

VANCOUVER
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COURT OF APPEAL
REGISTRY

Court of Appeal File No. CA035617
Supreme Court File No. 90 0913
Supreme Court Registry: Victoria

COURT OF APPEAL

ON APPEAL FROM THE ORDER OF JUSTICE VICKERS OF THE SUPREME COURT
OF BRITISH COLUMBIA, PRONOUNCED NOVEMBER 20, 2007

BETWEEN:

**Roger William, on his own behalf and on behalf of all other members
of the Xeni Gwet'in First Nations Government and
on behalf of all other members of the Tsilhqot'in Nation**

Respondent
(Plaintiff)

AND:

**Her Majesty the Queen in Right of the Province of British Columbia
and the Regional Manager of the Cariboo Forest Region**

Appellant
(Defendant)

AND:

The Attorney General of Canada

Respondent
(Defendant)

AND:

**B.C. Wildlife Federation and the B.C. Seafood Alliance;
Treaty 8 First Nations; Chief Wilson and Chief Jules Respondents;
First Nations Summit; and Te'mexw Nations**

Intervenors

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TO BRITISH COLUMBIA'S APPEAL ON ABORIGINAL RIGHTS**

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CHRONOLOGY OF RELEVANT DATES IN THE LITIGATION

Canada agrees with British Columbia's chronology.

OPENING STATEMENT

In this appeal on Aboriginal rights, Canada disagrees with British Columbia on only one issue. That is the issue of the proper collectivity and whether Mr. Justice Vickers erred in finding that the Tsilhqot'in Nation rather than the *Indian Act* band, the Xeni Gwet'in, is the proper holder of an Aboriginal right to hunt and trap. Canada submits that Mr. Justice Vickers correctly identified the Tsilhqot'in Nation as the proper Aboriginal rights holder.

Canada takes no position on the other issues raised in British Columbia's appeal.

PART I – STATEMENT OF FACTS

A. *Canada's Position with Respect to Particular Facts*

1. Canada agrees with British Columbia's statement of facts and adds the following facts.

2. The Plaintiff's Amended Statement of Claim also provided as follows:¹

2. The Tsilhqot'in Nation (the "Tsilhqot'in") is an aboriginal group itself comprised of several aboriginal groups including the Xení Gwet'in.

3. Roger William brings this claim on his own behalf and, as a representative, on behalf of all other members of the Xení Gwet'in and all other members of the Tsilhqot'in.

4. Roger William is a member of the Xení Gwet'in. Roger William is a member of the Tsilhqot'in Nation.

...

8. The Tsilhqot'in comprised an aboriginal group at contact and at or before the time the British Crown assumed sovereignty over the Brittany and the Trapline Territory, as defined below.

9. The Tsilhqot'in as it exists today is the continuation of, and successor to, the Tsilhqot'in as it existed as the time of contact with Europeans and the assumption of sovereignty by the British Crown, and, as such, the Tsilhqot'in as it exists today continues to hold the aboriginal title that was held by the Tsilhqot'in at the time of contact with Europeans and the assumption of sovereignty by the British Crown.

3. The issue of whether the proceeding was properly brought as a representative action was raised by British Columbia and determined by Mr. Justice Vickers in various interlocutory rulings.² British Columbia's

¹ Amended Statement of Claim, Joint Appeal Record, pp. 2, 8–9, paras. 2–4, 8–9 and a) and b).

² *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.*, [1999] B.C.J. No. 2459, 37 C.P.C. (4th) 101, Reasons for Judgment, Joint Appeal Record p. 633; *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.*, 2003 BCSC 735, 121 A.C.W.S. (3d) 1030, Reasons for Judgment, Joint Appeal Record, p. 733, para. 15.

Amended Statement of Defence also joined with the Plaintiff on the issue of the proper collectivity.³

4. In his Reasons for Judgment, Mr. Justice Vickers found that community members identify first as Tsilhqot'in, rather than as band members.⁴
5. Mr. Justice Vickers found that the evidence of explorer and Hudson Bay Company journals described meeting "Chilk hodins" and that HBC journals made no reference to Xení Gwet'in people.⁵

PART II – ISSUES ON APPEAL

6. The only issue raised in British Columbia's appeal on which Canada makes submissions is whether Mr. Justice Vickers erred in identifying the Tsilhqot'in Nation as the Aboriginal rights holders instead of the *Indian Act* band, the Xení Gwet'in.
7. Canada takes no position on the other issues raised in British Columbia's appeal.

PART III – ARGUMENT

A. *The Trial Judge Correctly Determined the Rights Holder*

8. On the issue of who the proper Aboriginal rights holder should be, Mr. Justice Vickers held at paragraph 470 of his Reasons for Judgment that:

I conclude that the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot'in people or any other sub- group within the Tsilhqot'in Nation are derived from the

³ Statement of Defence of the Defendants, Her Majesty the Queen in Right of the Province of British Columbia and The Regional Manager of the Cariboo Forest Region, Joint Appeal Record, p. 20, paras. 10 and 1.

⁴ Reasons for Judgment, Joint Appeal Record, p. 304, para. 459.

⁵ Reasons for Judgment, Joint Appeal Record, pp. 304-305, paras. 460–461.

collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation.

9. This is a finding of mixed fact and law that should be given considerable deference. In *Van der Peet* and subsequent jurisprudence, the Supreme Court of Canada made it clear that Aboriginal rights are collective rights, and must be established on a fact and site specific basis.⁶
10. At paragraph 100 of its Appellant's factum, British Columbia provides a number of examples of cases where courts found an Aboriginal rights holder to be a First Nation styled as an *Indian Act* band or where an *Indian Act* band sued in its own name. However, these cases do not preclude a First Nation from being a proper Aboriginal rights holder.⁷
11. The Supreme Court of Canada has used a variety of terms when describing the kinds of groups that can hold Aboriginal rights, including title. For example, "Aboriginal people" and modern-day claimants are used in *R. v. Bernard*; *R. v. Marshall*⁸, "Aboriginal group" and "Aboriginal nation" are referred to in *Delgamuukw*⁹, and "Aboriginal community" is referred to in *Van der Peet*.¹⁰
12. Moreover, in *R. v. Sappier*; *R. v. Gray*¹¹ the Supreme Court of Canada noted that an Aboriginal right is not to be exercised by any member of the Aboriginal community independent of the society it is meant to preserve.
13. In the present appeal, Mr. Justice Vickers held that the "Aboriginal rights of individual Tsilhqot'in people or any other sub-group within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions

⁶ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 46 and 69 [*Van der Peet*]; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 115 [*Delgamuukw*]; *R. v. Sappier*; *R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54 at para. 26 [*Sappier and Gray*].

⁷ *R. v. Adams*, [1996] 3 S.C.R. 101; *Delgamuukw*, *supra* note 6.

⁸ *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 22, 2005 SCC 43 at paras. 38, 48.

⁹ *Delgamuukw v. British Columbia*, *supra* note 6 at paras. 115 and 144.

¹⁰ *R. v. Van der Peet*, *supra* note 6 at para. 60.

¹¹ *Sappier and Gray*, *supra* note 6 at para. 26.

and shared historical experiences of the members of the Tsilhqot'in Nation."¹²

14. In the case at bar, where the Plaintiff represents both the larger Tsilhqot'in Nation and the Xeni Gwet'in, a subgroup of the Tsilhqot'in Nation, Mr. Justice Vickers was correct in finding the proper rights holder to be, whether for Aboriginal rights or title, the same community of Tsilhqot'in people.¹³ On the Plaintiff's evidence, the practices, customs and traditions presented at trial was tendered to prove both Aboriginal rights and title.

B. No Prejudice Arising from the Collectivity Issue

15. At trial, Canada took the position that the Tsilhqot'in Nation is the proper rights holder with respect to the claim for an Aboriginal right to hunt and trap.¹⁴ There is no prejudice to Canada arising from Mr. Justice Vickers' finding that the Tsilhqot'in Nation is the proper Aboriginal rights holder.
16. In his Reasons for Judgment, Mr. Justice Vickers held that the proper collectivity for both Aboriginal rights and title should be the same. He found at paragraph 1220 that the "Xeni Gwet'in people are Tsilhqot'in people, distinguished only by their nascent group and the fact of their location at the time reserves were set aside." This interpretation of the evidence was reasonably open to Mr. Justice Vickers and thus, he made no reviewable error.

PART IV – NATURE OF ORDER SOUGHT

17. Mr. Justice Vickers was correct in finding that the Tsilhqot'in Nation is the proper collectivity to hold an Aboriginal right to hunt and trap. Accordingly, British Columbia's appeal on this issue ought to be dismissed.

¹² Reasons for Judgment, Joint Appeal Record, p. 307, para. 470.


¹³ Reasons for Judgment, Joint Appeal Record, p. 307, para. 470.

¹⁴ Reasons for Judgment, Joint Appeal Record, p. 560, para. 1216.

18. Canada takes no position with respect to the other issues raised in British Columbia's appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, B.C. this 8th day of October, 2010.



Brian McLaughlin and Jennifer Chow
Counsel for the Respondent, The Attorney
General of Canada

LIST OF AUTHORITIES

Cases Cited	Paragraphs
<i>Delgamuukw v. British Columbia</i> , [1997] 3 S.C.R. 1010	9, 10, 12
<i>Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.</i> , [1999] B.C.J. No. 2459, 37 C.P.C. (4 th) 101	3
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<i>R. v. Adams</i> , [1996] 3 S.C.R. 101	10
<i>R. v. Marshall; R. v. Bernard</i> , [2005] 2 S.C.R. 22, 2005 SCC 43	12
<i>R. v. Sappier; R. v. Gray</i> , [2006] 2 S.C.R. 686, 2006 SCC 54	9, 12
<i>R. v. Van der Peet</i> , [1996] 2 S.C.R. 507, 1996 (S.C.C.) 216 (CanLii)	9, 12