IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***The Lax Kw'alaams Indian Band v. The Attorney General of Canada,*** 2006 BCSC 1463

Date: 20061002
Docket: L023106
Registry: Vancouver

Between:

The Lax Kw'alaams Indian Band, represented by Chief Councillor Garry Reece on his own behalf and on behalf of the members of the Lax Kw'alaams Indian Band, and others

Plaintiffs

And

The Attorney General of Canada and Her Majesty the Queen in Right of the Province of British Columbia

Defendants

Before: The Honourable Madam Justice Satanove

Reasons for Judgment

Counsel for the Plaintiffs:	John Rich and Matthew Kirchner
Counsel for the Attorney General of Canada:	James Mackenzie and Jack Wright
Counsel for Her Majesty the Queen in Right of the Province of British Columbia:	Keith J. Phillips
Date and Place of Trial/Hearing:	September 8, 2006 Vancouver, B.C.

[1] In October 2002, the plaintiffs commenced this action seeking what they describe as “a judicial determination of the nature and scope of their constitutional right to fish." They claim an aboriginal right to fish and sell fish. They also claim aboriginal title to specified fishing sites in the Prince Rupert area of B.C. Accordingly, they joined both the Federal Government of Canada (“Canada”) and the Provincial Government of British Columbia (the “Province”) as defendants.

[2] After extensive document production, interrogatories and examinations for discovery, I am told this case is ready to go to trial on October 30 of this year. However, the plaintiffs do not wish to proceed with their aboriginal title claim at this point in time. They seek to discontinue the aboriginal title claim against the Province of British Columbia and prefer to negotiate a comprehensive aboriginal title claim through the British Columbia Treaty process in which they are currently participating.

[3] The Province seeks a severance of the claims of aboriginal title and other claims against it. It also supports the plaintiffs’ motion for discontinuance as an alternative to severance.

[4] Canada opposes either discontinuance or severance of the plaintiffs’ claims against the Province. In a Memorandum to Counsel dated September 11, 2006, I advised the parties that I was granting the Province’s application and severing the plaintiffs’ claims against the Province, including the claim for aboriginal title. These are my reasons for that decision.

[5] In support of its opposition to the plaintiffs’ and Province’s motions, Canada relied heavily on the decisions of Mr. Justice Sigurdson of this Court in ***British***

Columbia (Minister of Forests) v. Adams Lake Indian Band, 2005 BCSC 1312 and ***British Columbia (Minister of Forests) v. Okanagan Indian Band***, 2005 BCSC 492. In the latter case, the Province applied to discontinue the proceedings that it had commenced but the defendant Band wished to pursue their Constitutional challenge to the validity of the sections of the ***Forest Practices Code of British Columbia Act***, R.S.B.C. 1996, c. 159 that the plaintiff was relying on. In the circumstances, Justice Sigurdson refused the Province's application because the key issue underlying the litigation was the Band's assertion and desire to attempt to prove aboriginal title, or an aboriginal right to log. Sigurdson J. found this to have an important public element and that the outcome of the case might assist negotiations with the Band to conclude more rapidly.

[6] In the ***Adams Lake*** and ***Okanagan Indian Band*** cases (*supra*), the Province brought an application that only one action should proceed (to save advanced costs) and that the issue of aboriginal title should be severed from the issue of aboriginal rights and tried later. Sigurdson J. stayed one of the actions but declined to sever the issue of aboriginal title or to make any order before trial that would limit the evidence that the respondent Band could lead regarding aboriginal title.

[7] In my view, both of the above cases are distinguishable in that only one party to the issue that was sought to be severed was in favour of it, while the other party was vehemently opposed. That opposing party, being the Band, was trying to defend a provincial prosecution and relied heavily on a finding of aboriginal title. The prejudice to the Band in those circumstances was obvious and overwhelming.

[8] In the case before me, the two parties that are most concerned with the issue of aboriginal title have joined together to seek the leave of the court to defer litigation of this issue in favour of the Treaty negotiation process. If these were the only two parties to the litigation there would be no question that I would accede to their request, as there can be no point in compelling both parties to litigation to proceed when neither desire to do so.

[9] However, in the case at bar Canada is considered to be the main defendant and she wishes to try the issue of aboriginal title. Counsel for Canada argues that the plaintiffs are no longer *dominus litis* because at this late stage they cannot choose to pursue only the relief they think they will succeed in obtaining and postpone the rest indefinitely. Once again, the difficulty I have with Canada's argument is that the Province and the plaintiffs have the primary interest in establishing or disproving aboriginal title, and they both wish to set aside this issue for the time being. It would not be appropriate to allow Canada to control the means by which the dispute between the Province and the plaintiff should be resolved. In saying this, I recognize Canada is concerned about its potential duty to consult with the plaintiffs, which could be affected by an adjudication of the plaintiffs' claim to aboriginal title. However, that is not the primary aspect of this litigation.

[10] The plaintiffs propose that the first part of the trial focus on the aboriginal rights claim and the test set out ***R. v. Van der Peet***, [1996] 2 S.C.R. 507. A general claim to an aboriginal right to fish for commercial purposes is not inextricably intertwined with a testing of specific title claims, and therefore may be severed (***Morrison-Knudsen Co. v. British Columbia Hydro and Power Authority*** (1972),

24 D.L.R. (3d) 579 (B.C.S.C.)). The issue of a commercial right to harvest the fisheries may be incidental to aboriginal title, but the converse is not true. For example, to prove aboriginal title the plaintiffs have to show not only that the fisheries were of central significance to their culture, but also that at the time of sovereignty the plaintiffs had continuous and exclusive use and occupation of the fisheries that could be equated with common law title (***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010). These features of continuity and exclusivity at the time of sovereignty are not requisite elements of proving a general aboriginal right to fish.

[11] Other aspects of the aboriginal title claim that would not be considered in the aboriginal rights claim and which could simplify the first part of the trial are listed by the Province as:

(a) whether a right to a commercial fishery is or was an ancillary right to aboriginal title to lands or lands covered by waters;

(b) whether there can be a right to an exclusive fishery that displaces the public right to a fishery in lands covered by tidal waters;

(c) whether aboriginal title can exist in the seabed specifically or in lands covered by water generally;

(d) whether aboriginal title in lands covered by water would carry with it any rights in the nature of title or ownership to the waters themselves;

(e) whether exclusive occupation of lands covered by waters could co-exist with an unfettered right of navigation, whether from time immemorial or more recently;

(f) whether aboriginal title to lands covered by waters and to the waters themselves can give a possessory right in the fish resources in, on or passing by or over the lands covered by waters and the waters;

(g) whether such a possessory right in fish resources, if so determined, would be different for migratory and non-migratory fish resources; and

(h) what is the constitutional status of lands covered by water, the waters and the fish resources, should all or some be subject to aboriginal title.

[12] The plaintiffs add these issues to the list of topics that will avoided through severance:

(a) date of sovereignty;

(b) organized society at sovereignty;

(c) exclusive occupation (or occupation at all, for that matter);

(d) boundaries;

(e) overlapping claims by other First Nations;

(f) the legal implications of Canada's dispute with the U.S. over the "A-B Line";

(g) entitlement of the current plaintiffs to title held at sovereignty;

(h) infringement of title by British Columbia;

(i) infringement of title by Canada;

(j) abandonment; and

(k) extinguishment of title.

[13] Canada points out that these are mostly legal issues and will not save much time and expense with respect to the evidence that will be led at trial. That may be accurate, but complex legal issues such as the ones listed above can take many days or even weeks to argue properly. In my view, there would be a major saving of time and expense if these issues were severed from the first part of trial.

[14] As I said recently in another aboriginal rights case, ***Kwakiutl Nation v. Canada (Attorney General)***, 2006 BCSC 1368 at para. 26, I am of the view that aboriginal rights litigation is unique and should not be regarded as typical civil litigation. There is an obligation on all involved, including the courts, to ensure that the core issues are tried in such a way that does not deter the claimants or prejudice the defendants.

[15] Therefore, I grant the Province's motion for severance. It is not necessary for me to deal with the application for discontinuance as that was a form of alternative relief sought by the applicants.

[16] The order will go in the general terms set out in the Province's notice of motion. There will be a further case management conference to be heard before trial commences on October 30, 2006, to refine the issues that will proceed on that date.

"D.A. Satanove, J."
The Honourable Madam Justice D.A. Satanove