UUKW ET AL. v. THE QUEEN ET ALL.; MARTIN ET AL. V. THE QUEEN ET AL.; PASCO ET AL. v. CANADIAN NATIONAL RAILWAY COMPANY ET AL.

British Columbia Court of Appeal, Taggart, Anderson and McLachlin JJ.A., July 22, 1986

Peter Grant, for the appellant Uukw
Hon. T.R. Berger and P. Rosenberg, for the appellant Martin
Leslie Finder, for the appellant Pasco
D.M.M. Goldie, Q.C. and P.G. Plant, for the Queen in Right of British Columbia in the Martin and Uukw actions
Howard R. Eddy, for the Queen in Right of British Columbia in the Pasco action
James A. Macaulay, Q.C. for the Attorney General of Canada in the Uukw and Pasco actions
P.G. Voith, for MacMillan Bloedel Limited E.C. Chiasson, Q.C. for Canadian National Railway

The plaintiffs in each of the these actions appealed from the pre-trial order of Chief Justice McEachern (reported supra, p.146) wherein he held, inter alia, that the three actions be tried to get her and by the same judge. Counsel for the plaintiffs in each of the actions took the position that the actions should proceed to trial separately. The position of the plaintiffs in the Martin action at the time the order was made was that they would not be ready to go to trial until the spring of 1987. On appeal they advised that they were prepared to proceed to trial in the fall of 1986.

The major issues argued on the appeal were: I) Should the three actions be tried at the same time before the same judge? 2) If they were to be tried at the same time, should the evidence given in any of the three actions be admissible in any of the other actions in which it was relevant subject to all just exceptions?

Held: Appeal allowed.

1. The factual situation presented on appeal differed from that presented to the Chief Justice. At the time of making the order the Chief Justice was not aware that the *Martin* action would be ready for trial in the fall of 1986, in fact, the opposite appeared to be the case. Thus, the basis for the order made by the Chief Justice had been weakened, if indeed it had not disappeared. The *Martin* action was ready to go to trial, so the delay factor envisioned by the Chief Justice had changed.

2. The Chief Justice had not been informed that the factual foundation in respect of aboriginal title was not the same in each of the three actions. Aboriginal title must be determined on a case-by-case basis.

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PER CURIAM: There are before the Court applications for extensions of time to apply for leave to appeal, applications for leave to appeal and, if leave is granted, appeals from orders directing that three actions be tried at the same time and by the same judge. The applications for extensions of time and leave to appeal were ordered to be heard at the same time as the appeals themselves. The Court has heard full argument on the merits of the applications and of the appeals. The major issues argued on the appeal were:

1. Should the three actions be tried at the same time before the same judge?

2. If they are tried at the same time, should the evidence given in any of the three actions be admissible in any other of the three actions in which it is relevant subject to all just exceptions?

Of the three actions, the first to be commenced was Action No. 0843, which will be referred to as "the Gitksan action". The plaintiffs in that action are 48 hereditary Chiefs of the Houses of the Gitksan and Wet'suwet'en Bands resident in valleys of the headwaters of the Skeena River and its tributaries. The defendants are the Crown in the right of the Province of British Columbia (the Crown) and the Attorney General of Canada.

In this action the plaintiffs claim:

> 1. A declaration that the Plaintiffs' ownership and jurisdiction over the territory has never been lawfully extinguished or removed;
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> 2. A declaration that the Defendants do not have jurisdiction over the territory of the Plaintiffs;

3. A declaration that the Plaintiffs are entitled to damages from the Defendant for the wrongful appropriation and use of their lands by the Defendant or by its servants, agents or contractors without their consent.

4. A Lis Pendens over the territory described in Schedule A and delineated in the map which is set out in Schedule B;

5. An interlocutory and permanent injunction prohibiting the Defendants from interfering with the aboriginal title, ownership and jurisdiction of the Plaintiffs.

6. The Costs of the action.

7. Such further and other relief as to this Court may seem just.

The second action to be commenced is Action No. C845934. In this action, which will be referred to as the Martin action, the plaintiffs ate Moses Martin, for himself, and the Clayoquot Band of Indians and Corbett George, for himself, and the Ahousaht Band of Indians. The defendants are Her Majesty the Queen in the right of the Province of British Columbia (the Crown) and MacMillan Bloedel Limited. In this action the plaintiffs claim:

(a) A declaration that the aboriginal rights of the Plaintiffs include the right to use, possess, harvest, manage, and conserve the resources of the forest within that portion of their ancient tribal territory known as Meares Island.

(b) A declaration that the interests of the Defendants are subject to the underlying aboriginal rights of the Plaintiffs.

(c) A declaration that any law of British Columbia or any Provincial authorization purporting to allow logging on Meares Island or to in any manner interfere with said aboriginal rights on Meares Island is ultra vires and of no force and effect.

(d) A permanent injunction against the Defendant, MacMillan Bloedel Limited, restraining them from continuing logging operations on Meares Island and from trespassing in derogation of the Plaintiffs' aboriginal rights.

In this action, this Court granted an interim injunction pending trial restraining MacMillan Bloedel Limited from logging on Meares Island.

The third action to be commenced is Action No. A850201. The plaintiffs are 36 Chiefs suing for themselves and their bands. The bands are located along the Fraser and Thompson Rivers and their tributaries. The defendants are the Canadian National Railway Company (C.N.R.), Her Majesty the Queen in the right of the Province of British Columbia (the Crown) and the Attorney General of Canada, who was joined at the instance of the Crown. This action will be called the Pasco action.

The plaintiffs in this action claim:

(a) An interim, interlocutory and permanent injunction restraining C.N.R., its agents, servants and employees or any other person acting on their behalf from constructing a second railway track so as to interfere with the Plaintiff Bands' right to the Fisheries as enumerated herein, without the consent of the Plaintiff Bands;

(b) In the alternative, an interim, interlocutory and permanent injunction restraining C. N. R., its agents , servants and employees or any other person acting on their behalf from constructing a second railway track so as to interfere with the Plaintiff Bands rights to the Specific Fisheries as enumerated herein, without the consent of the Plaintiff Bands;

(c) An interim, interlocutory and permanent injunction restraining C.N.R., its agents, servants and employees or any other person acting on their behalf from constructing a second railway track through the Reserves of the Plaintiff Bands in a manner which would derogate from the rights of the Plaintiffs in association with their Fisheries or, in the alternative, with their Specific Fisheries;

(d) Damages for the trespass to and interference with the Plaintiffs' Fisheries or, in the alternative, to the Specific Fisheries;

(e) Costs;

(f) Such further and other relief as to this Honourable Court may seem just.

The foregoing claims are based on the assertion that:

1. The plaintiffs have land reserve allotments along the rivers and enjoy riparian rights;

2. The plaintiffs have fisheries which they allege were reserved to them along the river pursuant to the recommendations of the McKenna-McBride Royal Commission;

3. The plaintiffs assert aboriginal title and rights to fish in the river, access to the fisheries and property rights in the fish.

In the Pasco action Mr. Justice Macdonald of the Supreme Court of British Columbia granted an interim injunction pending trial, restraining the C.N.R. from proceeding with construction of the second track [[1986] 1 C.N.L.R. 35]. An appeal by the C.N.R. to this Court was dismissed [[1986) 1 C.N.L. R. 34] as was an application for leave to appeal to the Supreme Court of Canada.

When this Court granted an interim injunction in the Martin action [[1985] 2 C.N.L.R. 58), it was anticipated that the action would go to trial in the late fall of 1985. On September 27, 1985 the plaintiffs in the Martin action applied to adjourn the trial. McEachern, C.J.S.C. granted the adjournment but ordered the injunction granted by the Court of Appeal to continue until trial.

In his reasons for judgment given on September 27, 1985, the Chief Justice said that, given the postponement of the Martin action to a time more or less contemporaneous with the trial date fixed in the Gitksan action, the proper administration of justice called for the two actions to be heard at the same time by the same judge. He did not order consolidation of the two cases and left the conduct of the trial to a pre-trial conference judge, or to the trial judge. The Chief Justice did say it was his opinion the Gitksan case should proceed first and that the trial should open in Smithers and continue there so far as might be appropriate. The Chief Justice made no order in the Pasco action but indicated that he was strongly disposed to order the aboriginal rights issues in that action tried at the same time as the other two actions. It was subsequently arranged that the trial in the Gitksan and Martin actions would commence on November 2, 1986.

The formal judgment included this paragraph:

> THIS COURT ORDERS that this action and Action Ho. 0843 in the Smithers Registry of this Honourable Court be set for trial at the same time, that the hearing of the evidence in Action 0843 shall commence first and that otherwise the manner in which the trials of the two actions be heard shall be determined as the Trial Judge or a Judge in a pre-trial conference shall direct;

On April 24, 1986, a pre-trial conference was held before the Chief Justice (judgment reported supra, at P.146]. Counsel for the parties in each of the three actions were present. Counsel for the plaintiffs in the Gitksan case advised the Chief Justice that they would not be ready to proceed with their trial in November 1986. Counsel for the plaintiffs in the Pasco case advised the Chief Justice they did not wish their action to be tried at the same time as the other two. Counsel for the plaintiffs in the Martin action also advised the Chief Justice that they did not wish their action tried at the same time as the other two.

Counsel for the Crown advised the Chief Justice that he thought some saving in time might be effected if the three actions were tried at the same time and by the same judge.

Having heard very full submissions from all counsel present, the Chief Justice made an order which included the following four paragraphs:

> THIS COURT ORDERS that Action No. 843 (Smithers Registry) (hereinafter referred to as the "Gitksan action")r Action No. A850201 (Vancouver Registry) (hereinafter referred to as the "Pasco action"), and Action No. C845934 (Vancouver Registry) (hereinafter referred to as the "Moses Martin action"), be set for trial at the same time commencing January 12th, 1987 at the Courthouse at Smithers, British Columbia;

AND THIS COURT ORDERS that the trial will commence with the evidence of the Plaintiffs in the Gitksan action and that otherwise the manner and place in which the trials of the three actions should be heard shall be determined as the Judge shall from time to time direct;

AND THIS COURT FU RT HER ORDERS that all evidence given in any of the three actions will be admissible in any other in which it is relevant, subject to all just exceptions;

AND THIS COURT FURTHER ORDERS that while the evidence of any party is being taken, counsel in any other of the within-named actions may cross-examine or take such other part in the proceedings as the trial Judge permits;

The Chief justice considered that the proper administration of justice required the three actions to be tried at the same time and by the same judge. His principal concerns were to avoid inconsistent judgments, to permit the appeal process to proceed as quickly as possible after the trial judgment and to avoid having to call evidence more than once. He considered the difficulties and expense to the plaintiffs in each of the three actions but held that the advantages of a single trial outweighed the advantages of the three actions being tried separately.

At the time of making the orders of September 27, 1985 and April 24, 1986, the Chief Justice was not aware of the position now taken by counsel in the Martin action. During argument we were advised:

1. The plaintiffs in the Martin action are prepared to proceed to trial anytime between September 1, 1986 and December 31, 1986,

2. They are anxious to proceed with the Martin case as soon as possible and do not wish to be delayed by the Gitksan and Pasco cases.

When these matters were being considered by the Chief Justice in September of 1985 and April of 1986, the plaintiffs in the Martin action took the position they could not be ready to proceed to trial until the spring of 1987.

We were informed by counsel for the plaintiffs in the three actions that if conducted separately they will require the following amounts of time:

The Martin action	- three months
The Gitksan action	- six months
The Pasco action	- four months.

According to counsel, the foregoing are conservative estimates.

We were informed by counsel for the plaintiffs in the three actions that if the cases were conducted separately there would be some overlapping with respect to the issue of extinguishment but there would be little or no overlapping with respect to proof of aboriginal title. With respect to the latter issue, the evidence in each case is quite distinct. The bulk of the evidence called would be with respect to aboriginal title.

Counsel for the plaintiffs in the Gitksan action describes the evidentiary issues relating to aboriginal title in his memorandum of argument as follows:

> The evidence supporting the claims in the three cases is very different. The cases involve native peoples from wholly different parts of the Province. Their histories, culture, institutions, spiritual beliefs traditions, language, resources and resource management practices are distinct. They are as different as the Dutch, French and Belgians are from one another.
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> Proof of aboriginal title in each case will depend on the evidence that will demonstrate the uniqueness of each people or nation. In Delgam Uukw [Gitksan] since a wider spectrum or rights is claimed, a broader range of evidence will be called to show the scope and richness of the culture and society. The same breadth of evidence is not needed to resolve the claims to the forest in Martin and the fishery in Pasco.

Counsel for the Crown does not take serious issue with the submissions of counsel for the plaintiffs relating to proof of aboriginal title. He does, however, point out that there are common features in all three actions. In this respect, his memorandum of argument reads, in part, as follows:

The Plaintiffs in all three actions make the following common assertions with respect to the source, content and indefeasibility of aboriginal rights:

(a) Rights claimed by virtue of the Royal Proclamation of 1763.

(b) Rights enjoyed by virtue of the Constitution Act 1867.

(c) Rights enjoyed by virtue of the Constitution Act 1982.

(d) Rights enjoyed by virtue of international law.

(e) Superiority of aboriginal rights over federal and provincial laws.

The Province [the Crown] is a defendant in all three actions. The following defences are common to all three actions:

(a) Jurisdiction, if any, to make laws, extinguished at union with Canada in 1871.

(b) Aboriginal rights, if any, voluntarily given up by requesting additional reserve lands.

(c) Extinguishment by the making or enactment of laws of general application and other ordinances and proclamations.

(d) Reliance on section 52 of the Constitution Act 1982.

The following defences are pleaded in both Martin and the Gitksan case:

(a) Extinguishment by the bringing of the laws of England into force in the territory.

(b) Extinguishment by the implementation of agreements and statutes.

Counsel for the plaintiffs in each of the three actions take the position that the actions should proceed to trial separately. Counsel for the C.N.R. takes the position that all the actions should be tried together or all should be tried separately. If tried together, relevant evidence in each action should be evidence in the other actions. Counsel for the Crown and counsel for MacMillan Bloedel Limited submit that the applications and the appeals should be dismissed. Counsel for the Attorney General of Canada supports that submission. Counsel for the Crown also submits that since it now appears the Martin action is ready to go to trial sooner than was contemplated in April 1986, the dismissal of the appeal could be without prejudice to an application by the plaintiffs in the Martin action for a separate trial at an early date.

The submissions of counsel for the plaintiffs in each of the three actions may be summarized as follows:

1. If the three actions are tried at the same time, all parties will be subject to intolerable delay. [We interject here to say that when the Chief Justice made his order on April 24, 1986, he was faced with quite a different picture as to delay, because at that time he was not aware the Martin action would be ready for trial in the fall of 1986. In fact, the opposite appeared to be the case.]

2. The order was made under a misconception as to the nature of the evidence supporting aboriginal title in each case. Counsel for the plaintiffs pointed out to us that the relief claimed is different in each case but, more importantly, the factual basis upon which the aboriginal title is asserted differs profoundly in each case. Thus the proof of aboriginal title in each case does not depend upon the same evidence as will be presented in the other cases. The evidence with respect to the existence of aboriginal title will be distinctly different in each of the three cases.

3. It is the considered opinion of counsel for the plaintiffs in each of the three cases that if the actions ate tried at the same time it will be necessary for all counsel, in the interests of their respective clients, to be present at all times. The result would be a material increase in the costs to the plaintiffs in each of the three actions.

4. If the actions are tried at the same time, the plaintiffs will not be able to control the manner in which their respective cases are presented. Moreover, the perception of the trial judge may

well be coloured by the evidence adduced on behalf of one or more of the plaintiffs, which would not occur if the trials were conducted separately,

5. The task of conducting such a trial would be extremely difficult for a single judge.

6. If the actions ate tried at the same time, many of the plaintiffs, as a practical matter, will be denied the right to be present at parts of their trial.

Counsel for the Crown submits that we should not interfere with the discretion exercised by the Chief Justice. He submits that while there can be no truly satisfactory solution to the problems involved in the trial of these actions, in the public interest the solution chosen by the Chief Justice is the best available. He submits that no error in law has been shown.

We think it appropriate to point out that a factual situation was presented to us which differs from that presented to the Chief Justice. In April of 1986, the Chief Justice was not informed that the Martin action would be ready to go to trial in the fall of 1986. Had he been so informed, he might well have concluded that the Martin action, being a relatively short trial, should proceed at an early date, especially since an interim injunction remained in effect. If the Martin action goes to trial at an early date, and judgment is given before the other two actions are tried, the extinguishment issue may be determined in a way which will affect the other two actions, insofar as the law is concerned. But it seems clear that the legal issues relevant to the extinguishment issue, and probably all other legal issues common to the three actions, will only finally be decided by the Supreme Court of Canada. Looked at in that way, the necessity for one judge to decide the common legal issues at trial 16 not so pressing. If the trials ate conducted separately each judge will decide the case before him on the evidence presented. Differences in the facts found in each case may lead to different conclusions on some issues. We do not think there is much danger of there being differing views of the relevant legal issues. If there are differing views they can be considered and, if necessary, corrected through the appellate process.

It seems to us as well that the Chief Justice was not informed, as we were, that aboriginal title cannot be determined on a global or province-wide basis, but must be determined on a case-by-case basis. Thus proof that the plaintiffs in the Gitksan action had aboriginal title would not necessarily be proof that the plaintiffs in the Martin action had aboriginal title. In Kruger and Manuel v. The Queen,[1978] 1 S.C.R. 104, 75 D.L.R, (3d) 435, Dickson J. (as he then was) confirmed the necessity of considering the question of aboriginal title on the facts pertinent to the particular band in question. He said at pp.108-109:

> Before considering the two other grounds of appeal, I should say that the important constitutional issue as to the nature of aboriginal title, if any, in respect of land in British Columbia, the further question as to whether it had been extinguished, and the force of the Royal Proclamation of 1763 -issues discussed in Calder v. Attorney General of British Columbia - will not be determined in the present appeal. They were not directly placed in issue by the appellants and a sound rule to follow is that questions of title should only be decided when title is directly in issue. Interested parties should be afforded an opportunity to adduce evidence in detail bearing upon the resolution of the particular dispute. Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis. Counsel were advised during argument, and indeed seemed to concede, that the issues raised in the present appeal could be resolved without determining the broader questions I have mentioned.

Our conclusion is that the basis for the order made by the Chief Justice has been weakened, if indeed it has not disappeared. The Martin action is ready to go to trial, so the delay factor envisioned by the Chief Justice has changed. Furthermore , it is now apparent that the factual underpinning in respect of aboriginal title is not, as the Chief Justice thought, the same in each of the three actions. We are satisfied that the factual foundation supporting aboriginal title differs profoundly in each of the actions.

In the result, our opinion is that if the Chief Justice had had the information we have been given he would not have included in the orders of September 27, 1986 and April 28, 1986 the paragraphs quoted above. Accordingly, we would extend the time within which the plaintiffs in the Gitksan and Martin actions may apply for leave to appeal from the order of September 27, 1985, grant the applications for leave for appeal, allow the appeal and order that the paragraphs of the orders made on September 27, 1985 and April 28, 1986 set out above be deleted.

We would also direct that counsel for the plaintiffs in the Martin action forthwith advise the Chief Justice that the plaintiffs in that action are ready to proceed to trial in the fall of 1986 and seek such directions as to the time and place of trial as the Chief Justice may deem appropriate.