceedings and the unfairness to private landowners of allowing the plaintiffs to retain the right - at some time in the future - to eject them from their land. However, whether the plaintiffs have that right has yet to be determined. The inter-relationship between aboriginal title and fee simple title is complex, and will not be solved by expanding the scope of this litigation beyond the reasonable means of the parties. As I indicated above, there are other ways for this Court to ensure that any potential effects of a declaration of aboriginal title on privately held lands are fairy and properly considered, one of which may be to seek the assistance of *amicus curiae* to represent private interests. This is an issue that may be pursued through the case management process.

[53] I am grateful to all counsel for their able submissions and their willingness to engage in a candid discourse with the Court.

“Fisher, J.”