MACMILLAN BLOEDEL LTD. V. MULLIN ET AL.; MARTIN ET AL. V. THE QUEEN IN RIGHT OF BRITISH COLUMBIA AND MACMILLAN BLOEDEL LTD.

British Columbia Court of Appeal, Seaton, Craig, Lambert, Macdonald and Macfarlane JJ.A., March 27, 1985

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D.M.M. Goldie, Q.C., and P.G. Plant, for the respondent, Attorney General of British Columbia
R.J. Gathercole and K. Roberts, for the appellants, Mullin et al.
P.S. Rosenberg, D.M. Rosenberg, and E.J. Woodward, for the appellants, Martin et al.
A. Pape, S. Rush, L. Mandell and P. Grant, for the intervenors, Union of B.C Indian Chiefs et al.

The appeals in this case are from orders made by the British Columbia Supreme Court (reported supra, at p. 26) in two actions dealing with logging on Meares Island. In the first action MacMillan Bloedel Ltd. was granted an order to restrain unlawful interference, intimidation and obstruction of their logging operations by the protestors. In the second action, an application by the Indian bands for a restraining order precluding MacMillan Bloedel Ltd. from carrying out logging operations on the Island was dismissed on the basis that the Indians' claim to aboriginal title would fail at trial

The issue before the Court of Appeal was whether an interlocutory injunction should be granted to prevent logging on Meares Island in the period before the actions come to trial.

Held: **Seaton J.A.** (Lambert J.A., concurring) (Macfarlane J.A., concurring in separate reasons) (Macdonald J.A., concurring on first appeal, dissenting on second appeal) (Craig J.A., concurring on first appeal, dissenting on second appeal)

1. With respect to the first action the appeal by the protestors is dismissed. The protestors resorted to vandalism, threats and physical destruction; such conduct is not acceptable in a democratic society.

2. To obtain an interlocutory injunction the appellants must establish that there is a serious question to be tried as to the existence of a right, and if that test is met then they must show they will suffer irreparable harm if the property in question is not preserved in its present condition until the question to be tried is disposed of, or at least, that the balance of convenience lies in favour of granting the injunction.

3. A substantial body of evidence was presented which showed that the Indian bands' claim to aboriginal title is a serious question that ought to be tried and that must take place at a trial; it cannot be done on a interlocutory application.

4. With regard to whether the property should be preserved in its present condition, the position of the appellants on the question of irreparable damage is far stronger than that of MacMillan Bloedel. If an injunction is not granted and logging proceeds the subject matter of the trial will have been destroyed before the rights are decided, and the symbolic value and cultural importance of the Island will be lost. Meares Island is of importance to MacMillan Bloedel, but it cannot be said that denying or postponing its right to log would cause irreparable harm. The timber would still be there if it was decided that MacMillan Bloedel had the right to log.

5. A separate consideration that leads to the same conclusion that the property should be preserved in its present condition is the need to preserve evidence. The Indians need time to carefully examine the area to be logged to see whether there is any evidence that ought to be recorded and preserved.

6. The prevention or postponement of logging on Meares Island will not have a significant economic impact on the coast or the whole of the province, nor will it lead to a rash of similar applications and thereby shut down a substantial part of the forestry industry.

7. An injunction in favour of the Indians will not cast doubt on the tenure that is the basis for the huge investment that has been or is being made. Logging will continue on the coast even if some parts are found to be subject to certain Indian rights.

8. Appeal of the protestors dismissed. Appeal of the Indian bands allowed; interlocutory injunction granted to the Indian bands precluding logging on Meares Island by MacMillan Bloedel.

Macfarlane J.A. (concurring)

1. The Indian bands did not sleep on their rights as was concluded by the chambers judge. They were engaged from 1981 to 1983 in discussions, research and studies in conjunction with the Meares Island Planning Team. At all times they took the position that the land ought not to be logged. Their conduct must also be viewed in the light of the recognized desirability to work out the problem without going to court, and ideally, by negotiation.

2. The balance of convenience and the question of irreparable harm must be considered together. The balance of convenience is not in favour of immediate logging. It is convenient if logging is postponed for a year or more on Meares Island. Justice to the Indian bands means giving a decision on the merits of their claim before destroying the forest involved in that claim.

3. Appeal of the protestors dismissed. Appeal of the Indian bands allowed; interlocutory injunction granted to the Indian bands in the terms specified by Seaton J.A.

Macdonald J.A. (dissenting on second appeal) (Craig J.A., concurring)

1. The Indian bands have shown that their claim to aboriginal title is a serious question that ought to be tried.

2. However, upon consideration of the balance of convenience an interlocutory injunction should not be granted in favour of the Indian bands.

3. Based on a publication put in evidence it appears that: the current method of dealing with aboriginal claims is that the Indian associations present formal land claims to the federal government; it is a matter of policy that the government is willing to negotiate settlements and it recognizes the urgency to settle land claims as quickly as possible in order that the interests of native people be protected in the wake of development; the courts have not been found by the native people to be the best instrument by which to pursue claims.

4. The situation in this case is not the usual kind in which injunctions are granted. In this case the differences from the usual militate against the granting of an injunction. They suggest that in cases such as this, brought by Indian bands, the courts ought to confine themselves to the issues of the existence of aboriginal title, its nature and extent.

5. At the end of this litigation there can be no permanent injunction in the usual sense of that term because the court will not finally determine the issues in dispute. They will be determined through successful negotiations in the future.

6. If an injunction is granted in this case it would set a precedent. Legal ingenuity would have no trouble formulating and bringing before the court applications with respect to situations which, in their essentials, would make this judgment indistinguishable.

7. Appeal of the protestors dismissed. Appeal of the Indian bands dismissed.

Craig J.A. (dissenting on second appeal)

1. The Indian bands have shown that their claim to aboriginal title is a serious question that ought to be tried.

2. A consideration of the aspects of the balance of convenience, however, justifies a refusal to grant an interlocutory injunction to the Indian bands.

3. The tendency is to consider the issue of irreparable damage as simply a part of the consideration of the balance of convenience. Refusal to grant an injunction to the Indian bands would not result in irreparable damage to them in the event that they establish, fully or partially, their claim to aboriginal title.

4. Another aspect of the balance of convenience justifies the refusal to grant an injunction. Many groups and agencies have scrutinized the proposed logging of this area over a period of years. The concerns of the Crown representatives have resulted in the Forestry Department attaching very stringent conditions to the right to log the area. The possibility of any environmental damage would appear to be slight.

5. Appeal of the protestors dismissed. Appeal of the Indian bands dismissed.

Appeal of the protestors dismissed. Appeal of the Indian bands allowed; interlocutory injunction granted to the Indian bands precluding logging on Meares Island by MacMillan Bloedel.

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SEATON J.A.: These appeals [from the judgment of the British Columbia Supreme Court reported supra, at p. 26] are from orders made in two actions. Both actions deal with logging on Meares Island. The question before the court is narrow: What is to happen on Meares Island in the period before the actions come to trial?

The MacMillan Bloedel Action

The first action was started by MacMillan Bloedel Limited on November 23, 1984. It claims the right to log on Meares Island and says that the defendants unlawfully obstructed its employees when they went to the Island to survey and otherwise prepare for logging. The defendants in this action are the people who prevented MacMillan Bloedel from logging on Meares Island. One of them, Moses Martin, is an Indian. The rest can be described, I think accurately, as protestors.

Immediately after the writ was issued, MacMillan Bloedel applied for an order restraining the defendants in the action, and others having knowledge of the order, from wrongfully interfering with the carrying out of logging.

The Attorney General of British Columbia has been added as an intervenor in the MacMillan Bloedel action.

The Indians' Action

The other action was started on November 27, 1984 by the two bands of Indians who claim Meares Island. Mr. Martin and Mr. George are the elected chief councillors of the Clayoquot Band and the Ahousaht Band respectively. The endorsement on the writ of summons as amended reads:

> The Plaintiffs' claim is for a declaration that their aboriginal title (also known as original or Indian Title) to that portion of their respective ancient tribal territories known as Meares Island has never been lawfully extinguished; and the Plaintiffs further claim a declaration that no law of British Columbia has any force or effect in contravention of the said aboriginal title with respect to Meares Island, and that to the extent that such law may purport to infringe upon the said aboriginal title to Meares Island, it is of no force or effect.
>
> The Plaintiffs' claim is for a declaration that any authorization purporting to allow logging or to in any other manner interfere with said aboriginal title on Meares Island is ultra vires and of no force and effect.
>
> The Plaintiffs claim 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 title.

In this action, an interlocutory order was sought ordering that:

> a) MacMillan Bloedel Limited, their servants, agents and any other persons having knowledge of this Order be restrained until the Trial or other disposition of this action:
>
> > i) from landing falling crews, or commencing the falling [of] trees, or continuing logging operations on Meares Island;

ii) from clearing any brush on Meares Island;

iii) from operating machinery which could frighten or disturb animals, birds or fish on Meares Island;

iv) from dumping gravel or other fill, and removing topsoil, gravel, or any other mineral or other material from Meares Island;

v) from constructing buildings, docks, wharves, shelters, or any other structure whatsoever on Meares Island or its foreshore;

vi) from disturbing the foreshore of Meares Island in any manner; and

vii) from landing any heavy equipment, including any road building equipment on Meares Island.

b) the timber which is subject of this action be preserved until the Trial or other disposition of this action.

An order was made in this court permitting intervention in the appeal [see p. 54 , supra]. A factum was filed and submissions were made on behalf of Carrier Sekani Tribal Council, Gitksan-Wet 'Suwet'en Tribal Council, Taku River Tlingits, Shuswap Tribal Council on behalf of twelve Indian bands, and the Union of B.C. Indian Chiefs.

Other Proceedings Respecting Indian Land Claims

The Clayoquot and Ahousaht Bands are members of the Nuu-Chah-Nulth Tribal Council. That Council has made a land claim:

> WE, THE NUU-CHAH-NULTH, are the rightful, legal and sovereign occupants and users of the lands and waters shown on the accompanying map, being the west coast of Vancouver Island, adjacent islands, and surrounding waters.

The accompanying map shows a line going inland from Brooks Peninsula, then southeast encompassing approximately one-half of the width of Vancouver Island, and out to the ocean near Jordan River on the Strait of Juan de Fuca. Meares Island falls within that territory. So does nearly half of Vancouver Island. Within the territory are timber supply areas that employ more than 28,000 people and support plants that have been built at a cost of over one billion dollars.

The claim of the Nuu-Chah-Nulth has been accepted by the federal government for negotiation. Claims covering much of British Columbia have been accepted for negotiation. The federal government's willingness to negotiate is contingent upon the provincial government agreeing to participate in tripartite negotiations.

We were told of one other Indian claim in the courts. The Gitksan-Wet ‘Suwet ‘en Tribal Council has started an action in the Supreme Court of British Columbia for declarations. In those proceedings neither a permanent nor an interlocutory injunction has been sought.

Decision of Chambers Judge

The chambers judge concluded that if logging was to take place, there had to be an injunction. The alternative was violence. He examined the competing claims and decided that the Indian bands' claim had no prospect of success at trial. He also held that neither party could prove irreparable harm if an injunction was not granted, that money could compensate either, that the Indians had "slept on [their] rights," that the opponents of logging had taken the law into their own hands, and that the interference with the conduct of the logging operations would have "potentially disastrous consequences." He granted the order sought by MacMillan Bloedel and dismissed the application of the Indian bands.

The order that was made follows from the decision that the Indians’ claim would fail at trial. Because that decision was the foundation for the order the claim to Indian title must be considered at once.

The Claim to Indian Title

The chambers judge thought the claim to Indian title was so weak that he could safely conclude that it could not succeed. I do not agree with that view.

Mr. Justice Dickson (now Chief Justice of the Supreme Court of Canada) in Kruger v. The Queen, [1978] S.C.R. 104, 75 D.L.R. (3d) 434 at p.437, demonstrated why the Indians' claim cannot be rejected summarily:

> 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 lands 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.

In Calder v. Attorney General of British Columbia, [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1, six judges of the Supreme Court of Canada dealt with many of the issues that will arise in this case. After five days of argument, three judges concluded that there were existing Indian rights in non-reserve lands in British Columbia; three concluded that there were not. Other issues will arise in this case that did not arise in Calder. Some of them have never been decided by a Canadian court.

It is impossible to say that the question is other than a very difficult one. The question is made more difficult in this case by the range of rights that the Indians might have and the nature of the logging that MacMillan Bloedel plans. The proposal is to clear-cut the area. Almost nothing will be left. I cannot think of any native right that could be exercised on lands that have recently been logged. It follows that rights far short of outright ownership might well warrant retaining the area until after a trial.

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. A great amount of factual evidence will have to be heard and considered, opinion evidence of those knowledgeable in these matters will have to be assembled and related to the factual evidence, and there will have to be a meticulous study of the law. That must take place at a trial; it cannot be done on an interlocutory application. All that we can decide here is whether the claim is one that ought to be tried. I have no trouble with that question.

I do not intend to say more on this issue, the trial judge should not be fettered in his consideration by anything said here or anything said by the chambers judge.

I do not agree with the chambers judge's finding that the Indians' application fails for want of evidence. A substantial body of evidence was presented. Enough to show that there is a serious question to be tried. No more is needed on this application.

Meares Island

Meares Island lies in Clayoquot Sound just north of the Village of Tofino. Vancouver Island lies across the channels to the north, east and south. Other islands lie to the west.

Meares Island takes the form of three lobes joined at the north, each extending toward the south. The centre lobe is the largest; it accounts for about two-thirds of the Island. The easterly lobe is small. The westerly lobe is about four miles long. The Island is about eight miles long. The span from the westerly to the easterly shore is about seven miles.

The village of Opitsat is at the southern end of the western lobe of the Island, across the channel from Tofino. An Indian reserve of about one-half a square mile surrounds the village. There is a smaller reserve with a few homes on it a mile or so north at Kakawis. There are a number of other Indian reserves in the area and the Indians from them use the resources of Meares Island. Part of the Island supplies domestic water for Tofino.

Much of the Island is heavily forested. There is evidence that some of the trees are over fifteen hundred years old. There is evidence that one of the largest cedar trees known to man is on Meares Island.

This litigation arises out of MacMillan Bloedel's intention to log an area along the east shore of the centre lobe of the Island. The area was not inhabited, is not visible from Tofino or Opitsat, and is only accessible from those inhabited areas by a boat trip of some miles.

The provincial government has granted the logging rights on Meares Island to MacMillan Bloedel and others. Many of those rights have been consolidated into two tree-farm licences. MacMillan Bloedel holds one of those licences.

The least environmentally sensitive area, Heelboom Bay, was selected for the base from which logging was to take place. There was no one in Heelboom Bay when that decision was made. However, when MacMillan Bloedel people arrived, it was a busy place; there were canoes being built and there were other activities. This was all a sham. The purpose of the people in Heelboom Bay was to obstruct MacMillan Bloedel.

MacMillan Bloedel's Right to Log

The interlocutory injunction was granted to prohibit interference with MacMillan Bloedel's right to carry on logging operations on Meares Island. In these proceedings MacMillan Bloedel's right to log has been challenged separately from the issue of Indian rights.

The first lease in the chain of leases leading to MacMillan Bloedel's current tenure was granted on March 15, 1905 to Sutton Lumber and Trading Co. Ltd. It was a twenty-one year lease. There was a purported renewal in 1912 that related back to 1909. It is said that there was a flaw, that the renewal should not have been granted. The argument is dependent on there not being a written surrender of the 1905 lease prior to March 7, 1909.

No doubt many letters and other documents of that period have been destroyed and witnesses who might have been able to testify about that question are gone. If there is an error in the paperwork of that period, I would expect that the government would and should correct that error.

I would not grant or refuse an interlocutory injunction on the strength of this argument. I proceed on the assumption that to the extent the provincial government can give the right to log, MacMillan Bloedel holds that right.

The Protestors' Appeal

Under this heading I deal with non-Indians only.

There have been strong feelings on both sides of this issue in Tofino. Fortunately, those who favour logging on Meares Island have been restrained and responsible. Unfortunately, those who oppose logging on Meares Island have allowed their strong feelings to overwhelm their judgment.

The proposed logging of Meares Island was carefully considered by the Meares Island Planning Team over a substantial period.

The five-year logging development plan was reviewed by the Department of Fisheries and Oceans, the Fish and Wildlife Branch, the Heritage Conservation Branch, the District of Tofino and the Ministry of Forests. The logging has been meticulously planned to minimize environmental damage and to avoid destruction of heritage sites.

In spite of that, some protestors resorted to vandalism, threats and physical obstruction. Such conduct is not acceptable in a democratic society.

I would dismiss the appeal of the protestors.

Conduct Subsequent to the Granting of the Injunction

Subsequent to the granting of the first injunction, tree markings have been removed, survey marks have been destroyed, access to the Island has been obstructed, and spikes have been driven into trees. Some persons have demonstrated that they do not intend to obey the law.

Some Indians have participated in the misconduct. There is evidence of continuing obduracy. The Indians have a case to be tried that I think to be a substantial case. That case is put in jeopardy by unlawful conduct. It has almost approached the stage at which it might be argued that their appeal should not be heard or an order in their favour should not be made. We cannot protect the rights of those who do not respect the rights of others.

I think that matters have not gone so far that the Indians' appeal should be rejected. Whether the courts can continue to hear their case may have to be considered if it appears that they are not willing to abide by the orders that the court makes.

Meares Island History

Meares Island was occupied by Indians when Europeans first arrived. Indians were dependent on the forest for their shelter, their means of transportation and, to a lesser extent, their food and clothing. It has other intangible values for them. Their dependence on the forest in some aspects continues today.

MacMillan Bloedel had Arcas Associates prepare a report on the native use of Meares Island trees. It is an independent study and an impressive study. I see nothing to indicate that the authors were influenced by the source of their instructions. There was not time for a study of every tree in the area. What this study involved was an examination of a limited area and an extrapolation.

The report suggests that in the area MacMillan Bloedel proposes to log in the next years, there are many trees that have had bark taken from them.

Other trees were cut down generations ago. A number of the logs on the ground and a few standing trees have had planks taken from them. Some logs and some trees are notched. Some trees have been felled and the first step toward making a canoe completed.

The material indicates that the natives have used this area over a long period. Many of the bark-stripped trees within the area being examined could be dated. The trees show use in the twentieth century, the nineteenth century, the eighteenth century and in the seventeenth century. A stump was found from which the tree had been felled in 1685 or earlier. Bark had been stripped from another tree in 1642.

It is probable that many years ago hand loggers came to Meares Island, as they came to much of the coast, and took trees that were close to the water. The first organized logging on Meares Island dates from the early 1900's when a mill was established. It was there for many years. In all, about 156 hectares have been logged. That is something less than two percent of the Island. Some commercial logging has been done on reserve lands.

Meares Island's Importance to MacMillan Bloedel

MacMillan Bloedel operates an extensive forestry industry on the west coast of Vancouver Island. It has a long-term cutting plan that has the approval of various government authorities. Included within MacMillan Bloedel's tree farm licence for this area are parts of Meares Island. MacMillan Bloedel has held the lease to cut that timber for years but has not attempted to act on that right until recently.

The evidence does not establish that logging Meares Island is economically essential to MacMillan Bloedel. No mills will close if Meares Island is not logged. We were told that something like one percent of the tree-farm licence in question is on the Island. Only a part of the licence on Meares Island was intended to be cut in the next year or two. About 182 hectares, two percent of Meares Island, was to be logged in 1985. That is a greater area than the whole area logged commercially in the past.

Meares Island is important to MacMillan Bloedel in this way. MacMillan Bloedel has gone through all of the necessary steps to obtain permission to cut. If it is stopped here there is worry that it will be stopped elsewhere. Meares Island has become the front line in the dispute over Indian title. It has also become central to the dispute between the logger and those who favour the preservation of wilderness areas.

Meares Island is important to MacMillan Bloedel not because of its trees, but because it is where the line has been drawn. It has become a symbol.

Meares Island's Importance to the Indians

The Indians of Clayoquot Sound have been dependent on the forest as Europeans never have been. Old cedar trees offer an example. The tree that is seen by a forester as decadent was a valuable resource to the Indian. The inner bark was used for containers, clothing and regalia; planks were used for the buildings and for other structures such as fish traps; and larger sections were used to make canoes. Trees were cut down for some purposes, huge logs were used for the buildings, but often planks or bark were taken without the tree being cut down. It would survive the uses to which it was put and be available in the future.

The affidavit of an anthropologist says:

> 20. Elements of traditional culture survive. The use of cedar continues to the present day. In the past several years there has been a revival and expansion of interest in traditional culture which has intensified the need for and use of cedar products today. Members of the Clayoquot and Ahousat [sic] Bands continue to use the forests, waters and other resources of Meares Island to carry on traditional activities.

The Island is much more than trees, but the trees are essential to the survival of the other uses. The evidence shows that the Indians still use Meares Island, including the Heelboom Bay area, and that logging is not compatible with that use.

An affidavit of an anthropologist who examined parts of Meares Island referred to the heritage sites that would be jeopardized by logging. These included shell middens, fish traps and canoe skids. He said that Heelboom Bay had the highest concentration of sites on the Island.

The Indians wish to retain their culture on Meares Island as well as in urban museums.

The Indians have pressed their land claims in various ways for generations. The claims have not been dealt with and found invalid. They have not been dealt with at all. Meanwhile, the logger continues his steady march and the Indians see themselves retreating into a smaller and smaller area. They too have drawn the line at Meares Island. The Island has become a symbol of their claim to rights in the land.

Meares Island has also become symbolic for other British Columbia Indians.

Other tribal councils and the Union of British Columbia Indian Chiefs have intervened in these appeals because they have thought the case to be of importance to all Indians in the province.

Preservation of Evidence

It is important to the Indians' case that they be able to show their use of this forest. I do not mean to suggest that the Indians ought to continue using the forest only as they used it in the past. The importance of the evidence of extensive use is that it may demonstrate a right to continued use.

There ought to be an examination of the whole area rather than a portion of it. That ought to be done so that the evidence is available when the Indians' case is presented. Counsel told us that they were waiting for funding. It may be that the Indians will have to do this work without waiting for funding. The Arcas Report indicates what needs to be done and does not indicate that it can only be done by outsiders hired for that purpose.

Interlocutory Injunctions

There is an almost unlimited supply of cases dealing with interlocutory injunctions. They go from American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, [1975] 1 All E.R. 504 to Ziebart Rustproofing Ltd. v. Ottawa Rustproofing Ltd. et al., February 8, 1978, Ontario High Court. Each of the decisions represents an attempt on the part of the court to see that justice is done. Often it is an attempt to preserve property so that a claimant will not find at the end of a successful trial that the subject matter is gone, and always there is an attempt not to impede others unnecessarily.

Cotton L.J., in Preston v. Luck (1884), 27 Ch.D. 497 at p.505, referred to an interlocutory injunction:

> ... the object of which is to keep things in status quo, so that, if at the hearing the Plaintiffs obtain a judgment in their favour, the Defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.

Spry in The Principles of Equitable Remedies, 2nd ed. (Sweet & Maxwell, 1980), after quoting the above, said at p.423:

> A need for protection of this kind most commonly arises where property as to which there is a dispute between the parties is threatened with damage, destruction or removal or where the value of other rights of the plaintiff may be diminished.

An injunction is granted where "it appears to the court to be just or convenient that the order should be made" (s.36, Law and Equity Act, R.S.B.C. 1979, c.224). All of the circumstances must be considered.

The tests to be applied in a case such as this were established in Wheatley v. Ellis and Hendrickson (1944), 61 B.C.R. 55, where O'Halloran J.A., said (at p.58):

> To put it shortly, a person who comes to the Court for an interlocutory injunction of this nature is not required to make out a case which will entitle him at all events to relief at the trial. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition until the question can be disposed of.

That raises two questions.

The First Question

The first question, whether there is "a fair question to raise as to the existence of the right" has been discussed under the heading "The Claim to Indian Title." In my view, the claim of the Indian bands meets the test; so does the claim of MacMillan Bloedel.

The Second Question

The second question, whether "the property should be preserved in its present actual condition until the question can be disposed of," is more difficult.

Kerr on Injunctions, 6th ed. (1981), dealt with that question in this way at pp.17-18:

> A man who seeks the aid of the Court by way of interlocutory injunction, must, as a rule, be able to satisfy the Court that its interference is necessary to protect him from that species of injury which the Court calls irreparable, before the legal right can be established upon trial. By the term "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury; all that is meant is, that the injury would be a material one, and one which could not be adequately remedied by damages; and by the term "the inadequacy of the remedy by damages" is meant that the remedy by damages is not such a compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood.

On this question, the position of the Indians is far stronger than that of MacMillan Bloedel.

Meares Island is of importance to MacMillan Bloedel, but it cannot be said that denying or postponing its right would cause irreparable harm. If an injunction prevents MacMillan Bloedel from logging pending the trial and it is decided that MacMillan Bloedel has the right to log, the timber will still be there.

The position of the Indians is quite different. It appears that the area to be logged will be wholly logged. The forest that the Indians know and use will be permanently destroyed. The tree from which the bark was partially stripped in 1642 may be cut down, middens may be destroyed, fish traps damaged and canoe runs despoiled. Finally, the Island's symbolic value will be gone. The subject matter of the trial will have been destroyed before the rights are decided.

If logging proceeds and it turns out that the Indians have the right to the area with the trees standing, it will no longer be possible to give them that right. The area will have been logged. The

courts will not be able to do justice in the circumstances. That is the sort of result that the courts have attempted to prevent by granting injunctions.

I am concerned too about this. In the first year more of Meares Island will be logged than has been logged in the whole of its history. Each year the effect would be cumulative. Just to log the first hectare there must be loggers and their equipment. Approval has already been given for miles of roads, a parking area, dumping grounds, log storage area and docks.

I have emphasized the material and symbolic importance of Meares Island to the Indians, but its cultural importance should not be disregarded. I adopt the words of Muirhead J., speaking of the protection of aboriginal secrets by interlocutory injunction in Foster v. Mountford and Rigby Ltd. (1976), 14 A.L.R. 71 at p.75, [1978] F.S.R. 582 at p.586:

> These people have come to the law for relief and protection and they have, in my view, established a strong prima facie case. They have set up a cause of action and raised issues, which require, of course, careful examination and consideration. As I have emphasised, monetary damages cannot alleviate any wrong to the plaintiffs that may be established and perhaps, there can be no greater threat to any of us than a threat to one's family and social structure.

Both justice and convenience demand that the proposed logging not take place while the Indians' claim is being actively pressed in this litigation.

Preservation of Evidence

A separate consideration that leads to the same conclusion is the need to preserve evidence. The Indians need time to carefully examine the area to be logged to see whether there is any evidence that ought to be recorded or preserved. Of course, a chambers judge would be able to make any special orders required.

Other Considerations

It was strongly pressed on us that an order suspending logging on Meares Island would threaten the whole of the coast, indeed the whole of the province; that if we made an order here, similar applications would be made for other areas and eventually the forest industry and other industries would be shut down.

I do not believe that to be so. Meares Island has attained an unique importance. I have already said that it has become a symbol for each side in the contest between the forest industry and the Indians. I have also said that to prevent or postpone logging on Meares Island will not have a significant economic impact. When other areas are considered, they will be considered in the light of this decision. They will be seen as an addition to the Meares Island restriction and in consequence, the balance of convenience may be seen to have shifted to favour the industry.

It has also been suggested that a decision favourable to the Indians will cast doubt on the tenure that is the basis for the huge investment that has been and is being made. I am not influenced by the argument. Logging will continue on this coast even if some parts are found to be subject to certain Indian rights. It may be that in some areas the Indians will be entitled to share in one way or another, and it may be that in other areas there will be restrictions on the type of logging. There is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that.

I test my conclusion by asking this question: If the Indians wished to do something that had the effect of making the area unusable by MacMillan Bloedel, would we let them, or would we preserve the forest in its present state? I think that we would preserve the forest. I think we should do that for either party.

The Chief Justice of the Supreme Court has indicated that a judge can be made available to hear a case such as this on two or three months notice. This litigation was started in November. It has been anticipated for years. The parties should be ready to proceed to trial within a reasonable time if they are serious about the case. A judge will be available when they are ready for trial. They should attempt to be ready for trial by November 1, 1985. In the meantime, logging should be suspended. If extensions of time are necessary that will be a matter for the trial court.

Conclusion

I would allow the appeals in part and make the following order:

1. MacMillan Bloedel will not log on Meares Island, or do any site preparation work for logging on Meares Island before November 1, 1985.

2. The injunction already issued will stand. If any modification to its terms is required to make it consistent with the new circumstances presented by this order, that modification can be made by a Supreme Court judge.

3. There will be no obstruction of MacMillan Bloedel's personnel doing that which they are permitted to do under this order.

4. Within the next four weeks, but not after that, persons may remove things they have put in Heelboom Bay in the last year.

5. After the end of the four-week period, MacMillan Bloedel may remove the things that have been placed in the area in the last year, including the spikes that have been driven into the trees.

In the circumstances of this case, I would not exact an undertaking from Mr. Martin, Mr. George, or the members of the Clayoquot or Ahousaht Bands of Indians, to pay any damages that MacMillan Bloedel may suffer by the granting of this injunction. Nor would I require an undertaking from MacMillan Bloedel to pay any damages that the Indian bands or the protestors may suffer through having to comply with this injunction.

LAMBERT J.A.: The reasons of Mr. Justice Seaton express my own views so exactly that it is unnecessary for me to add anything. For the reasons given by Mr. Justice Seaton, I would make the order that he has proposed.

MACFARLANE J.A.: I have had the advantage of reading the reasons for judgment of Mr. Justice Seaton, with which I am in substantial agreement. He has described the two actions, and the history giving rise to the legal issues. I will try not to be repetitive.

The Judgment from which the Appeals are Taken

Mr. Justice Gibbs decided that logging should not be prevented by the issuance of an interlocutory injunction in favour of the Indian bands. In his view the scales were tipped in favour of MacMillan Bloedel Limited because he thought, as a matter of law, that aboriginal rights had been extinguished in British Columbia, or that, as a matter of fact, the Indian bands had not established that aboriginal rights to Meares Island had been acquired, and had survived. When considering the balance of convenience, he found that the scales were tipped in favour of MacMillan Bloedel because of the potentially disastrous effect upon that company, and upon the province, if an interlocutory injunction were to be granted to the Indian bands. He also held that the Indians had "slept on the rights" they now assert.

He issued an injunction in favour of MacMillan Bloedel to restrain unlawful interference, intimidation and obstruction by the protestors.

Aboriginal Rights -- An Issue for Trial

I agree with Mr. Justice Seaton that the question of the existence and of the extent of aboriginal rights is one that should not be decided until a full trial of the issue has taken place. It may be appropriate in some cases, where an interlocutory injunction is sought, to decide, or at least assess the strength of the opposing views, on the ultimate issue in the case. But this is not one of those cases. The issue here is far too difficult and complex. The Supreme Court of Canada was divided equally upon this issue in Calder v. Attorney General of British Columbia, [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1. The jurisprudence generally on the subject leaves the question open for decision. In my opinion, it ought not to be foreclosed on a preliminary application of this nature. Suffice it to say that whether the Indians have aboriginal rights, and if so, what is the extent of those rights, are serious questions to be decided after a trial.

Considerations Affecting the Granting of an Injunction

The question before us is whether logging on Meares Island should go ahead in the meantime. To obtain an interlocutory injunction in British Columbia applicants must establish that they have a fair question to raise as to a right. This has sometimes been described as a prima facie case, an arguable case, or a probable case. In American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, [1975] 1 All E.R. 504 (H.L.) it was described as a serious question to be tried. In addition to showing that there is a serious question to be tried with respect to a right, the applicants must show a breach actually or reasonably apprehended of that right, and such reasonable probability of success as would warrant the case proceeding to trial. The applicants must then show that they will suffer irreparable harm if the injunction is not granted, or at least, that the balance of convenience lies in favour of granting the injunction.

The jurisdiction to grant an interlocutory injunction is found in s.36 of the Law and Equity Act, R.S.B.C. 1979, c.224. It may be granted where "it appears to the court to be just or convenient that the order should be made".

Mr. Justice Seaton has said that both the Indian bands and MacMillan Bloedel have established that they have a fair question to raise as to the existence of a right. I agree with him. The right which the Indian bands claim is to aboriginal title to Meares Island, including the standing timber. If they have such a right then the plans of MacMillan Bloedel to remove the timber constitute a reasonably apprehended breach of the right which is asserted.

The question which concerned Mr. Justice Gibbs was whether the case presented by the Indian bands was strong enough to justify the granting of an interlocutory injunction. I think, in the context of this case, that if there is enough merit in the case presented by the Indian bands to warrant the case proceeding to trial no further consideration need or should be given to the probability of success. Using the Calder case as a standard the least that can be said is that there is an even chance of success at trial.

If that view of the matter be correct, then it cannot be said that the scales are tipped in favour of MacMillan Bloedel because of the weakness of the case presented by the Indian bands.

Considerations Affecting the Balance of Convenience

The balance of convenience and the question of irreparable harm must be considered together in this case.

The focus of the application before Mr. Justice Gibbs, and before us, was not on Meares Island, standing alone. If it had been, there would have been less difficulty. The economic impact of an order that there be no logging on Meares Island until the trial of this action would be minimal if Meares Island were considered alone. MacMillan Bloedel would only log two percent of the timber on Meares Island in the next year. The number of jobs involved, and the economic consequences of not logging that timber, would not be significant. If logging could not take place on Meares Island for a year or two, or even several years, the economic consequences would not be serious. MacMillan Bloedel can keep its men employed without logging Meares Island. On the other hand, the claims being advanced by the Indian bands involve their alleged rights to the land and to the standing timber. If the trees were removed before that issue was determined they say that their victory would be an empty one.

Counsel opposing the issuance of an interlocutory injunction to the Indian bands submitted that such an order would have far-reaching consequences. Counsel for the province submitted that the granting of such an order would result in confusion and uncertainty because it would be understood that the court was calling into question the Crown's title to and management of public lands.

Counsel for MacMillan Bloedel echoed the concern of Mr. Justice Gibbs that the granting of an interlocutory injunction to prevent logging on Meares Island might provide a legal platform from which would spring other injunction orders in other areas, resulting finally in disastrous economic losses to employees, employers and to the province generally.

I think those concerns can be laid to rest.

Provincial Concern about Sovereignty Over Resources

I will deal first with the concern of the province that its control over Crown lands and timber may be jeopardized by the granting of such an interim order. It should be noted that a temporary restraining order does not signal victory or defeat to either side. Whether aboriginal rights exist, or if they do how far they extend, will not be decided until the judicial process is exhausted. Even then, if the Indian bands are successful in establishing some rights the remedies may be varied. Many of those remedies would not involve a loss of sovereignty. In a publication put before us, it was indicated that the settlement of Indian claims "could include a variety of terms such as protection of hunting, fishing and trapping, land title, money, as well as other rights and benefits". But the granting of an interlocutory injunction in this case cannot in any way signal the consequences which will flow generally from final judicial pronouncements on claims based upon alleged aboriginal rights.

The fact that there is an issue between the Indians and the province based upon aboriginal claims should not come as a surprise to anyone. Those claims have been advanced by the Indians for many years. They were advanced in Calder, and half the court thought that they had some substance. The Constitution Act, 1982 recognized and affirmed "the existing aboriginal and treaty rights of the aboriginal peoples of Canada". The federal government has agreed to negotiate some claims. Other claims are being advanced. Another action has been started by other Indian bands concerning lands in the northwestern part of the province. It is significant that no injunction has been sought in that action. I think it fair to say that, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations. Viewed in that context, I do not think that the granting of an interlocutory injunction confined to Meares Island can be reasonably said to lead to confusion and uncertainty in the minds of the public.

Concern about Extended Economic Impact of an Injunction

The concern expressed by MacMillan Bloedel was that the granting of this injunction might lead to the granting of other injunctions in other areas, and thereby shut down a substantial part of the forest industry. We were urged by counsel for the Indian bands to hold that was not a proper consideration. I think that such practical matters cannot be overlooked. I am not concerned, however, that other injunctions respecting other areas will be granted on a reflex basis because an injunction is granted with respect to Meares Island. Mr. Lawson, one of the more active of the protestors, is reported to have said "if we are allowed to stop them here, their right to log 300 other contested areas in British Columbia can be challenged". In making that bold statement he fails to understand the judicial process. An application for an injunction may be made anywhere, but that is not to say that it will be granted. Each application will depend upon its own individual circumstances, and the factors to be taken into account in weighing the balance of convenience will vary from area to area. The cumulative effect of granting applications will not be overlooked. Of course, the balance of convenience on any subsequent application would have to be weighed in the light of the cumulative effect upon the industry and the economy. Furthermore, if an injunction is granted here it is because there are special circumstances in this case, which are unlikely to give rise to other injunctions, especially a rash of them. The bona fides of any particular application will weigh heavily in the balance.

Steps by the Indians in Pursuit of their Rights

The chambers judge held that the Indian bands had slept on their rights, waiting until the eve of the commencement of logging to take a position. But I do not understand that to be the situation. It is true that the Indian bands did not commence their court action until MacMillan Bloedel pressed the issue of logging. But the Indian bands were engaged from 1981 to 1983 in discussions, research and studies in conjunction with the Meares Island Planning Team. At all times during those discussions they took the position that the land ought not to be logged. MacMillan Bloedel and other logging companies were members of the group, and so were the International Woodworkers of America, Local 1-85. MacMillan Bloedel withdrew from the discussions before they were completed. Without producing an exact list of the people and groups involved in the discussions suffice it to say that they were representative of the area and of the interests to be protected in the area. They included representatives of the Indian bands and the Tribal Councils, the Village of Tofino, the Regional District, the Ministry of Forests, the Ministry of Tourism, the Provincial Parks Branch, and the Water Management Branch. The Heritage Conservation Branch, friends of the Indian bands, the Tofino Mariculture Development Group, the B.C. Fish and Wildlife Branch, the Marine Sources Branch and the Sierra Club of Western Canada were also involved. The planning team started out to consider three options. The first proposed the preservation of Meares Island from logging. The second proposed controlled logging over half the Island and a

deferment of the remainder. The third proposed controlled logging over half the Island, with preservation of the remainder from logging. After three years the planning team was unable to arrive at a decision. The material indicates that the Village of Tofino has supported the position of the Indians, and understands that Meares Island may be a special place which ought to be preserved, and which might be a useful adjunct to the development of tourism.

Having considered that material, I do not think that it can be fairly said that the Indian bands have slept on their rights. They have made their rights known, they have participated in discussions which might have led to a resolution of their problem and they have left legal action as a final resort. Their conduct also must be viewed in the light of the recognized desirability to work out this problem without going to court, and, ideally, by negotiation.

Temporary Preservation of Timber on Meares Island

I turn then to focus on Meares Island. It is the temporary use of that land and that timber which is in issue on this application. If an interlocutory injunction to restrain logging is granted it will last until the trial is concluded, and may be extended until the question is finally determined on appeal. That may take a number of years. I do not think the length of time is of great importance to MacMillan Bloedel. It matters not, in the context of its total business operations, whether the timber is cut now or a few years from now. The Indian bands, however, are laying claim to the land with the growing timber on it, and they say that the land should be preserved in its virgin state until their claims have been decided by the courts. I think this Island must be viewed as a special place so far as the Indians are concerned. The sincerity and legitimacy of their desire to retain it in its virgin state, pending the resolution of the legal questions raised in this action, are borne out by the support they have received from the Village of Tofino which looks out on the Island. It is no ordinary logging site. It is an Island with special values, rising above commercialism. In a sense it is like a park. It contains trees of great size and antiquity. It discloses the history and culture of the Indian Nations. It contains evidence of use by the Indians over many years, and before the colonists arrived. Some of that evidence has been documented in a report done for MacMillan Bloedel by Arcas Associates. Some of it is yet to be documented. Until all the evidence needed for trial is documented there is a need for a preservation order.

In saying that this is no ordinary logging site, I have not overlooked the fact that logging has been carried out on the Island. It commenced in the early part of the century. The Indians themselves have removed some trees. But that does not mean to say that the area in question ought to be "clear-cut" before the judgment, certainly not if logging can be conveniently postponed. Even MacMillan Bloedel does not say that it must log now or suffer irreparable damages. Mr. Justice Gibbs agreed that no such damage would occur if an injunction were granted to the Indians.

An interlocutory injunction will not usually be granted if damages would be an adequate remedy. MacMillan Bloedel submits that if the Indian bands have any claim to aboriginal rights which involve the timber that they can be compensated adequately by payment of money. It must be remembered that the claim by the Tribal Council to which they belong to aboriginal rights extends beyond Meares Island and encompasses a large part of Vancouver Island. But we are only concerned here with Meares Island, and particularly with two percent of it that MacMillan Bloedel plans to log in the next year. It is with respect to that small part that they claim an injunction, on a temporary basis, to prevent logging. If an injunction were being sought with respect to the whole area the economic consequences of granting an injunction would probably weigh heavily against making the order. But small, isolated, special sites may be dealt with differently than most of the terrain. I have said that aboriginal claims may be resolved in a number of ways -- by granting title, by permitting use and occupation of various types, by recognizing hunting and fishing priorities, or by money damages. Probably there are a variety of other ways of settling such claims. But it is not unusual to deal in the preservation of land. So damages are not necessarily an appropriate remedy in respect to all aboriginal claims. There is still room for an order to preserve assets in a case like this.

Conclusion

The balance of convenience in this case is not in favour of immediate logging. Justice and convenience are the twin standards to be applied in deciding if an injunction is to be granted. It is convenient if logging is postponed for a year or even a few years on Meares Island. Justice to the Indian bands in these unusual circumstances means giving a decision on the merits of their claim before destroying the forest involved in that claim.

I would grant the interlocutory injunction to the Indian bands in the terms specified by Mr. Justice Seaton.

The Injunction to Restrain the Protestors

As the litigation now stands there are competing rights to the timber on Meares Island. The rights of the Indians are protected by the order preventing logging. The rights of MacMillan Bloedel to that timber are entitled to be preserved and protected and MacMillan Bloedel must be able to enter the Island and take appropriate steps to preserve the timber from damage. They are also entitled to have the land preserved in the state it was before the protestors came on the scene. Mr. Justice Gibbs granted an injunction to MacMillan Bloedel to protect those rights. That injunction was justified and continues to be justified. The protestors against whom it was granted have appealed. There is no merit in their appeal. There is no place in this controversy for violence, intimidation, or obstruction. Those acts do not assist the Indian bands. They jeopardize their right to be heard in the courts, for the courts will not give audience to those who take the law into their own hands and show contempt for the democratic process.

I would continue that injunction, with the modifications required to suit the new circumstances presented by this judgment.

In the result, I would allow the appeal of the Indian bands, and I would dismiss the appeal of the protestors, and would make the orders proposed by Mr. Justice Seaton.

MACDONALD J.A. (dissenting on second appeal): I have had the privilege of reading the draft reasons of Mr. Justice Seaton. I need not repeat a great deal of what he has written.

As Seaton J.A. has done, I proceed on the assumption that to the extent the provincial government can give the right to log, MacMillan Bloedel holds that right. I too would dismiss the appeal of the protestors. For the reasons Mr. Justice Seaton has expressed I agree that the Indian bands have shown that there is a serious question to be tried. Putting that matter another way, they have met the test stated by Sheppard J.A. giving the judgment of this court in Brady v. Heinekey & Black Ball Ferries (1960), 24 D.L.R. (2d) 737 at p.739:

> Hence to obtain the interlocutory injunction these plaintiffs must establish that they have "a fair question to raise as to the right". That has been elsewhere described as a prima facie case, an arguable case, or a probable case, all of which means that it is implicit that the plaintiffs establish:
>
> (a) A right,
> (b) A breach, actually or reasonably apprehended, as required by the authorities, and
> (c) Such reasonable probability of success as would warrant the case proceeding to trial.

These matters having been established the court then goes on to consider what is called the balance of convenience. The circumstances under which it arises for consideration is well expressed by Lord Diplock, for the House of Lords, in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 at p.408, [1975] 1 All E.R. 504:

> So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.
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> As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was

> sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.
>
> It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

The chambers judge found that neither party had proved irreparable damages. But, citing Gulf Island v. S.I.U. and Cunningham and Heinekey (1959), 27 W.W.R. 652 at p.662 held that the omission was not fatal. He went on to seek the balance of convenience and concluded: "What tips the balance in MacMillan Bloedel's favour is interference with the conduct of business operations, the potentially disastrous consequences which I have referred to earlier, the propensity of the opponents of logging to take the law into their own hands, and the laches of the Indian bands." As to potentially disastrous consequences, the judge was referring to his earlier statement that the grant of an injunction to the Indian bands, at this stage, would be interpreted as some recognition of an overriding aboriginal title, and taken as a precedent, resulting in a rash of similar applications throughout the province. He observed that they would not necessarily be restricted to proposed logging operations and he contemplated the havoc which wholesale challenges would create in the financial, business and public activities of the province.

I propose treating the matter by assuming that it is properly carried to the stage of consideration of balance of convenience. I do that despite the likelihood of the Indian bands being unable to pay damages, in accordance with their undertaking, if, in the end they fail, and an injunction prohibiting logging is in force for a considerable time.

Counsel for the Indian bands say that the chambers judge erred in taking into consideration public inconvenience which might result not from this case but from other hypothetical proceedings by persons not party to the action and not now before the courts. They say that if their clients had made out a case justifying the granting of an interim injunction they are entitled to it and the fact that others may come forward and seek the same relief should not be a prohibiting factor in this case. They urge, that in each case when an injunction is sought it will be for the applicant, before the order goes, to establish the necessary facts and show the possibility of harm. The court, it is put to us, maintains control over the process and the fear of wholesale challenges should not pose a problem as each case is dealt with on its own merits.

The court need not and should not take that tunnel vision approach. Spry's Principles of Equitable Remedies, 2nd ed. (Sweet & Maxwell, 1980), in discussing the factors to be taken into account by a court deciding whether to grant an interim injunction says this at pp.464-65:

> The most important matters which are taken into account by courts of equity in deciding whether interlocutory injunctions should issue have already been considered individually. It should not be thought, however, that other considerations also may not arise. It has been said that whether or not an injunction should be granted before the legal rights of the parties have been established "depends upon a great variety of circumstances, and it is utterly impossible to lay down any general rule upon the subject, by which the discretion of the court ought in all cases to be regulated", and it must be remembered that in every case the ultimate issue is whether in the particular circumstances the most just course is to restrain the defendant from carrying out the acts which are apprehended until the matters which are in issue between the parties can be finally disposed of by the court. Any particular fact or matter will be treated as material or immaterial according to whether or not it is relevant to that issue.
>
> . . .
>
> Nonetheless it is useful to note that considerations that are material in this sense may be divided into three classes. The first comprises all matters which affect the relative claims of the parties as against each other, such as hardship, unfairness, laches and so on. The second comprises all matters which affect the interests of persons not before the court, such as possible injury or inconvenience to third persons or, indeed, to a particular class of

> the general public. The third comprises matters of policy, of which an example is found in cases where an applicant positively misleads the court or else fails to disclose matters which in the particular circumstances it is his duty to disclose. (My underlining)

The breadth of circumstances which should be considered was recognized by this court in Edgett v. Taylor et al., [1934] 1 D.L.R. 113. A wide view of the implications of an order is implicit in Lord Diplock's discussion, at p.409 of the factors arising in the American Cyanamid case.

The context in which these particular aboriginal claims are presented is shown by a publication put before us entitled In All Fairness. A Native Claims Policy published in 1981 under the authority of the then Minister of Indian Affairs and Northern Development. The booklet commences by observing that Indian and Inuit people through their associations have presented formal land claims to the Government of Canada for large areas of the country. It is in evidence in this case that a large part of Vancouver Island is claimed. After stating that the current method of dealing with native claims emerged in 1973 there is reference to a policy statement issued in that year and this comment upon it:

> The policy statement acknowledged another factor that needed to be dealt with. Because of historical reasons continuing use and occupancy of traditional lands - there were areas in which Native people clearly still had aboriginal interests. Furthermore these interests had not been dealt with by treaty nor did any specific legislation exist that took precedence over these interests.
> Since any settlement of claims based on these criteria could include a variety of terms such as protection of hunting, fishing and trapping, land title, money, as well as other rights and benefits, in exchange for a release of the general and undefined Native title, such claims came to be called comprehensive claims.

In another part of the booklet there is this significant statement:

> Recently greater attention has been given to land claims. The various demands for natural resources, vast amounts of which have been discovered in some of the areas being claimed, have pressed Native people to present their formal land claims to the government. This is not to say that the first and only reason for settling claims is development, because the government has accepted claims for negotiation in areas where development is not imminent. Rather, it is a matter of policy that the government is willing to negotiate settlements. Since 1973, the federal government has operated under a policy that acknowledges Native interests in certain land areas claimed and that allows for the negotiation of settlements for claims where these interests can be shown not to have been previously resolved.
>
> Development has only served to make the settlement of these claims more urgent to some native groups. The government recognizes the urgency to settle land claims as quickly and effectively as possible in order that the interests of Native people be protected in the wake of development, in a way that offers them a choice of lifestyles.
>
> When working to protect Native interests, respect for the rights of other Canadians must be maintained during the negotiation process and in the terms of settlement. It serves no just purpose if the terms of settlement ignore or arbitrarily infringe upon the rights of other citizens. Just as much as this policy addresses the land rights issues of Native people, it also respects the rights of all other Canadians.

There is discussion of the processes by which the aboriginal claims may be resolved. After referring to the experience of other countries the discussion goes on:

> Further alternatives considered by the government included arbitration, mediation and the courts. There are drawbacks to all three approaches.
>
> For example, while a court may be able to render a judgment on, say, the status of lands, it is unable to grant land as compensation or to formulate particular schemes that would meet the needs of the plaintiff. In general, it can be said that the courts have not been found by the Native peoples to be the best instrument by which to pursue claims.
>
> There are a number of compelling advantages to the negotiation process, as the federal government sees it. The format permits Natives not only to express their opinions and state

> their grievances, but it further allows them to participate in the formulation of the terms of their own settlement. When a settlement is reached, after mutual agreement between the parties, a claim then can be dealt with once and for all. Once this is achieved, the claim is nullified.

Now government policy may be changed. But there is the clear prospect that aboriginal claims will be settled by negotiation. Two comprehensive claims have already been resolved in this way.

At this point I wish to refer to the usual situation in which injunctions are granted. It is one in which the court, if the parties do not settle among themselves, will finally and completely determine all issues in dispute. It is contemplated that damages will not be an adequate remedy to the aggrieved party and, at trial, the court will be asked to grant an injunction permanently prohibiting some activity. In order to prevent the alleged illegal activity pending trial, an interlocutory injunction is sought. That is so that the question of a permanent injunction after trial will not be rendered academic. It is recognized that the trial court's judgment may be appealed. But, with respect to interlocutory injunctions, the period looked to is that ending with the judgment after trial when rights will have been determined and remedies prescribed.

The situation in this case is not the usual one. That factor alone should not deter issue of a restraining order. But here the differences from the usual militate against the granting of an injunction. They suggest that in cases such as this, brought by the Indian bands, the courts ought to confine themselves to the issues of the existence of aboriginal title, its nature and extent.

Now what lies ahead in this case? The litigation will be carried to the Supreme Court of Canada. In view of the divisions of opinions in the Calder case it is only in the Supreme Court of Canada that the question of the existence of aboriginal title can be determined. The judgment after trial in the Supreme Court of British Columbia and the judgment of this court upon appeal, will be significant, but they will only be steps along the way. After those steps have been taken the question of aboriginal title will be as open as it is today.

How long will it take? It will be years before we see the judgment of the Supreme Court of Canada. If the proper course is to preserve the existing situation by prohibiting logging pending judgment after trial, I can see no justification for refusing an injunction until the question is finally answered in the Supreme Court of Canada. The trial may not get under way as quickly as we anticipate. The marshalling of evidence by the Indian bands will be critical. They may resist being hurried to trial. We can expect applications in the trial court, and after judgment there, in this court, for orders continuing the prohibition on logging. And the clear message from this court to judges hearing those applications will be that the existing situation should be preserved while the litigation continues.

There is another matter to consider. In the usual situation when interlocutory injunctions are applied for, it is contemplated that, after trial, a permanent restraining order in similar terms will issue. In other words, obtaining that permanent order is a major objective of the litigation. At the end of this litigation there can be no permanent injunction in the usual sense of that term. That is because the court will not finally determine the issues in dispute. They will be determined through successful negotiations in the future. MacMillan Bloedel, now sought to be enjoined, will not be a party to those negotiations. The so-called permanent injunction will in essence be an interlocutory one with the court granting it blindly in the sense that it can have no idea whether it will fit into the final settlement others will make.

The chambers judge anticipated that granting an injunction in this case would result in a rash of similar applications in the province. As to that, I would be considerably influenced if I thought that the Meares Island situation is unique. But it is unique only in the sense that every individual situation is unique as to its details and particulars. If an injunction is granted in this case it will be a precedent. Legal ingenuity will have no trouble formulating and bringing before the court applications with respect to situations which, in their essentials, will make this judgment indistinguishable. The advantage of an injunction in negotiations is obvious.

For these reasons I think that the chambers judge was right in refusing an injunction upon consideration of the balance of convenience. I would therefore dismiss the appeal of the Indian bands.

CRAIG J.A. (dissenting on second appeal): Mr. Justice Seaton has set out the circumstances and the relevant law in his opinion, and I will not reiterate them except to the extent that I consider it

necessary for the purposes of my opinion. I have had, also, an opportunity to read the opinions of Mr. Justice Macdonald and Mr. Justice Macfarlane. I agree with Mr. Justice Seaton's conclusions regarding the disposition of these appeals except I disagree with his conclusion that the court should grant an interlocutory judgment to the Indians. I would dismiss the appeal on this aspect of the case, generally for the reasons which Mr. Justice Macdonald has stated.

While the views expressed by Lord Diplock in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, [1975] 1 All E.R. 504, are a valuable exposition on the law relating to interlocutory injunctions, they are not binding on us. The governing case on interlocutory injunctions in this jurisdiction is, of course, Wheatley v. Ellis and Hendrickson (1944), 61 B.C.R. 55 in which the court held that an applicant for an interlocutory injunction need not establish that the court will grant him injunctive relief after a trial and that he need only show "that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition until the question can be disposed of". Having said that, I reiterate what I have said on other occasions, namely, that there appears to be no difference between the phrase "a fair question to raise as to the existence of the right which he alleges" and the phrase "serious question to be tried" used by Lord Diplock in the American Cyanamid case. In his judgment, Lord Diplock deprecated the use of the phrase "prima facie case" and stated that this was not a test on an application for an interlocutory injunction, but he accepted the view that the relevant strength of an applicant's case may well be a factor in the ultimate decision. This is clear from his subsequent opinion in N.W.L. Ltd. v. Woods (1979), 1 W.L.R. 1294 and Hadmor Productions Ltd. v. Hamilton (1983), A.C. 191. In any event, this court in applying the Wheatley v. Ellis test has tended to consider the strength of the applicant's case using such expressions as "prima facie case, an arguable case, or a probable case" -- see Shepherd J.A. in Brady v. Heinekey & Blackball Ferries (1960), 24 D.L.R. (2d) 737 at p.739.

The principles governing this court's power to review the exercise of a judge's discretion in refusing to grant an interlocutory injunction are well known. In this case, the judge concluded that the Indian bands had not "made out an arguable case of aboriginal title". I assume that he was saying that the Indians had not raised a fair question as to the existence of the right which they alleged.

I think that he erred in this conclusion. The question of the nature and extent of aboriginal title is a complex one. As Mr. Justice Dickson pointed out in Kruger v. The Queen, [1978] S.C.R. 104 at p.109 "claims to aboriginal title are woven with history, legend, politics and moral obligations". The Indians have asserted this claim for many years. In these circumstances, I think that the Indians have raised a fair question as to the existence of the right which they allege and that the chambers judge was wrong in concluding otherwise, but they have not satisfied me that "the property should be preserved in its present actual condition until the question can be disposed of ". Accordingly, I would dismiss their appeal from the refusal of the chambers judge to grant them an injunction generally for the reasons stated by Mr. Justice Macdonald. In considering what I shall call the second branch of the test in Wheatley v. Ellis, courts have had regard to what is compendiously referred to as "the balance of convenience". The most important consideration on this aspect of the case -- and generally the determinative consideration -- is whether damages would be an adequate remedy and the defendants' ability to pay such damages -- the issue of "irreparable damage". Some cases seem to treat this issue as an issue which must be resolved prior to the consideration of the balance of convenience, but I think the tendency is to consider it simply as a part of this particular concern. If damages would be an adequate remedy and if the defendant appears to be capable of paying any such damages, the courts generally will refuse an interlocutory injunction but in certain circumstances will grant an interlocutory injunction even though the plaintiff has failed to show possible irreparable damage. I do not think that the refusal to grant an interlocutory injunction to the Indians would result in "irreparable damage" to them in the event that they establish, fully or partially, their claim to aboriginal title. The ultimate position of the Indians regarding the extent of their aboriginal title -- as I understand the written and oral arguments -- is that the provincial Crown could not dispose of any land or interest in land to which the Indians assert aboriginal title without the consent of the Indians. Even if they do establish aboriginal title to this extent, I think that the inevitable solution must be: What is fair and reasonable compensation for the land and interest already alienated and what should be fair and reasonable compensation for land and interest which the provincial Crown considers should be alienated or utilized for the welfare of all the citizens of the province? The major portion of this compensation would be the responsibility of the provincial Crown. I think, too, that the other aspects of balance of convenience clearly justify the refusal to grant an injunction in this case. Many groups and agencies have scrutinized the proposed logging of this area carefully over a period of years, including the Meares Island Planning Team (Macfarlane J.A. has referred to the composition of this group in his opinion). In its report, the planning team referred to the Heelboom

Bay area as the "least sensitive area" in terms of environment. The concerns of the Crown representatives, including the officials of the Ministry of Forest and the Heritage Conservation Branch as well as the concerns of the Meares Island Planning Team, have resulted in the Forestry Department attaching very stringent conditions to the right to log the area known as "Meares Island Planning and Operational Prescriptions". The possibility of any environmental damage would appear to be very slight.

A consideration of the factors which I have mentioned and the factors which Mr. Justice Macdonald has mentioned satisfies me that we should not grant an interlocutory injunction to prevent logging. Accordingly, I would dismiss the appeal.