IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Council of the Haida Nation v. British Columbia,* 2018 BCSC 277

Date: 20180222
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 Mr. Justice Mayer

Oral Reasons for Judgment on Severance

Counsel for the Plaintiffs:	D. Paterson T. Williams-Davidson E. Bulbrook
Counsel for the Attorney General of Canada:	M. Doherty S. Dawson S. Miller
Counsel for Her Majesty the Queen of the Province of British Columbia:	P. Foy, Q.C. K.J. Tyler E. Christie (by telephone)
Place and Date of Trial/Hearing:	Vancouver, B.C. January 15, 2018
Place and Date of Judgment:	Vancouver, B.C. February 22, 2018

Background

[1] This action is case managed. A trial date has not been set although the plaintiffs wish to do so, with a trial commencing as early as October 2018.

[2] In this action, the plaintiffs seek a declaration of Aboriginal title to the terrestrial portions of Haida Gwaii including its inland waters, to the waters and submerged lands within the surrounding territorial sea (12 nautical miles from the coastal baseline) and to all living creatures such as fish and birds during times when they are present in the claim area (defined below).

[3] The plaintiffs also seek a declaration of aboriginal rights within the claim area which is from the top of Haida Gwaii to the US border in the north, to the limits of Canada's exclusive economic zone (200 nautical miles) to the west, to the mid-point of Hecate Strait to the east and to the mid-point between the south end of Haida Gwaii and the northern tip of Vancouver Island (the "Claim Area").

[4] The plaintiffs have not set out the specific Aboriginal rights for which they seek a declaration. They claim what can be described as general aboriginal rights including the right to harvest and manage fish, marine resources and trees within the Claim Area. They also claim a general right to trade fish and other marine resources and goods manufactured from trees for commercial purposes.

[5] The plaintiffs claim that the defendants have infringed their asserted aboriginal title and aboriginal rights by issuing tenures, permits and licences, conveying land and passing laws in relation to Haida Gwaii that do not accommodate the plaintiffs' interests. The principle form of infringements for which compensation is sought from the defendants are related to forestry, fisheries and land alienations. The plaintiffs seek compensation for these infringements, or for unlawful interference with their asserted Aboriginal rights and Aboriginal title and an accounting of all benefits collected in connection with Haida Gwaii.

[6] During submissions made on this application, the plaintiffs confirmed that they are not seeking to quash tenures, permits or licences or conveyances of land or to eject fee simple owners. They are only seeking compensation for relevant losses.

[7] Canada admits that the plaintiffs' ancestors exclusively occupied certain areas in Haida Gwaii, including lands which were later set aside as reserves for the Old Massett Village Council and the Skidegate Band Counsel and some or all of the lands now known as the Gwaii Haanas National Park Reserve of Canada. Canada denies the plaintiffs' claim of Aboriginal

title to submerged lands excepting, perhaps, some inter-tidal lands and submerged lands in the mouths of some rivers. Canada admits that the plaintiffs have Aboriginal rights to: fish for food, social and ceremonial purposes ("FSC" purposes) in unspecified waters near to Haida Gwaii; harvest cedar for cultural and domestic purposes in undetermined areas; and the right to engage in incidental trade of dried halibut and clams if such trade was integral to the pre-contact Aboriginal society of the Haida Nation. Canada denies that the plaintiffs have other Aboriginal rights and say that the plaintiffs must prove where they exercised their FSC and cedar harvesting rights. To the extent that the plaintiffs can establish Aboriginal rights on and title to Haida Gwaii, Canada denies that it has infringed or unlawfully interfered with such rights and title. Alternatively, they say that if such infringements are made out that they are justified on a number of grounds.

[8] As stated by Canada in its written submissions on this application "the plaintiffs' claim is incredibly expansive and complex. It encompasses in a single proceeding an undefined range of asserted Aboriginal rights, as well as an assertion of Aboriginal title to all of Haida Gwaii, which is broadly defined to include "the land, inland waters, seabed, archipelagic waters, air space, and everything contained thereon and therein". The plaintiffs' claim raises many novel issues of law, the determination of which will have important implications in British Columbia.

Relief Sought

[9] The application before me as case management judge is for an order severing the trial of this action into two parts, Phase 1 and Phase 2.

[10] In materials submitted at the hearing of this application, the plaintiffs submit that Phase 1 include a determination of the following:

a) all matters related to the proof required, and the defences and answers in respect of the proposed declarations of Aboriginal title and Aboriginal rights relating to Haida Gwaii as sought in paragraph 1 of Part 2 of the Notice of Civil Clam as amended and as raised in the Responses to Civil Claim as amended; and

b) all matters pertaining to making the declarations and orders sought in paragraphs 2 and 4 of Part 2 of the Notice of Civil Claim as amended, including all determinations of infringement, justification and all defences raised in the Responses to Civil Claim, as amended in relation to the following representative interests (the "Representative Interests"):

   i. the land and resources within Timber Licence T0461 in the Maamin Watershed;

   ii. the fisheries for Razor Claim, Dungeness Crab, Herring Spawn-on-Kelp,

Northern Abalone, and Pacific Halibut; and

iii. lands on Haida Gwaii known by the following descriptors:

1. parcel identifier 026-576-236
2. parcel identifier 017-808-359
3. parcel identifier 015-387-798
4. parcel identifier 007-150-636
5. parcel identifier 004-310-110
6. parcel identifier 010-768-858
7. parcel identifier 015-635-201.

[11] In paragraph 1 of Part 2 of the Notice of Civil Claim, the plaintiffs seek a declaration of "Aboriginal Title and Rights to Haida Gwaii within the meaning of Section 35 of the *Constitution Act, 1982*". In paragraph 2, the plaintiffs seek a declaration that the Haida Nation is entitled to an Order for damages and compensation for the defendants' unlawful conduct. In paragraph 4, the plaintiffs seek a declaration that the defendants have unlawfully collected revenues from Haida Gwaii.

[12] The plaintiffs submit that Phase 2 would include a determination of all matters not dealt with in the first phase, including, without limitation, issues of federal-provincial pre-Confederation liability as between the defendants. This would therefore include the relief sought in paragraphs 3 and 5 of Part 2 of the Notice of Civil Claim which is, respectively, for orders quantifying damages and an accounting of all amounts collected by the defendants in respect of Haida Gwaii.

[13] Further, the plaintiffs submit that in either Phase 1 or Phase 2 the Court consider such ancillary relief and remedies as are sought in paragraphs 6, 7, 8, 9 and 10 of Part 2 of the Notice of Civil Claim as the Court deems just.

[14] Finally, with respect to various procedural matters during and after trial, the plaintiffs submit as follows:

a) Following the completion of the first phase of trial, the Court's determination of the issues addressed in that phase will be the final determination of those issues;

b) That the parties may appeal the decision in phase one before the

commencement of phase two, but phase two may proceed pending such appeals with the consent of the parties;

c) That subject to availability, the same Justice will be seized of both phases of the trial which will be, with or without intervening appeals, a single trial; and

d) Evidence heard in the first phase of trial shall be deemed to be evidence in the second phase of the trial.

Position of the Parties

[15] All parties agree that some form of severance is required for reasons including, in summary: that doing so will result in a real saving of time and expense resulting from a narrowing of the issues required to be determined in Phase 2, through findings of fact and law made in Phase 1; and such findings will greatly enhance the parties' ability to seek to settle the remaining issues after Phase 1 is completed, which it is hoped will make Phase 2 unnecessary.

[16] Canada agrees with the form of severance proposed by the plaintiffs.

[17] British Columbia does not agree that Aboriginal rights should be determined in respect of the whole Claim Area in Phase 1. Instead, British Columbia submits that Phase 1 include a determination of aboriginal rights only in respect of the Representative Interests. It contends that Aboriginal rights claims cannot be appropriately characterized in isolation from the circumstances of alleged interference with those rights and potential justification for that interference. In addition British Columbia does not agree with the plaintiffs' proposal that at the completion of Phase 1 the Court will make a final determination on the issues dealt with in that phase or its proposal with respect to appeal of a decision in Phase 1.

Issues

[18] For the reasons set out below, I consider that it is appropriate to sever the trial into two phases, Phase 1 and 2. The key issue in dispute is whether Phase 1 of the trial should include a determination of broader Aboriginal rights, beyond those pertaining to the Representative Interests.

Summary of the Law of Severance

[19] Rule 12-5(67) permits the severance of particular issues:

> (67) The court may order that one or more questions of fact or law arising in an action be tried and determined before the others.

[20] Whether or not to sever part of a trial is within the discretion of this Court and the scope of the Court's discretion must be interpreted in light of the overall object embodied in Rule 1(3) to "secure the just, speedy and inexpensive determination of every proceeding on its merits": *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2009 BCSC 1592, at paras. 12 and 13.

[21] The principles relevant to the exercise of discretion under Rule 12-5(67) were summarized in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2007 BCSC 1014, aff'd 2008 BCCA 107, at para. 69 (citing *Nguyen v. Bains,* 2001 BCSC 1130):

> a. A judge's discretion to sever an issue is probably not restricted to extraordinary or exceptional cases. However, it should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense.
>
> b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.
>
> c. Severance is most appropriate when the trial is by judge alone.
>
> d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.
>
> e. A party's financial circumstances are one factor to consider in the exercise of the discretion.
>
> f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.

[22] There must be more than a bare, or mere, assertion that there will be a real likelihood of saving time and expense. There must be case specific information before the court about expected efficiencies: *Nguyen*, at para. 12.

Analysis and Reasons

[23] In analyzing this issue, I will start by referring to the relevant principles, (a), (b) and (d), set out in *British Columbia (Minister of Forests) v. Okanagan Indian Band.*

Significant Saving of Time and Expense:

[24] If this trial was to proceed in the usual manner, that is, without being severed into two parts, I have little doubt that it would be long and complex. Canada has provided evidence that in the *Ahousaht* trial (*Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2015 BCSC 2313 and 2015 BCSC 2418), which was also divided into two phases, phase one dealt mainly with determination of Aboriginal rights and took 124 days of court time and phase two, on justification alone, took a further 152 days.

[25] Both Canada and British Columbia dispute that the plaintiffs have aboriginal title to all of

the Claim Area and both agree that the plaintiffs' claims with respect to Aboriginal title over private lands and submerged lands are novel. No such claims were dealt with in the Tsilhqot'in case (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44). In my view, without severance, evidence concerning a defence of justification for infringement to Aboriginal title would have to be adduced for the entire Claim area. With severance, once title is determined in Phase 1, this Court will only have to concern itself in Phase 2 with infringements to areas where title has been declared.

[26] In addition, as noted by the plaintiffs and Canada, previous comprehensive title cases have not resulted in compensatory awards. The intention of the parties is that in Phase 1 the question whether pecuniary damages are payable in respect of the Representative Interests, and from when, will be judicially determined. The expectation is that such a determination will assist in either the settlement of damages claims for other claimed interests or by establishing a framework for evaluating such claims, which can be utilized in Phase 2. I agree with the submissions of the plaintiffs that the establishment of a template for determining compensation may considerably reduce the range of expert financial computations and evidence required to compute damages valuations and other remedies.

[27] I am advised that after Phase 1, the parties intend to engage in negotiations. Resolving issues of aboriginal title within the entire Claim Area and aboriginal rights in respect of the Representative Interests in Phase 1, and any ancillary matters, will likely assist in facilitating settlement discussions afterwards – which may result in a settlement of the remaining issues or at least narrow the issues to be decided in Phase 2.

[28] I agree with the submission of the parties that a compelling reason for severing this trial is to promote settlement discussions after determination of certain key issues in Phase 1. In my view, this is consistent with the comment of the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 14 that "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests".

[29] Although it is preferable in an application for severance that the applicant provide evidence to demonstrate how much time and money can be saved through severance, failure to do so is not an absolute bar to the exercise of the Court's discretion (*Emtwo,* para. 20). In my view, completing a calculation of time and expense saving is difficult to impossible in Aboriginal rights and title cases – especially when novel issues such as Aboriginal title to private and submerged lands are in play.

[30] I am satisfied that the plaintiffs have demonstrated that there is a real likelihood that an order severing this trial into two parts will result in a considerable saving of time and expense. I

will deal with the issue of whether Aboriginal rights, beyond those in respect of the Representative Interests, should be included in Phase 1 or Phase 2 later in my reasons.

Will the issues to be tried first be determinative in that their resolution could put an end to the action for one or more parties?

[31] None of the parties suggest that resolving any of the issues in Phase 1 will, in and of itself, eliminate the requirement for Phase 2. As I stated earlier, resolving issues of aboriginal title within the entire Claim Area and aboriginal rights in respect of the Representative Interests in Phase 1 will likely assist in facilitating settlement discussions taking place afterwards – which may result in a settlement of the remaining issues.

[32] Evidence of the possibility that resolving some issues could result in settlement may be considered in determining the appropriateness of a severance application (see *Emtwo*, para. 24). I am satisfied that an order severing this trial into two parts will facilitate settlement discussions between the parties and may therefore result in an end to the action.

Are the issues proposed to be decided in Phase 1 interwoven with issues to be decided in Phase 2?

[33] The parties are in agreement that in Phase 1 issues of Aboriginal title over the entire Claim Area should be decided. Further the parties agree that all claims concerning the Representative Interests, excluding the question of damages and an accounting, should be decided in this phase. This includes claims concerning Aboriginal rights in respect of the Representative Interests. In my view, there will be limited overlap between these issues in Phase 1 and the remaining issues to be decided in Phase 2.

[34] As I have already stated, the parties disagree whether issues of Aboriginal rights, beyond those relating to the Representative Interests, should be decided in Phase 1. The plaintiffs and Canada contend that they should be, and British Columbia's position is that they should be deferred to Phase 2.

[35] The plaintiffs and Canada submit that it will be most efficient and helpful if both Aboriginal title and Aboriginal rights issues in respect of the entire Claim Area are dealt with in Phase 1. It is submitted that that both of these issues will require extensive consideration of historical evidence and witnesses will overlap and therefore, deferring the issue of Aboriginal rights to Phase 2, will result in unnecessary duplication.

[36] British Columbia contends that Aboriginal rights claims cannot be appropriately characterized in Phase 1 in isolation from an evaluation of the circumstances of alleged interference with those rights and potential justification for that interference, which are intended to be dealt with in Phase 2. For this proposition British Columbia relies upon the observations

of the Court of Appeal in *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539.

[37] In *Cheslatta*, the Court of Appeal considered an appeal of an order striking out the plaintiff's statement of claim on the basis that it failed to disclose a reasonable cause of action. The plaintiff had alleged an Aboriginal right to fish for a number of species of fish in the Cheslatta Lake area but failed to plead how such rights had been infringed. The Court of Appeal upheld the decision of the trial judge. Newbury J. said as follows at paragraph 19:

> … it is clear that any aboriginal "right to fish" that might be subject of a declaration would not be absolute. Like other rights, such a right may be subject to infringement or restriction by government where such infringement is justified. The point is that the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself.

[38] As I have already stated, the plaintiffs have not set out in the relief sought, the specific Aboriginal rights for which they seek a declaration. The plaintiffs have plead certain rights including the use, harvesting, management and conservation of fish, other aquatic species and trees and trading in those things for commercial purposes and claim that such rights have been infringed. During submissions counsel for the plaintiffs confirmed that the plaintiffs do not intend to advance their claim with respect to Aboriginal rights on a species by species basis but seek to demonstrate only a *prima facie* infringement of certain aboriginal rights. The plaintiffs contend, relying on the reasons of the Supreme Court at para. 54 of *R. v. Van der Peet*, [1996] 2 S.C.R. 507, that in order to inform a court's analysis of an Aboriginal right that the activities in question must be considered at a general rather than a specific level.

[39] In response to British Columbia's contention that an Aboriginal right should not be determined in isolation from justification, the plaintiffs point to the decision in *Ahousaht,* 2009 BCSC 1494 in which this Court found a *prima facie* right to fish for any species of fish in Ahousaht territory, and a right to sell fish, which rights had been infringed by Canada's fisheries regulatory regime, and deferred the issue of justification (*inter alia,* at paras. 791, 909). I note the reasons of the Court of Appeal in *Ahousaht, 2011* (2011 BCCA 237) at para. 66 in which the Court concluded that the trial judge had not erred, by not engaging in a species specific analysis.

> I very much doubt that it would have been either practicable or helpful for the trial judge to seek to engage in a species related analysis when dealing with the issue of *prima facie* infringement. The evidence she accepted sufficed in my respectful opinion to underpin her factual findings at this stage of the process. That leaves at large and properly for future negotiation and, if necessary, further consideration and decision by a court, the unresolved issues of accommodation and justification in this particular case. At a future stage of the process, which has as its ultimate end the reconciliation of Aboriginal and non-Aboriginal interests, I venture to suggest that discreet fisheries and species will need to be considered and addressed on an individual basis.

[40] I also note the subsequent reasons of the Court of Appeal in *Ahousaht, 2013* (2013 BCCA 300) at para. 31, in which the Court stated that "rights do not exist in a vacuum" and repeated the observations of Newberry J. in para. 19 of *Cheslatta*.

[41] Finally I note the methodology for analysis of a rights claim set out by the Supreme Court in *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56, referenced by the Court of Appeal at para. 9 of *Ahousaht 2013*, which is as follows:

> 1) at the characterization stage, identify the precise nature of the claim based on the pleadings;
>
> 2) determine whether the claimant has proved, based on the evidence:
>
> > a) the existence of a pre-contact practice, tradition or custom advanced in the pleadings as supporting the claimed right; and
> >
> > b) that this practice was integral to the distinctive pre-contact aboriginal society;
>
> 3) determine whether the claimed modern right has a reasonable degree of continuity with the "integral" pre-contact practice; and
>
> 4) if an aboriginal right to trade commercially is found to exist, the court, when delineating such a right, should have regard to the objectives in the interest of all Canadians and aimed at reconciliation.

[42] The Aboriginal rights claimed in this action are general in nature and include claimed rights to fish and harvest trees, manage such resources within Claim Area and to trade commercially in fish, other marine resources and forest products. The Claim Area is a large terrestrial area, and includes the waters and subsurface within the terrestrial area, and extends to the territorial seas surrounding Haida Gwaii and beyond to the limits of Canada's Exclusive Economic Zone to the west. In my view, a determination of Aboriginal rights within this area can not be practically disentangled from an evaluation of alleged infringements of those rights including an assessment of the justification for any such alleged infringements. Seeking to do so would make it impractical to carry out the methodology for analysis of a rights claim set out in *Lax Kw'alaams*.

[43] Although there may be some overlap in the evidence and witness testimony concerning Aboriginal title and Aboriginal rights, given that it is intended that one judge, likely me, will hear both Phase 1 and 2 of the trial, evidence from Phase 1 can be used in Phase 2 if the second phase is required. In addition, since issues of Aboriginal title for all of the Claim Area and Aboriginal rights in respect of the Representative Interests will be determined in Phase 1, it is likely that any findings will provide some assistance in settlement discussions.

Other Matters

[44] Two additional aspects of the plaintiffs' proposed severance order require comment.

[45] The first concerns the question of whether following completion of Phase I, the Court will make a determination on the issues addressed in that phase which will be a final determination of those issues. As I understand British Columbia's submission, it proposes that this should not be decided until the Phase I of the trial is concluded. I am not sure that I understand the basis of British Columbia's objection to this portion of the proposed severance order. In my view, it is logical that any determination made in Phase I will be a final determination – subject to appeal.

[46] The remaining aspect of the proposed severance order concerns the right to appeal the decision in Phase 1 before commencement or completion of Phase 2. Again, British Columbia objects to this portion of the proposed order.

[47] This court has granted this type of order, concerning appeals from the first part of a severed trial, in the past: *Morrison-Knudsen Co. Inc. et al. v. British Columbia Hydro and Power Authority,* [1972] 24 D.L.R. (3d) 579 at p. 584. It is preferable for a court to confirm whether a decision in first part of a trial can be appealed prior to the completion of the entire trial.

[48] I agree with the submission of the plaintiffs that it would not be an economical use of court resources or those of the parties to engage in a lengthy second phase of the trial, focusing on the remaining, substantial, Aboriginal rights issues and damages, where there remains a possibility that the orders in Phase 1 will be modified on appeal. Accordingly, I find that it would be preferable to permit such appeals to proceed prior to commencing Phase 2, subject to the parties agreeing otherwise by consent.

Conclusion

[49] The plaintiffs' application for severance is granted on the terms sought, with the exception that in Phase 1 of the trial, matters related to Aboriginal rights will only be decided in respect of the Representative Interests.

[50] Costs are ordered in the cause.

"Mayer J."