ATTORNEY GENERAL OF BRITISH COLUMBIA and R. IN RIGHT OF BRTITISH COLUMBIA (Plaintiffs) v. WALLACE (MOUNT CURRIE INDIAN BAND) et al. (Defendants)

[Indexed as: **B.C.(A.G.) v. Mount Currie Indian Band**]

British Columbia Supreme Court, Macdonald J., March 18, 1991

B.W. Tyzuk and J.M. MacKenzie, for the plaintiffs
B. Clark and L. Crompton, for the persons arrested

The defendants were before the court on contempt proceedings for blocking the Lillooet Lake Road contrary to an injunction issued by the British Columbia Supreme Court in October 1990. The defendants, at least 56 of whom are Native Indians, admitted knowledge of the injunction but alleged that the injunction was of no effect in that the Supreme Court had no jurisdiction on unceded Indian land, thereby seeking to have the court deal with the issue of Indian sovereignty in the contempt proceedings rather than at the trial of the action.

Held: The defendants are not entitled to question, on these contempt hearings, the court's jurisdiction to issue the injunction.

1. The defendants are not entitled to question, on these contempt proceedings, the authority of the court to issue the injunction. Contempt proceedings are not suitable for the determination of the merits of a given case, rather they are limited to the determination of whether an order of the court has been knowingly disobeyed.

2. The suggestion that the court did not have jurisdiction over the defendants carries with it a "collateral attack" on the injunction issued. The principle underlying the collateral attack doctrine is that an order of a court of general jurisdiction is valid and binding and must be obeyed until set aside or varied by the court itself or reversed on appeal. This principle is fundamental to the maintenance of the court's authority.

3. Even though constitutional rules and the common law are to be applied in a manner favourable to Native Indians, it does not mean that the law is to be ignored if it is unfavourable to their cause. There are no exceptions to the collateral attack doctrine insofar as contempt of court proceedings are concerned. The issue of Indian sovereignty is not an exception to the collateral attack doctrine in the case of a superior court of general jurisdiction which had the capacity to make the injunction order. Therefore the court has jurisdiction to determine the defendants' guilt or innocence on the contempt charges.

4. A court cannot create a jurisdiction which it does not have simply by purporting to exercise such jurisdiction. In the absence of binding authority to the contrary, the court refused to entertain the proposition that there are areas in the province and individuals therein who are not subject to the jurisdiction of the court.

5. In that it will require evidence and argument on fact as well as law, Indian sovereignty is not an issue of pure law.

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MACDONALD J.: Before the court on these contempt proceedings are 59 persons, arrested on November 6, 1990 near Mount Currie, for the alleged breach of an order of this court. All but three of those persons are Native Indians. The majority, if not all, of those are members of the Lil’wat Peoples' Movement, which distinguishes itself from the band council of the Mount Currie Indian Band. The defendant, Chief Katherine Wallace, is the elected representative of the band council. Her predecessor, Chief Fraser Andrew, occupied that position at the time these contempt proceedings were initiated. Neither of those chiefs nor the band is involved in these contempt proceedings.

Early in the plaintiffs' case in these contempt proceedings, the persons arrested on November 6, 1990 for blocking the Lillooet Lake Road contrary to the injunction issued by the Chief Justice of this court on October 30, 1990 [reported 50 B.C.L.R. (2d) 145, [1991] 1 C.N.L.R. 14] chose to admit knowledge of that injunction and conduct which, technically, puts them in breach thereof.

Those admissions, however, were entirely consistent with their position from the outset of these contempt proceedings.

While the reasons for judgment of the Chief Justice dated October 30, 1990 reflect the arguments which were raised before him on the hearing of the application by the plaintiffs for the injunction, namely, the issue of whether the province has the right to resume lands in an Indian reserve for road purposes, and if so, whether such right is effective in respect of the Indian interest in such lands, the persons before me in these contempt proceedings seek to raise a much more fundamental issue.

They say that the Lil'wat Nation is a sovereign people; one over which this court has no jurisdiction. That position led to a notice to the Attorney General for Canada, and his involvement in these proceedings, because of the constitutional issue which it raises. The argument, briefly put, is that the Royal Proclamation, 1763, together with subsequent decisions of English, colonial and Canadian courts, prohibits the plaintiffs and this court from “molesting or disturbing" Native Indians on their unceded territory. They rely on Indian sovereignty over the lands of the Lil'wat Nation which have never been sold or surrendered to another government. They say that this court has no jurisdiction to find them in contempt of the injunction in question; that it has no authority over their conduct on unceded Indian lands.

Of course, if they prove to be correct in that position, the Chief Justice had no jurisdiction to issue the injunction under which they are alleged to be in contempt. That consequence raises the need to consider the doctrine of collateral attack, which has been the subject of considerable comment during the intermittent course of these contempt proceedings. In an oral ruling on January 18, 1991, I directed that full argument on the collateral attack issue, as it pertains to the defences of Indian sovereignty and lack of threshold jurisdiction which are raised by the persons arrested, be placed before the court in advance of any further evidence. These reasons for judgment are in response to those arguments.

The Question

Counsel for the persons arrested initially framed the question to be answered in this ruling as follows:

> Does Indian sovereignty, as a threshold jurisdiction issue, constitute an exception to the collateral attack rule?

Counsel for the plaintiffs responded by phrasing the question in these words:

> Should this court, in these contempt proceedings, hear argument on the issue of Indian sovereignty?

At the close of the plaintiffs' argument on the collateral attack and threshold jurisdiction questions, Mr. Clark reframed the question which he was addressing in this way:

> Whether or not this is a court of general jurisdiction in relation to unceded Indian territory?

That restatement was obviously designed to counter the effect of certain arguments advanced on behalf of the plaintiffs and reviewed below.

I have concluded that any attempt to frame a particular question should be avoided. The danger is that the form of the question may dictate the answer. The real issue is whether or not it is open to the persons before me to deliberately defy the injunction, cause their arrest (with the attendant publicity for their cause) and thereby force this court to deal with the Indian sovereignty issue in these contempt proceedings rather than at the trial of this action.

Ordinarily, the answer to such a question would be easy. However, as presented by counsel for the persons before me in these contempt proceedings, the Indian sovereignty issue is one of pure law. Few facts, they say, are necessary to provide a foundation for the Indian sovereignty argument: nearly all the persons arrested are Native Indians and no treaty, sale or surrender documents exist in respect of the land on which the road blockage occurred. Thus, the full pre-trial and trial processes may not be necessary to support the resolution of the Indian sovereignty issue.

My primary concern is that the courts above may take a different view of the propriety of dealing with that issue in the context of contempt proceedings. If I purport to decide that issue here, the courts above may refuse to do so on the ground that it was improper for me to do so. There is already a strong suggestion to that effect in the reasons of a judge of the Court of Appeal in chambers in the course of denying the persons before me leave to join in the appeal by the Mount Currie Band Council from the injunction granted by the Chief Justice, and the right to expand the issues to be argued on that appeal to include the Indian sovereignty issue. (See reasons for judgment of Mr. Justice Macfarlane, [1991] B.C.W.L.D. 546, January 30, 1991, Vancouver Doc. CA013228.)

For those reasons, I have concluded that I must consider fully the arguments which have been placed before me on the collateral attack doctrine and the threshold jurisdiction issue, in order to determine whether it is open to me to entertain the Indian sovereignty argument in the context of these proceedings.

Position of the Plaintiffs

The plaintiffs submit that contempt proceedings are enforcement proceedings, limited in scope by their very nature. Their purpose is not to determine the merits of the case. Nor are they the proper forum for an argument such as the one which the persons arrested seek to raise here; one which would have far-reaching effect if successful.

The collateral attack doctrine, the plaintiffs argue, is founded on the principle that an order of a court of general jurisdiction is valid and binding until set aside or varied by the court itself or reversed on appeal. They say that the Indian sovereignty argument, however characterized, is a collateral attack on the injunction itself because to allege that this court has no jurisdiction to find the persons arrested in contempt of its order necessarily impugns its jurisdiction to issue the injunction in the first instance.

They say that the rule of law is imperilled when court orders can be ignored on the basis of defences yet to be argued, and thus the collateral attack doctrine admits of no exceptions. A court order, once made, must be obeyed and cannot be challenged in contempt proceedings. To permit doubt to be cast upon the jurisdiction of this court to hear these contempt proceedings, they submit, would lead to doubt about the validity of the injunction and create uncertainty generally about the rule of law in this province.

The plaintiffs argue that for this court to hold that it is without jurisdiction to find the persons now before it in contempt of its own order is tantamount to holding that it is not a superior court. It would, in effect, amount to a declaration that the injunction is of no force and effect and can be disobeyed with impunity.

In *R.* v. *Bridges* (1989), 48 C.C.C. (3d) 545, 61 D.L.R. (4th) 154 at 157-58 (B.C.S.C.), one of the decisions of this court involving demonstrations at an abortion clinic in Vancouver, this statement appears:

> The breach of an order of this court is not a crime against the judge who issued it, it is an attack upon the institution itself ... The inherent jurisdiction of this court to punish for contempt is the sole device by which the court can ensure its own continued effectiveness ... In the whole spectrum of conduct classified as contemptuous, there can be none more sinister or more threatening than that of organized, large scale, deliberate defiance of an order of the court.

The plaintiffs say that is precisely what occurred here.

On the basis of the discussion in *Wilson* v. *R.,* [1983] 2 S.C.R. 595, [1984] 1 W.W.R. 481, 37 C.R. (3d) 97, C.C.C. (3d) 97, 4 D.L.R. (4th) 577 at 597-601, 51 N.R. 321, the plaintiffs submit that the phrase “having jurisdiction" means having the capacity to grant an injunction. Thus, the jurisdiction concept referred to in the collateral attack decisions is not applicable to a court, such as this, of general jurisdiction. It cannot be argued that such a court, one of general jurisdiction, loses that jurisdiction each time it makes a mistake. Even if a mistake has been made in this case as to the territorial jurisdiction of this court, it still had the "capacity" to issue the injunction in question. *Wilson* v. *R.* (at p. 584) also contains this statement:

> I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs.

In *Canadian Transport (U.K.) Ltd.* v*. Alsbury* (the *Poje* case), 7 W.W.R. (N.S.) 49 at 83, 105 C.C.C. 20, [1953] 1 D.L.R. 385 (B.C.C.A.), it was held that a superior court order is never a nullity.

> None of the questions raised ... goes to the jurisdiction of a court which is a superior court of record, i.e. of general jurisdiction. Each of the grounds relied upon ... is [a] proper matter for consideration upon an appeal from such an order when an appellate court ... might determine that the order could not be sustained; but that is far from saying that a party ... while the order stands unchallenged, may with impunity disobey or ignore that order because ... they consider it to be invalid.
>
> The order under review is that of a superior court of record, and is binding and conclusive on all the world until it is set aside or varied on appeal. No such order may be treated as a nullity.

The challenge to the injunction in the *Poje* case was lack of jurisdiction to make the order (based upon the applicable statute), essentially the same challenge that is sought to be advanced here. Even if a mistake, in the sense of an incorrect application of the law, was made in granting the injunction in issue here (something which the plaintiffs by no means concede) that mistake does not go to capacity.

This court has always been reluctant to carve exceptions out of the collateral attack doctrine. Indeed, that concern has already been expressed, without the benefit of full argument on this question, in my ruling of January 18, 1990 in these proceedings.

> That principle is essential to the ordered operation of the judicial system. To permit a second judge of the same court to set aside, or ignore, the other of a fellow judge, except in very limited circumstances, none of which exists here, would herald the breakdown of the system.

The plaintiffs argue that to entertain a collateral attack on the injunction in this case, under the label of a threshold jurisdiction issue, would be equivalent to this court sitting on appeal from one of its own orders.

There can be no argument that this court has the jurisdiction to defend its own authority: see *B.C.G.E.U.* v*. British Columbia (Attorney General),* [1988] 2 S.C.R. 214, [1988] 6 W.W.R. 577 at 597, 53 D.L.R. (4th) 1, 31 B.C.L.R. (2d) 273, 30 C.P.C. (2d) 221, 88 C.L.L.C. 14,047, 44 C.C.C. (3d) 289, 71 Nfid. & P.E.I.R. 93, 220 A.P.R. 93, 87 N.R. 241. The essential power of a superior court necessarily includes a power to maintain its authority and to prevent its process being obstructed and abused. Without such a power, the court would have form but would lack substance: see I.H. Jacob in "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23, at pp. 27-28, cited at p. 597 in *B.C.G.E.U*. v*. British Columbia (Attorney General)* with approval.

These proceedings have already been characterized by me as criminal in nature, based on the public character of the defiance of the injunction. The plaintiffs point out that even counsel for the persons before me concede to this court a criminal jurisdiction over Native Indians arising from an enactment of the Imperial Parliament in the 19th century which "constitutionally [took] back some of the power formerly allowed to the Natives. The law regulating crimes and offences ... was made universally applicable throughout ... Canada." *Vaillancourt v. R.,* [1981] 1 S.C.R. 69, 120 D.L.R. (3d) 740, 19 C.R. (3d) 178, 58 C.C.C. (2d) 31, 35 N.R. 597, and *R.* v*. Vermette,* [1987] 1 S.C.R. 577, [1987] 4 W.W.R. 595, 38 D.L.R. (4th) 419, 52 Alta. L.R. (2d) 97, 77 A.R. 372, 57 C.R. (3d) 340, 32 C.C.C. (3d) 519, 74 N.R. 221, 84 N.R. 246n, deal with the distinction between an indictable offence under the Criminal Code and the power of the court, reserved by s.9 of the Criminal Code, to protect its processes through contempt proceedings. Despite that distinction, the plaintiffs say that a finding of criminal contempt results in a criminal record and that it must follow that this court is exercising its admitted criminal jurisdiction in these contempt proceedings.

While it by no means exhausts the plaintiffs' arguments, I propose to summarize only one further argument advanced by them. They say that, properly understood, the Indian sovereignty argument challenges the basic constitutional framework of Canada. It alleges that Native Indians in most of this province, in the Yukon and large portions of the Northwest Territories, Quebec and other

provinces as well, are not, for constitutional reasons, subject to the laws of Canada. The plaintiffs submit that it is not in the public interest to resolve an argument of such gravity in the course of summary proceedings for contempt which were initiated before pleadings or pre-trial processes; mere enforcement proceedings which provide a mechanism to protect the authority of the court.

Arguments of Mr. Clark

To place the arguments of Mr. Clark on the collateral attack and threshold jurisdiction issues in proper perspective, it is appropriate to summarize his argument on Indian sovereignty. To do so, I turn first to his doctoral thesis, now published under the title "Native Liberty, Crown Sovereignty" which is filed as Ex. 21 in these proceedings. In his introduction to that thesis, Mr. Clark writes:

> Under the Royal Proclamation of 1763 [which gave birth to the colony of Quebec, and enacted that the "several Nations or Tribes of Indians ... should not be molested or disturbed" in relation to their unceded Territory or "hunting grounds"], and several other Imperial legislative instruments ... the natives were assured that the crown would not unilaterally usurp any part of British North America ...
>
> Government is normally understood to have a territorial extension. The aboriginal right of self government is no different ... A series of constitutional instruments [including the Royal Proclamation of 1763, which speaks of "such Parts of Our Dominions ... not having been ceded to or purchased by Us, are reserved to them ..."] speaks of land that is "reserved" ... the land has never been demonstrably unreserved - that is, never "ceded to or purchased by" the crown. The crucial point is that *all* land in what is now Canada started out by being reserved ...
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> Furthermore, by reiterating the continued existence of the Indian territory concept first identified in the 1763 proclamation, the Imperial Parliament perpetuated the legal attributes of the Indian territory, including the aboriginal right of self-government. Thus when the powers of federal and provincial governments were constituted in Canada they were made to accommodate this previously established right. In the nineteenth century ... the Imperial government did constitutionally take back some of the power formerly allowed to the natives. The law regulating crimes and offences ... was made universally applicable throughout ... Canada. Thereafter the aboriginal right of self-government can be understood only in terms of a civil jurisdiction ...
>
> The essential premise ... is that legal protection and reservation of *tribal sovereignty* follow from legal protection and reservation of *tribal land.* The British crown ... reserved all unceded North American land, and enacted that upon such land the native nations or tribes should not be molested or disturbed. The argument is that by not molesting or disturbing these political entities, one necessarily leaves them in a self-governing condition.

Mr. Clark "fleshes out" that approach to Indian sovereignty by emphasizing that it means co--existence in peace, friendship and respect and precludes the dominance of one race over the other. He alleges the existence of a "social compact" between the Imperial government and the Indian nations, flowing from the Royal Proclamation, 1763, which had legal force on November 6, 1990. He relies in particular on a series of five court decisions in the Privy Council and the courts of this country, stretching from 1773 to 1989, for such propositions as these:

1. Only the Imperial Parliament can revoke a promise by the King and his council to an overseas people.

2. Colonial powers, and those of the federal and provincial governments of Canada, are limited to those expressed in their respective constitutions. Such governments have no sovereign powers except those expressly granted to them.

3. Acquiescence by the Imperial government in an ultra vires act or proclamation by a colonial government does not render that act or proclamation lawful.

4. The Indian interest is paramount to the provincial interests; and to reconcile that principle with the statement in the *St. Catherine's Milling* case [*St. Catherine's Milling & Lumber Co*. v*. R*. (1888), 14 App. Cas. 46 (P.C.)] (that Indian interests are dependent on the goodwill of the Sovereign), the "Sovereign" must be equated with the Imperial Parliament in England and not a provincial legislature.

5. Indian rights stem from their priority of occupation. Those rights predate and survive provincial sovereignty and have never been revoked by the Imperial Parliament.

6. A series of legislative instruments, starting with the Royal Proclamation of 1763, established that in Canada Aboriginal rights are the *only* remaining subject over which the “colonial" governments now established in Canada do not now have paramountcy. That series ends with s.35 of the *Constitution Act, 1982,* which preserves "existing" Aboriginal rights.

Thus, as Mr. Clark underlines, the "Imperial perspective" is crucial to his thesis. One cannot assume from local practice what the law is. To a large extent, he submits, the past practices of both the federal and the provincial governments have been unlawful. Fifty-six of the arrested persons are patently Aboriginal. He alleges that on November 6, 1990, they were simply exercising their right to protect "sovereign Aboriginal territory" from loggers and other non-natives. He says that the Constitution of this country protects that right and that this court is powerless to punish them for so doing.

Mr. Clark adds that in a constitutional situation where the two races (Indian and white) must co-exist, it would be improper for one race (represented by myself) to sit in judgment over another. I do not have, he argues, the power to deprive these people of their constitutional liberty in proceedings founded upon an alleged breach of an order of this court which he alleges has no jurisdiction over acts committed on Indian land (unless, presumably, those acts result in charges being laid under the Criminal Code).

The arguments advanced by Mr. Clark at this hearing on the issue of whether the Indian sovereignty issue is an exception to the collateral attack doctrine and should be regarded instead as a question of threshold jurisdiction, can be summarized under six headings:

1. The Indian sovereignty issue is one of "pure law"; as appropriate in these contempt proceedings as it would be in the Court of Appeal following the trial of this action. Native Indians have been making the same basic point for generations: "Why does white society break its own laws, when it is so simple for all to see?" They ask how white society can get away with such a transparent fraud; how the provincial government can "steal" Indian territory in the face of a clear constitutional prohibition? Mr. Clark submits that it is important to vindicate the rule of law without further delay. He alleges that until some court has dealt with these arguments, both the courts and the police are, in his view, acting outside the law.

2. As long ago as 1895 (see *Ontario* v. *Canada; Re Indian Claims* (1895), 25 S.C.R. 434) the Supreme Court of Canada declared that constitutional rules and the principles of the common law should be strained in favour of Native Indians because they must be regarded as "wards of the nation." It is not, the court stated, simply a question of good faith and justice.

3. The simple point is that the Royal Proclamation, 1763, precludes non-Native courts from acquiring non-consensual jurisdiction over Indians on unceded Indian territory. Among the Aboriginal rights preserved by s.35 of the *Constitution Act, 1982*, is the right to refuse to acknowledge the authority of this court in respect of unceded Indian territory.

4. The arrested persons rely on the paramountcy of Aboriginal rights. They say that if there is a conflict between the territorial jurisdiction of this court and s.52 of the *Constitution Act, 1982*, then the Aboriginal rights must be paramount.

5. It is not appropriate for this court to enforce laws which make Native Indians trespassers on their own territory. The civil dispute which underlies these contempt proceedings and is the subject of this action is really a political problem. For this court to "assume" jurisdiction would be to countermand the Royal Proclamation, 1763. This court cannot "create" jurisdiction for itself simply by characterizing these proceedings as contempt proceedings.

6. In response to the argument of the plaintiffs that the characterization of these proceedings as criminal contempt gives rise to a "jurisdiction" in this court which might otherwise be absent, Mr. Clark states that such reasoning would in itself constitute a “fraud and abuse" in the sense prohibited by the Royal Proclamation, 1763.

<u>Arguments of Ms. Crompton</u>

Ms. Crompton's arguments are developed from an initial premise, raised earlier in these proceedings, that basic jurisdiction is a question which falls outside the collateral attack doctrine. It was Ms. Crompton who introduced the term "threshold jurisdiction" to these proceedings. Without that characterization of the issue, it is unlikely that the issue would have assumed the dimensions which it has. Her submissions can be summarized as follows:

1. If the injunction was granted in the absence of jurisdiction to do so, it is a nullity and there is nothing to attack collaterally. The doctrine only applies where there is jurisdiction, but an error has been made in exercising it.

2. A court cannot confer a jurisdiction on itself simply by purporting to exercise a power which it does not have.

3. There is not only an inherent power, but also an inherent obligation, in this court to guard against abuse of process. That obligation is at least equal to the court's concern to preserve its authority. The exercise of that authority must not of itself become an abuse.

4. A challenge to the jurisdiction of a court must be squarely met. That cannot be done here by failing to hear either evidence or argument on the jurisdictional question which arises from the Indian sovereignty issue.

5. Each and every case authority on which the plaintiffs rely for their submission that the Indian sovereignty argument is a collateral attack on the injunction are situations in which the court clearly had basic jurisdiction. The phrase "a court having jurisdiction" appears regularly throughout the decisions in those cases. "Jurisdiction" must be distinguished from the "exercise of jurisdiction." The authorities cited are all cases where jurisdiction was wrongly exercised. That alone distinguishes those cases from this one. It is the authority to pronounce judgment, rather than the correctness of the judgment, that is in issue here.

6. The injunction should be regarded as an ex parte order insofar as the persons arrested are concerned. They requested the chief to raise the Indian sovereignty issue on the application for the injunction and he chose not to do so. If these contempt proceedings are concluded without their argument being advanced, they will effectively be denied their day in court.

7. At every turn, the persons arrested are faced with the argument that there is another procedure or a different occasion on which it might be appropriate to raise the Indian sovereignty issue. When will it be the time for the plaintiffs and the court to face that issue? Trial may be too late for the persons arrested if they have already been found guilty of criminal contempt.

8. It was entirely inconsistent with the position of the persons now before the court to attorn to its jurisdiction by participating in the opposition to the application for the injunction. There is authority for the proposition that doing so might confer jurisdiction on the court over at least "the person."

9. There is a right here to make full answer and defence. That includes a right to have the question of this court's jurisdiction over the conduct of these persons on unceded Indian territory determined in advance of any finding of guilt. There must be an affirmative finding on every question essential to such a result. Jurisdiction is such a question.

10. The Indian sovereignty issue is one of "pure law," as Mr. Clark maintains. Thus, the court in these proceedings is in the same position to determine that issue as a trial judge would be. The burden is on the plaintiffs to establish that the land on which the alleged contempt occurred is not unceded Indian territory and, until that is done, judicial notice can be taken of the absence of any treaties with the Indians in the lower mainland area.

Discussion

(a) The submission of the persons arrested that the Indian sovereignty issue is one of "pure law" which can be resolved equally as well on these proceedings as it can at trial does not survive careful scrutiny. On an application for leave to join in the appeal by the Mount Currie Band from the injunction, and to expand the scope of that appeal to include the Indian sovereignty issue, Macfarlane J.A. stated (at pp. 6 and 7):

> There is no doubt ... the argument ... is one of great complexity involving a consideration of the origins of the people involved and a historical analysis which [will] undoubtedly give rise to conflicting expert opinions ...
>
> ... I think that the question is one to which the trial process should be applied.

In *MacMillan Bloedel Ltd.* v. *Mullin,* [1985] 2 C.N.L.R. 58 at 65, 61 B.C.L.R. 145 at 151, [1985] 3 W.W.R. 577 (C.A.), Mr. Justice Seaton said:

> I am firmly of the view that the claim to Indian title cannot be rejected at this stage of the litigation. The questions raised by the claim are not the type of questions that should be decided on an interlocutory application.

Those two opinions appear to me to be vindicated by the 16 pages in *Delgamuukw* v*. British Columbia* (see below) devoted exclusively to the application of the Royal Proclamation, 1763 (and described by the court, with apologies to counsel, as a "summary" disposition of the question).

(b) The attempt of counsel for the persons arrested to distinguish the decisions which have enunciated the collateral attack doctrine on the basis that the court in all those cases clearly had the "basic" or threshold jurisdiction over the parties, must fail. I agree with the submission of the plaintiffs that the phrase "a court having jurisdiction" which appears in those decisions, refers to the "capacity" of the court to make an order such as the one impugned. A judge of the Provincial Court, for example, has no capacity to grant injunctive relief. Any attempt on the part of such a judge to do so would be a nullity. No such considerations apply to this court, a superior court of general jurisdiction. This court can, and does, make mistakes. That does not remove its "capacity" to make orders such as the injunction in issue here. The statements in *Wilson* v*. R.* and the *Poje* case (both *supra)* can be interpreted in no other way.

(c) I recognize and accept that the Supreme Court of Canada has dictated an approach to the application of constitutional rules and the common law in the manner which is most favourable to Native Indians: *Ontario* v*. Canada, supra.* That does not mean, however, that the law is to be ignored if it is unfavourable to their cause. I consider it to be clear that there are no exceptions to the collateral attack doctrine insofar as contempt of court proceedings are concerned. Any exception would be tantamount to permitting this court to sit on appeal from one of its own orders.

Underlying the collateral attack doctrine is the principle that an order of a court of general jurisdiction is valid, binding and must be obeyed until set aside or varied by the court itself (in those limited circumstances in which that course is open) or reversed on appeal. That principle is fundamental to the maintenance of this court's authority. One of the essential inherent powers of a superior court is the power to maintain its own authority.

(d) I accept the proposition advanced by the persons arrested that this court cannot create a jurisdiction which it does not have simply by purporting to exercise such jurisdiction. But, in the absence of binding authority to the contrary, I refuse to entertain the proposition that there are areas of this province and individuals therein who are not subject to the jurisdiction of this court.

The final outcome in this and other cases now before the courts may well establish that some laws of this country and province may not apply to some of its inhabitants in some locations. This court will still administer those laws which do apply.

(e) I reject the submission of the plaintiffs that because I have characterized these proceedings as criminal contempt in nature rather than civil, jurisdiction is conferred by the enactment of the Imperial Parliament which made "the law regulating crimes universally applicable." These proceedings originate in a civil action for trespass and nuisance on what is alleged to be public highway. While a conviction of the persons arrested will result in a criminal record, I consider that to base a finding of jurisdiction on that ground would be to create jurisdiction by exercising it.

"Although criminal contempt has some of the characteristics of any criminal offence, particularly since the offender can be punished by imprisonment or fine, it is best to regard it as an offence which is sui generis": see Borrie and Lowe, *The Law of Contempt* (1973)*,* at p. 253*.* Procedure is different from that which applies in ordinary criminal cases. There is no summons nor right to trial by jury. There is no theoretical limit to the length of the sentence or the amount of the fine. The many peculiarities of criminal contempt have developed largely by historical accident.

The elementary justification for contempt proceedings is the preservation of the court's authority. At issue here is the court's civil jurisdiction over Native Indians on what they claim to be unceded Indian territory. To convert that into a non-issue merely by characterizing these collateral proceedings as criminal in nature, would not be appropriate.

(f) While I accept Ms. Crompton's submissions that the court must deal with a challenge to its jurisdiction, and must find jurisdiction as one of the elements necessary to support a conviction for contempt, I consider that I have spent considerable time in doing exactly that. This court purported to exercise jurisdiction over the conduct of the persons arrested when the Chief Justice issued the injunction. Whether he was right or wrong in so doing will ultimately be determined on appeal, but in my view his "capacity" to make such an order is unquestioned. Having so ordered, it was not open to the persons arrested to defy that order. In that regard, I have the jurisdiction to determine their guilt or innocence on the contempt charges which they face.

(g) The persons arrested urge me to treat the injunction, as against them, as I would an order made ex parte. I reject that suggestion outright.

They were well aware of the application for the injunction. They elected not to appear and present the sovereignty argument which they wish to advance in these contempt proceedings. I remarked earlier in these proceedings that I considered such legal strategy to be ill-conceived. I have heard no reasons in the interim to change that view.

It is not correct, as counsel suggest, that to appear in opposition to the application for the injunction would be an attornment to the jurisdiction of the court. One need only have reference to R.14(6) of the Rules of Court in that regard, which applies whether or not a person has entered an appearance:

> (6) Where a person ... alleges that ...
>
> (c) the court has no jurisdiction over him ...
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> the person may apply ... for a declaration to that effect.

(h) There is much to be said for the general statement by the plaintiffs that the potential consequences of the Indian sovereignty argument are serious indeed. The success of that argument would fundamentally alter the constitutional framework of this country. However, the persons arrested have a right to make full answer and defence. Whatever the consequences, they cannot be prevented from raising a legitimate issue. I have concluded that the jurisdiction of this court to try them for contempt is not an issue which they are entitled to raise.

They complain that they are blocked at every turn by procedural objections designed to prevent the Indian sovereignty argument from being advanced. Yet they reject suggestions as to the proper manner in which to raise that issue.

Contempt proceedings are, by their very nature, limited in scope. They are not suitable for the determination of the merits of a given case. They are limited to the determination of whether an order of the court has been knowingly disobeyed. To hold that I am without jurisdiction to find the persons now before this court in contempt of its earlier order, would be to declare that order of no effect and to state that it can be disobeyed with impunity. I am not prepared to so decide.

The Gitksan/Wet'suwet’en Decision

In the course of this argument, reasons for judgment were handed down by McEachern C.J.B.C. in *Delgamuukw* v. *British Columbia,* March 8, 1991, Smithers Doc. 0843 (B.C.S.C.) [now reported Special Edition - [1991] 5 C.N.L.R. 1, [1991] 3 W.W.R. 97]. One of the findings and conclusions in that judgment is that the Royal Proclamation, 1763, has never applied to or had any force in the colony or province of British Columbia or to the Indians living here. On the strength of that judgment of this court, the plaintiffs argue that it is academic for me to deal with the collateral attack doctrine of the threshold jurisdiction issue. I disagree.

Counsel for the persons arrested argue strenuously that the judgment in *Delgamuukw* is "incapable of being persuasive or a precedent." They characterize it as a per incuriam decision (one clearly the result of some oversight) and therefore not binding on me. They say that there is a fundamental difference between that case and this because in *Delgamuukw* there was an

attornment to the jurisdiction of this court by the Indians from the outset, something which they have studiously avoided here, even to the extent of refusing to divulge their English names.

In response, the plaintiffs point to p. 83 [p. 72 C.N.L.R., p. 211 W.W.R.] of the judgment of *Delgamuukw* and the statement that 25 per cent of the arguments of counsel (which spanned a total of almost 60 days) and "a great deal of interesting evidence" was devoted to the Royal Proclamation, 1763. In the light of that attention, the imposing array of counsel for the Indians in that case, and the 16 pages (pp. 83-98 [pp. 72-86 C.N.L.R., pp. 211-31 W.W.R.]) of the judgment devoted exclusively to this subject, it hardly seems appropriate to describe that decision as one made per incuriam.

The plaintiffs say that the Royal Proclamation, 1763, is the "foundation" on which the persons arrested base the Indian sovereignty argument which has been summarized for me in this case. While the word "foundation" may be a considerable overstatement, there can be no questions that the Royal Proclamation, 1763, is an important element of that argument.

It is also true the *Re Hansard Spruce Mills Ltd.* (1954), 13 W.W.R. 285 at 286, 34 C.B.R. 202 (B.C.S.C.), places severe limits on my right to differ from the decision of another judge of this court, for the reasons there expressed. It does not appear to me that any of the three situations outlined in *Hansard Spruce Mills* which would permit me to go against the decision in *Delgamuukw* on the effect of the Royal Proclamation 1763, exist here.

Despite all that, I have concluded that it is appropriate for me to deal fully with the collateral attack and threshold jurisdiction issues for two reasons:

1. It is important to state clearly, as soon as possible following the decision in *Delgamuukw,* that an order of this court must be obeyed until it is set aside or varied on appeal. The defiance of an order of this court, whether or not the underlying issue is Indian sovereignty, cannot be countenanced. That must be so whether or not the persons involved are acting with the benefit of legal advice and whether or not the order was properly made. To hold otherwise would herald the breakdown of our judicial system.

2. The question of whether or not I am bound by the decision in *Delgamuukw* need not be investigated if I conclude, as I have done, that the jurisdiction of this court cannot be attacked in these contempt proceedings.

Judgment

The persons arrested are not entitled to question, on these contempt proceedings, the authority of the Chief Justice of this court to issue the injunction in question here. Of necessity, any suggestion that I have no jurisdiction over them carries with it a "collateral attack" on the injunction itself. The issue of Indian sovereignty may not be raised or argued in these contempt proceedings. That issue is not an exception to the collateral attack doctrine in the case of a superior court of general jurisdiction such as this.

Whether or not this is a court of general jurisdiction in relation to "unceded Indian territory" remains to be determined in this action, although the outcome of that question appears hardly in doubt unless and until *Delgamuukw* is reversed on appeal.