

**VANCOUVER**  
**OCT 08 2010**  
**COURT OF APPEAL**  
**REGISTRY**

Court of Appeal File No. CA035618  
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 Xenigwet'in First Nations Government and  
on behalf of all other members of the Tsilhqot'in Nation**

Respondent  
(Plaintiff)

AND:

**The Attorney General of Canada**

Appellant  
(Defendant)

AND:

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

Respondent  
(Defendant)

AND:

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

Intervenors

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**CANADA'S REPLY FACTUM  
TO BRITISH COLUMBIA ON ABORIGINAL TITLE**

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**TABLE OF CONTENTS****CANADA'S REPLY ARGUMENTS TO BRITISH COLUMBIA ON ABORIGINAL TITLE**

A. The <i>Wongatha</i> decision is distinguishable .....	1
B. <i>CUPE</i> sets a high bar for relitigation .....	3
C. Alternatively, a second trial should be limited to the Opinion Area .....	3
D. Mr. Justice Vickers' obiter dicta should not prejudice a second trial .....	4
<b>APPENDIX 1</b> <i>Native Title Act 1993 (Cth) [NTA 1993]</i> , ss. 10 and 13.....	5
<b>APPENDIX 2</b> <i>Native Title Act 1993 (Cth) [NTA 1993]</i> , s. 61(1).....	9
<b>APPENDIX 3</b> <i>Native Title Act 1993 (Cth) [NTA 1993]</i> , s. 67(1).....	12
<b>LIST OF AUTHORITIES</b> .....	13

## CANADA'S REPLY ARGUMENTS TO BRITISH COLUMBIA ON ABORIGINAL TITLE

### A. *The Wongatha decision is distinguishable*

1. At paragraph 9 of its Respondent's factum, British Columbia relies on *Wongatha People v. Western Australia*<sup>1</sup> ("*Wongatha*") as authority for the "without prejudice" order made by Mr. Justice Vickers. The "without prejudice" order, in the case at bar, would allow the Plaintiff to relitigate his claim for a declaration of Aboriginal title.
2. The *Wongatha* case however, did not involve a "without prejudice" ruling so is distinguishable from the case at bar. *Wongatha* involved several overlapping claims for Native title over a large part of central Australia. In Australia, Native title issues are governed by the *Native Title Act*, which sets out mandatory requirements for a proper trial on Native title issues.
3. Section 67(1) of the *Native Title Act* requires that where overlapping claims to the same land exist, all claims must be dealt with in the same proceeding since a declaration of Native title extinguishes all claims to the same land.<sup>2</sup> Thus, eight different Aboriginal claims were heard in *Wongatha*.
4. Additionally, the *Native Title Act* requires that claimants be properly authorized by the Aboriginal groups they purport to represent in order to pursue a Native title claim under that *Act*.<sup>3</sup> In a 1400-page decision, Mr. Justice Lindgren found that only one of eight Aboriginal claimants was properly authorized to bring forward the Native title claims. On that basis, he found that the Court had no jurisdiction to hear the claims.<sup>4</sup>
5. While Mr. Justice Lindgren in *Wongatha* dismissed the claims, under the *Native Title Act* a dismissal of the claim does not amount to either a positive

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<sup>1</sup> *Wongatha People v. Western Australia* [2007] FCA 31. [*Wongatha*].

<sup>2</sup> *Native Title Act 1993* (Cth) [NTA 1993], s. 67(1).

<sup>3</sup> *Native Title Act 1993* (Cth) [NTA 1993], s. 61(1).

<sup>4</sup> *Wongatha*, *supra* note 1, at paras. 1269-1270.

or negative determination on the merits of the land claim.<sup>5</sup> Mr. Justice Lindgren's judgment amounted to a ruling that the *Native Title Act* was not properly engaged. Accordingly, the parties were at liberty to file further Native title claims to the same area, provided they were properly authorized. The situation in *Wongatha* that allowed the parties to relitigate was different from the case at bar.

6. Mr. Justice Vickers' "without prejudice" order was attached to an order that dismissed the Plaintiff's claim to "all" of the Claim Area on the basis that the Tsihqot'in Nation had not proven regular use or occupation of the entire claim area.<sup>6</sup> To the contrary, In *Wongatha*, Mr. Justice Lindgren did not decide any of the eight claims for Native title on the merits. Instead, Mr. Justice Lindgren found because the claims were not properly authorized, the Court did not have the jurisdiction to make any determination. Mr. Justice Lindgren in effect dismissed the claims for want of jurisdiction.<sup>7</sup> In that ruling, made after an extensive review of the language, culture, and history of the claimant groups, Mr. Justice Lindgren found that the claimant groups were not constituted based on the traditional laws and customs of the Western Desert people, but were simply created as platforms to bring Native title claims.<sup>8</sup>
7. In *Wongatha*, if another proceeding were to commence, the claimants would not be the same as in the first proceeding. To the contrary, in the case at bar, if another trial were to commence, the claimants would be the same in a second action.

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<sup>5</sup> *Native Title Act 1993 (Cth) [NTA 1993]*, ss. 10 and 13.

<sup>6</sup> Reasons for Judgment, Joint Appeal Record, pp. 465-466, para 957.

<sup>7</sup> Marshall McKenna, Hunt & Humphrey, 'Wongatha- A Question of Framing?' (2007) 26 ARELJ, at 15.

<sup>8</sup> *Wongatha*, *supra* note 1, at para 885.

**B. CUPE sets a high bar for relitigation**

8. At paragraph 10 of its Respondent's factum, British Columbia also relies on *Toronto (City) v. CUPE, Local 79*<sup>9</sup> for its position that the courts will permit some form of relitigation in special circumstances. In *CUPE*, the Supreme Court of Canada set a very high standard before relitigation is permitted. The court noted that "relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact **necessary** to enhance the credibility and effectiveness of the adjudicative process."<sup>10</sup> (emphasis added). To the contrary, relitigation in the circumstances of this case would not only be unnecessary, but would diminish the credibility and effectiveness of the adjudicative process.

**C. Alternatively, a second trial should be limited to the Opinion Area**

9. At paragraphs 11 to 13 of its Respondent's factum, British Columbia suggests a second trial can be "properly limited to village sites." This position contrasts with that of the Plaintiff who suggests that a second trial can be broader to address "portions" of the Claim Area.<sup>11</sup> Canada disagrees with both parties.
10. If, contrary to Canada's arguments in its Appellant's factum this Court holds that a second trial is warranted, a second trial should be restricted in geographical scope to the Opinion Area.
11. As discussed in Canada's Appellants' factum, in dismissing the "all" claim and discussing only 40% of the Claim Area in his *obiter dicta*, Mr. Justice Vickers intended that a second trial focus only on whether Aboriginal title could be proven within the Opinion Area.<sup>12</sup>

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<sup>9</sup> *Toronto (City) v. CUPE, Local 79* [2003] S.C.R. 77, 2003 SCC 63. [*CUPE*].

<sup>10</sup> *CUPE*, *supra* note 6, at para 52.

<sup>11</sup> Plaintiff's Respondent Factum filed in CA035618, p. 23, para. 71.

<sup>12</sup> Reasons for Judgment, Joint Appeal Record, p. 418, para. 792.


12. It is however difficult to see how the Plaintiff's evidence would be any different in a second action. If the Plaintiff's evidence is that his ancestors had no notions of boundaries as required by the Supreme Court of Canada in *Delgamuukw* and *Bernard & Marshall*, then a second action is bound to fail. As seen in the Plaintiff's post-judgment motion to amend his pleadings,<sup>13</sup> the Plaintiff took the position that the evidence provided by his witnesses was exhaustive.<sup>14</sup> He went on to say that his witnesses had already provided all the evidence they could as to use and occupation, and that they would not be able to provide evidence as to boundaries.<sup>15</sup>

***D. Mr. Justice Vickers' obiter dicta should not prejudice a second trial***

13. If contrary to Canada's position as set out in its Appellant's factum, this Court determines that a second trial is warranted, it would be appropriate and important to ensure that the contents of Mr. Justice Vickers' *obiter dicta* do not disrupt the fairness of a second trial. At present, it is unclear whether a second trial judge could or would disregard parts or all of Mr. Justice Vickers' *obiter dicta*. Clear statements made by this Court that the fairness of a second trial would require Mr. Justice Vickers' *obiter dicta* to be disregarded would assist the parties in how they conduct their cases.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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

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

<sup>13</sup> Reasons on Post-Judgment Pleadings Amendment, 9 May 2008, Joint Appeal Record, p. 853.

<sup>14</sup> Mr. David Rosenberg, Transcripts, 9 May 2008, vol. 128, p. 22333:23-27.

<sup>15</sup> Mr. David Rosenberg, Transcripts, 9 May 2008, vol. 128, p. 22333:38-41.



## Commonwealth Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Help\]](#)

### NATIVE TITLE ACT 1993 - SECT 10

#### Recognition and protection of native title

Native title is recognised, and protected, in accordance with this Act.

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## Commonwealth Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Help\]](#)

### NATIVE TITLE ACT 1993 - SECT 13

#### Approved determinations of native title

##### Applications to Federal Court

(1) An application may be made to the Federal Court under Part 3:

(a) for a determination of native title in relation to an area for which there is no approved determination of native title; or

(b) to revoke or vary an approved determination of native title on the grounds set out in subsection (5).

##### Native title determinations by Federal Court when determining compensation entitlements

(2) If:

(a) the Federal Court is making a determination of compensation in accordance with Division 5; and

(b) an approved determination of native title has not previously been made in relation to the whole or part of the area concerned;

the Federal Court must also make a current determination of native title in relation to the whole or the part of the area, that is to say, a determination of native title as at the time at which the determination of compensation is being made.

Note: In these circumstances, the compensation application must be accompanied by the affidavit, and contain the information, that would be required for a native title determination application for the area; see subsection 62(3).

##### Approved determinations of native title

(3) Subject to subsection (4), each of the following is an approved determination of native title :

(a) a determination of native title made on an application under paragraph (1)(a) or in accordance with subsection (2);

(b) an order, judgment or other decision of a recognised State/Territory body that involves a determination of native title in relation to an area within the jurisdictional limits of the State or Territory.

### Variation or revocation of determinations

(4) If an approved determination of native title is varied or revoked on the grounds set out in subsection (5) by:

- (a) the Federal Court, in determining an application under Part 3; or
- (b) a recognised State/Territory body in an order, judgment or other decision;

then:

(c) in the case of a variation--the determination as varied becomes an approved determination of native title in place of the original; and

(d) in the case of a revocation--the determination is no longer an approved determination of native title.

### Grounds for variation or revocation

(5) For the purposes of subsection (4), the grounds for variation or revocation of an approved determination of native title are:

(a) that events have taken place since the determination was made that have caused the determination no longer to be correct; or

(b) that the interests of justice require the variation or revocation of the determination.

### Review or appeal

(6) If:

(a) a determination of the Federal Court; or

(b) an order, judgment or other decision of a recognised State/Territory body;

is subject to any review or appeal, this section refers to the determination, order, judgment or decision as affected by the review or appeal, when finally determined.

### High Court determinations

(7) A determination of native title by the High Court is an approved determination of native title.

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## Commonwealth Consolidated Acts

[Index] [Table] [Search] [Search this Act] [Notes] [Noteup] [Previous] [Next] [Download] [Help]

### NATIVE TITLE ACT 1993 - SECT 61

#### Native title and compensation applications

Applications that may be made

(1) The following table sets out applications that may be made under this Division to the Federal Court and the persons who may make each of those applications:

<u>Applications</u>		
<u>Kind of</u>		
<u>application</u>	<u>Application</u>	<u>Persons who may make application</u>
Native title determination application	Application, as mentioned in subsection 13(1), for a determination of native title in relation to an area for which there is no approved <u>determination of native title</u> .	<p>(1) A person or persons <u>authorised</u> by all the persons (the <u>native title claim group</u>) who, according to their traditional laws and customs, hold the common or group rights and <u>interests</u> comprising the particular native title claimed, provided the person or persons are also included in the <u>native title claim group</u>; or</p> <p>Note 1: The person or persons will be the applicant; see subsection (2) of this section.</p> <p>Note 2: <u>Section 251B</u> states what it means for a person or persons to be <u>authorised</u> by all the persons in the <u>native title claim group</u>.</p> <p>(2) A person who holds a non-native title interest in relation to the whole of the area in relation to which the determination is sought; or</p> <p>(3) The <u>Commonwealth Minister</u>; or</p> <p>(4) The State Minister or the Territory Minister, if the determination is sought in relation to an area within the <u>jurisdictional limits</u> of the State or Territory concerned.</p>
Revised native	Application, as	(1) The <u>registered native title body</u>

title determination application	mentioned in subsection 13(1), for revocation or variation of an approved determination of <u>native title</u> , on the grounds set out in subsection 13(5).	<p><u>corporate</u>; or</p> <p>(2) The <u>Commonwealth Minister</u>; or</p> <p>(3) The State Minister or the Territory Minister, if the determination is sought in relation to an area within the <u>jurisdictional limits</u> of the State or Territory concerned; or</p> <p>(4) The <u>Native Title Registrar</u>.</p>
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Compensation application	Application under subsection 50(2) for a determination of compensation.	<p>(1) The <u>registered native title body</u> <u>corporate</u> (if any); or</p> <p>(2) A person or persons <u>authorised</u> by all the persons (the <i>compensation claim group</i>) who claim to be entitled to the compensation, provided the person or persons are also included in the compensation claim group.</p>
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Note 1: The person or persons will be the applicant: see subsection (2) of this section.

Note 2: Section 251B states what it means for a person or persons to be authorised by all the persons in the compensation claim group.

Applicant in case of applications authorised by claim groups

(2) In the case of:

(a) a native title determination application made by a person or persons authorised to make the application by a native title claim group; or

(b) a compensation application made by a person or persons authorised to make the application by a compensation claim group;

the following apply:

(c) the person is, or the persons are jointly, the *applicant* ; and

(d) none of the other members of the native title claim group or compensation claim group is the *applicant* .

Applicant's name and address

(3) An application must state the name and address for service of the person who is, or persons

who are, the applicant.

Applications authorised by persons

(4) A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must:

(a) name the persons; or

(b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Form etc.

(5) An application must:

(a) be in the prescribed form; and

(b) be filed in the Federal Court; and

(c) contain such information in relation to the matters sought to be determined as is prescribed; and

(d) be accompanied by any prescribed documents and any prescribed fee.



## Commonwealth Consolidated Acts

[\[Index\]](#) [\[Table\]](#) [\[Search\]](#) [\[Search this Act\]](#) [\[Notes\]](#) [\[Noteup\]](#) [\[Previous\]](#) [\[Next\]](#) [\[Download\]](#) [\[Help\]](#)

### NATIVE TITLE ACT 1993 - SECT 67

#### Overlapping native title determination applications

(1) If 2 or more proceedings before the Federal Court relate to native title determination applications that cover (in whole or in part) the same area, the Court must make such order as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding.

#### Splitting of application area

(2) Without limiting subsection (1), the order of the Court may provide that different parts of the area covered by an application are to be dealt with in separate proceedings.

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## LIST OF AUTHORITIES

<b>Cases Cited</b>	<b>Paragraphs</b>
<i>Toronto (City) v. CUPE, Local 79</i> [2003] S.C.R. 77, 2003 SCC 63	8
<i>Wongatha People v. Western Australia</i> [2007] FCA 31	1, 2, 3, 5, 6, 7
<b>List of Statutes and Other Government Instruments</b>	<b>Paragraphs</b>
<i>Native Title Act 1993 (Cth) [NTA 1993]</i>	2, 3, 4, 5
<b>Secondary Source</b>	<b>Paragraphs</b>
Marshall McKenna, Hunt & Humphrey, 'Wongatha- A Question of Framing?' (2007) 26 ARELJ, at 15	6