Date: 19980625
Docket: CA024761
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT:

BEFORE THE HONOURABLE — June 25, 1998

MADAM JUSTICE SOUTHIN

IN CHAMBERS — Vancouver, B.C.

BETWEEN:

CHIEF COUNCILLOR MATHEW HILL, also known as Tha-lathatk, on his own behalf and on behalf of all other members of the Kitkatla Band, and KITKATLA BAND

APPELLANTS

AND:

THE MINISTER OF FORESTS, THE REGIONAL or DISTRICT MANAGER OF THE NORTH COAST FOREST DISTRICT, THE MINISTER OF SMALL BUSINESS, TOURISM AND CULTURE, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and INTERNATIONAL FOREST PRODUCTS LIMITED

RESPONDENTS

Mr. J. Woodward and
Ms. P. Hutchings — appearing for the Appellant

Mr. P.J. Pearlman, Q.C. — appearing for the Respondent, Her Majesty the Queen in Right of the Province of British Columbia

Mr. P.G. Foy, Q.C. and Mr. W.K. McNaughton appearing for the Respondent, International Forest Products Limited

[1] **SOUTHIN, J.A.:** This is an application for an interlocutory injunction restraining the respondent Interfor from logging a number of cut blocks on the north coast in what the parties call the Kumealon Watershed pending the applicant's application for leave to appeal the judgment of Mr. Justice Hutchison refusing such an injunction pending the trial of this action or further order.

[2] This action was begun on 1st June. Its foundation is the claim of the applicants, the Kitkatla Band, who have their principal Reserve on Dolphin Island, that they have aboriginal title to the watershed under the principles of the case generally known as ***Delgamuukw***.

[3] There are two passages in ***Delgamuukw*** which have weighed with me in considering this matter:

> 143 In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

* * *

168 Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

169 Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*. In keeping

> with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. Since the issue of damages was severed from the principal action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day.

For the purposes of these matters the Supreme Court of Canada has fixed I believe it is the year 1846 as the date of sovereignty.

[4] In opposing this application as I understood him, Mr. Pearlman for the Crown asserted that ***Delgamuukw*** which was decided in December 1997 really makes no difference to the principles upon which an interlocutory injunction is granted when a Band applies asserting such title. I understand the learned judge below to hold essentially the same view. What has troubled me today and why I think this matter should be heard by the Court and why I extracted the concession, if that is what it can be called, as to leave to appeal from Mr. Foy and Mr. Pearlman, is that I am not at all sure that is right. I am not at all sure it should fairly be said in light of ***Delgamuukw*** that the earlier cases on applications for

injunctions founded on assertions of aboriginal matters should govern.

[5] I am troubled by the question of the weight of the evidence. The learned judge below said there was here a fair question to be tried presumably he meant as to title to these lands. I would think if Indian bands are to come to court and try to prevent the normal commercial operations of the Province carried on under permits of the Crown, which is what this is, they must surely have something more than some evidence, some low threshold as Mr. Woodward would have it. It may be that the weight of the evidence can equally well be dealt with under the general rubric of balance of convenience. The stronger the evidence the greater the risk to an injunction; the thinner the evidence the less the right.

[6] In the case at bar, though I did not have much time to absorb the evidence relating to the title of this Band to these lands, it did strike me as being rather on the thin side. It may be that that is not a proper consideration under ***Delgamuukw***. It may be that under ***Delgamuukw*** now the mere assertion of aboriginal title to Crown land entitles the Band in question to the protection of its alleged interest. As to that I cannot say.

[7] Another aspect that troubled me here was how this matter began. It began, as I understand it, as an injunction to protect the trees in issue because they might be trees of evidentiary value. As the matter seems to have progressed it has gone beyond the protection of the evidence which was an aspect of Meares Island and into a general thrust of protecting whatever is on the land in case someday it should be held that it is indeed land with an aboriginal title. These are all matters of concern.

[8] This is the first application for an interlocutory injunction since ***Delgamuukw*** that has come to this Court. There are bound to be more because this process regarding aboriginal claims may well outlive a good many of the people in this courtroom. At some point, this Court will have to face the question on what criteria are to be adopted when a Band which has not as yet proven its claim, let us say before the Treaty Commission or anybody else, says that certain commercial activities cannot be carried on or ought not to be carried on because to carry them on would be to destroy in effect the benefit of their title.

[9] It is because I think these matters should be dealt with by the Court that I have adopted the course I have. I well appreciate that Mr. Woodward says that these particular trees that are going to be logged will be lost but I do not believe

that the aboriginal land title process is necessarily to be used for general environmental purposes. In any event it will be of assistance to the Band, I would think, to have the general principle established because the Band claims title not merely to the place that is to be logged next week but as I understand it, to the whole of the watershed and therefore it will wish to have its position I suppose in the whole of the watershed established and not merely its position about these particular trees.

[10] There will therefore be an order in the terms which Mr. Foy recited adapted properly.

(submissions)

[11] **SOUTHIN, J.A.:** It is my view that the proper order in this case is that there be no injunction on this application but that leave to appeal should be granted. I also make it a condition of granting leave that there be no application for an order under s.18. That will not prevent any other applications you might care to make about anything else in any other Court.

(submissions)

[12] I do not think that on the paucity of the evidence of the aboriginal title alleged here that the balance of convenience

favours the injunction sought or a stay under s.18. It may be that a panel of the Court would consider that the paucity of evidence is not very important. That is what I think is the critical question that ***Delgamuukw*** raises in the broad sense of the balance of convenience. If the strength of the evidence is of no matter on the question of title in truth the commercial life of the Province can be brought to a halt. Perhaps that is what ***Delgamuukw*** says but it is not for a single judge to bring the commercial life of the Province to a halt. That may be the result.

[13] If there are difficulties in the terms of the order you may return tomorrow. I would add only the comment that I was not persuaded that the trees which are going to be cut have any evidentiary significance. Their undoubted value to the people who love that land is not in itself a sound foundation for the granting of an injunction in a matter of this kind. As I say, if there is any difficulty in the terms of the order, I am the chambers judge tomorrow.

"The Honourable Madam Justice Southin"