Court of Appeal File No. CA035620
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

Appellant
(Plaintiff)

AND:

Her Majesty the Queen in Right of the Province of British Columbia, the Regional Manager of the Cariboo Forest Region and The Attorney General of Canada

Respondents
(Defendants)

APPELLANT'S REPLY

to the ATTORNEY GENERAL OF CANADA

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INDEX

APPELLANT'S REPLY TO CANADA

A. Issue I: The Preliminary Issue

1. Canada's position that the Trial Judge correctly decided the "preliminary issue" (by refusing to make a declaration of Aboriginal title to the Proven Title Area) rests on two broad grounds. First, Canada describes the Proven Title Area as "implausible" on the facts and law. However, as the Plaintiff has argued in response to Canada's appeal, the Trial Judge's conclusions are fully supported by the law and the evidence before him – it is the Defendants' discredited "postage stamp" theory of Aboriginal title that is implausible in light of both.[1]

2. Second, Canada says the Trial Judge properly found that the Defendants would be prejudiced by findings of Aboriginal title to lesser, included portions of the Claim Area. Canada suggests that the Plaintiff "ignores" these findings of prejudice. In fact, the Plaintiff has explained that these findings of prejudice rest entirely on clear legal errors by the Trial Judge, as reviewed below. Canada's response further clarifies the Trial Judge's errors and the impossible and unprincipled burden that his ruling imposes on claimants to Aboriginal title.

1. Nature of the Plaintiff's claim – the "all or nothing" fallacy

1. The Plaintiff has responded to Canada's claims that the Plaintiff deliberately advanced an "all or nothing" claim such that he would "accept nothing less" even if the evidence supported it and such a declaration would preserve the land from logging.[2] Such a litigation strategy defies reason. Canada has not pointed to any statement from the Plaintiff to this effect.

2. Instead, Canada argues that the Plaintiff did not rebut the characterization of his claim as "all or nothing" by British Columbia when it opened its defence.[3] Remarkably, in the passage cited by Canada, counsel for British Columbia does not refer to the

[1] Plaintiff's Response Factum (Canada's Appeal), paras. 116-67.
[2] Plaintiff's Response Factum (Canada's Appeal), paras. 15-25; Plaintiff's Appeal Factum, paras. 99-113.
[3] Canada's Response Factum (Plaintiff's Appeal), para. 51.

Plaintiff's claim as "all or nothing"; rather, he takes issue with the Plaintiff's view that he had established Aboriginal title to the whole of the Claim Area on the evidence. In this same passage, Counsel for British Columbia concedes that, on the evidence, there are some "**likely candidates for Aboriginal title**", that there are "**some areas** where the plaintiff's ancestors' activities might be considered sufficiently regular and exclusive to comport with title at common law" and that the Court "will be asked to examine the evidence to determine whether the Xeni possessed aboriginal title in 1846 in **winter village sites** and whether **seasonal village usage** was sufficiently regular to comport with the common law requirements".[4]

3. British Columbia's statements, on opening its defence case, leave no doubt that the Parties understood Aboriginal title to constituent portions of the Claim Area was directly at issue in these proceedings. As the Plaintiff has argued in other submissions, this is reflected in the Defendants' pleadings and the comments of counsel for both Defendants and the Trial Judge throughout the course of the trial.[5]

4. Indeed, in its submissions, Canada concedes that the "scope and extent" of the Plaintiff's claims to Aboriginal title were to "**all of the various geographical areas** that comprise the Claim Area".[6] Given that all of the constituent areas were in issue, and the case was tried and argued on this basis, no prejudice can arise from findings that Aboriginal title is established to some geographical areas and not others.

2. Pleading the boundaries of Aboriginal title claims

5. Canada says that prejudice arises unless the Plaintiff, from the outset of litigation, has specifically pleaded the exact boundaries of land to which the Court ultimately finds Aboriginal title. As the Plaintiff has argued in other submissions, this requirement cannot be correct, as it imposes an impossible and unjust burden on Aboriginal claimants.[7]

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[4] Transcript, v. 111, p. 19302, lines 31-40; p. 19309, line 21 – p. 19310, line 16; p. 19311, lines 16-41; see also: p. 19305 lines 41-43.
[5] Plaintiff's Response Factum (Canada's Appeal), paras. 20-25; Plaintiff's Appeal Factum, paras. 107-12.
[6] Canada's Response Factum (Plaintiff's Appeal), para. 57 [bolding added].
[7] Plaintiff's Appeal Factum, paras. 128-36; Plaintiff's Response Factum (Canada's Appeal), paras. 28-32.

6. Canada offers no meaningful response. It says simply that "at the start of litigation, the Plaintiff has first hand knowledge of the evidence and a theory of the case".[8] However, it is self-evident that myriad factors beyond the Plaintiff's control will shape the extent to which Aboriginal title is ultimately proved at the end of trial: the actual testimony of witnesses; the extent to which it withstands cross-examination; the extent to which oral history is accepted or rejected by the court; contrary expert evidence led by the Defendants; and most importantly, the Trial Judge's assessment of the evidence, resolution of conflicting testimony, findings of credibility, drawing of inferences, findings of fact and application of the law to the facts. An approach to pleading cannot be tenable if it requires the Plaintiff to anticipate, in his pleadings, the exact outcome of 339 days of trial or forfeit his relief.

7. This is illustrated by Canada's submissions. Canada faults the Plaintiff for not pleading the tracts of land described in his Reply submissions, but then also faults the Plaintiff for not also pleading the Proven Title Area, and at the same time argues that *both* are wrong, and that Aboriginal title can only be found to narrowly defined pinpoint sites, which would also have to be specifically pleaded.[9] Canada complains that without such notice the Defendants are faced with a "moving target",[10] but it is clear that it is the Plaintiff who faces an impossible "moving target" at trial and on appeal if he is compelled to accurately predict the outcome of factual and legal disputes that, to this day, remain unresolved and highly contested between the Parties.

8. It cannot be that the Plaintiff is required to plead the virtually infinite variations on his claim to Aboriginal title to avoid prejudice. To prove Aboriginal title, whether to all or portions of the Claim Area, the Plaintiff necessarily had to lead extensive evidence showing Tsilhqot'in use and occupation of "**all of the various geographical areas** that comprise the Claim Area", as both Canada and the Trial Judge have acknowledged.[11] The Defendants necessarily had to test the Plaintiff's evidence setting out the nature,

[8] Canada's Response Factum (Plaintiff's Appeal), para. 47.
[9] Canada's Response Factum (Plaintiff's Appeal), paras. 23, 37, 67, 75.
[10] Canada's Response Factum (Plaintiff's Appeal), para. 43.
[11] Canada's Response Factum (Plaintiff's Appeal), para. 57 [bolding added].

intensity, location and extent of Tsilhqot'in use and occupation throughout the Claim Area. The Defendants specifically put the Plaintiff to "strict proof of the location and extent"[12] of Aboriginal title in the Claim Area and defended the claim on this basis. Ultimately, the Trial Judge found Aboriginal title to included portions of the Claim Area based on his assessment of the resulting evidentiary record.

9. This is the only practical or workable approach. It is not a "restatement" or "readjustment" of the Plaintiff's case, as Canada contends.[13] It is not an "alternative theory" of Aboriginal title.[14] Rather, the sole issue in dispute was the existence and extent of Aboriginal title. If at the end of trial the Plaintiff establishes Aboriginal title to a considerable portion, but not all, of the Claim Area, this can hardly surprise or prejudice Defendants who have spent several years of trial litigating this very issue.

3. No requirement of universal recognition of boundaries

10. Like the Trial Judge, Canada's concerns about prejudice rest on the misapprehension that to prove "regular use of definite tracts of land", it is necessary that the Aboriginal group universally recognized and agreed on the boundaries of such "definite tracts". On this mistaken view, the Defendants require notice of these boundaries in the pleadings to effectively cross-examine the Plaintiff's witnesses and test their agreement on these boundaries.[15]

11. This is simply not the case. As the Plaintiff has argued, Aboriginal title is established by proof of regular use of definite tracts of land – there is no additional requirement that the Aboriginal group also uniformly recognized the boundaries of such tracts.[16] There is no reason, in 1846, that Tsilhqot'in ancestors would recognize and agree on internal boundaries to the Claim Area that happen to align perfectly with

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[12] Canada's Statement of Defence, filed March 12, 2001; British Columbia's Statement of Defence, Joint Appeal Record, v. I, p. 021.
[13] Canada's Response Factum (Plaintiff's Appeal), paras. 108-9.
[14] Canada's Response Factum (Plaintiff's Appeal), para. 59.
[15] Trial Decision, Joint Appeal Record, v. II(a), p. 188-189, para. 111; Canada's Response Factum (Plaintiff's Appeal), para. 52; See also: *Tsilhqot'in Nation v. British Columbia*, 2008 BCSC 600, [2008] B.C.J. No. 871, para. 9.
[16] See Plaintiff's Appeal Factum, paras. 147-51.

Canadian legal tests, based on factors that hold no cultural significance for them. Such an expectation is unrealistic and completely denies the Aboriginal perspective.

12. Canada argues that a tract of land is not "definite" unless there is a "commonly held understanding of where it begins and ends".[17] The Plaintiff says that Aboriginal title is established by the **actual footprint** of use and occupation established by the evidence, not by common understanding of boundaries. For example, ancestral groups or individuals may have traditionally hunted in overlapping areas, such that areas of overlap demonstrate sufficient intensity and regularity to support Aboriginal title, but areas of "thinner" use and occupation only support Aboriginal rights. In such circumstances, none of the ancestral groups or individuals would have reason to recognize or agree on the boundaries of the area found to support Aboriginal title.

13. Canada says that if the Plaintiff had brought an "alternative claim" to portions of the Claim Area, then the Plaintiff would have led evidence to explain the boundaries of such included portions.[18] This is not the case. The Plaintiff always sought to "demonstrate regular use of all of the various geographical areas that comprise the Claim Area pursuant to an organized pattern of occupation".[19] The Plaintiff led extensive evidence to show Tsilhqot'in patterns of use and occupation *circa* 1846. The Defendants rigorously tested this evidence. The Trial Judge concluded that the evidence established a "clear pattern of Tsilhqot'in seasonal resource gathering in various locations in the Claim Area".[20]

14. The Proven Title Lands consist of "definite tracts" in the sense that the Tsilhqot'in returned to these same lands, year after year, season after season, generation after generation, pursuant to a pattern of traditional land use that was essential to their cultural survival and continuity. Aboriginal title is based on this actual footprint of use

[17] Canada's Response Factum (Plaintiff's Appeal), para. 52.
[18] Canada's Response Factum (Plaintiff's Appeal), para. 63.
[19] Trial Decision, Joint Appeal Record, v. II(a), p. 186, para. 104.
[20] Trial Decision, Joint Appeal Record, v. II(b), p. 463, para. 948.

and occupation, not by agreement of Tsilhqot'in witnesses on boundaries that would have been wholly artificial to the Tsilhqot'in in 1846 and remain so today.[21]

4. The Trial Judge found the Proven Title Area as binding fact in the event that he was wrong on the Preliminary Issue

15. Canada argues that the Trial Judge's conclusions on the Proven Title Area were solely to "encourage negotiations" and cannot stand as judicial findings of fact.[22] This position is unsustainable in the face of the Trial Judge's explicit direction that "[i]f I am wrong on this preliminary issue, then my conclusion on Tsilhqot'in Aboriginal title, insofar as it describes land within Tachelach'ed and the Trapline Territory, is **binding on the parties as a finding of fact** in these proceedings".[23]

16. The Trial Judge's inclusion of lands outside of the Claim Area in the Proven Title Area does not detract from the binding nature of his findings (if wrong on the preliminary question), because he expressly confined the binding effect to "land within Tachelach'ed and the Trapline Territory".[24] Finally, the northern boundary of the Claim Area is not "arbitrary", as Canada asserts. As argued in Reply to British Columbia, this boundary is supported by the Trial Judge's assessment of the evidentiary record and is binding on the Parties in light of the Trial Judge's error on the preliminary issue.[25]

5. Canada's continued reliance on *Biss*

17. Canada continues to rely on *Biss* for the proposition, relied upon by the Trial Judge, that "the plaintiff must make up his mind and set out in his pleadings exactly what declaration he seeks".[26] As the Plaintiff has argued, this *obiter* statement from a single judge in *Biss* is not accurate or reliable as a general statement of law. It is simply far too categorical a statement.

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[21] Trial Decision, Joint Appeal Record, v. II(a) and v. II(b), p. 233-406, paras. 645-49.
[22] Canada's Response Factum (Plaintiff's Appeal), paras. 78-83.
[23] Trial Decision, Joint Appeal Record, v. II(b), p. 468-469, para. 961.
[24] Trial Decision, Joint Appeal Record, v. II(b), p. 468-469, para. 961.
[25] Plaintiff's Reply to British Columbia (Plaintiff's Appeal), paras. 32-37.
[26] Trial Decision, Joint Appeal Record, v. II(a), p. 194, para. 128; Canada's Response Factum (Plaintiff's Appeal), paras.90-105.

18. Canada argues that the English commentators Zamir & Wolf have affirmed that *Biss* is "good law". However, these authors expressly note that the statement from *Biss* was *obiter* and "should not now be regarded as of general application". They further describe the results of such a principle as "unfortunate" and contrary to the objective of resolving issues between the parties fairly and expeditiously.[27]

19. Like the Trial Judge, Canada says that *Halsbury's Laws of England* cites *Biss* as good law on this point, but both rely on an outdated edition of *Halsbury's*.[28] The current edition of *Halsbury's* does not cite *Biss* in relation to pleadings, declarations of title or any other matter except for the extent of use necessary to establish a "caravan site".[29]

20. The English authorities cited by Canada consider *Biss* for this same narrow issue: *i.e.* how to define the lands that qualify as a "caravan site".[30] None of the English cases cited by Canada affirm the *obiter* statement from *Biss* relied upon by the Trial Judge in the present case.

21. The only case that Canada points to from England or Canada citing *Biss* for this proposition is the trial decision in *Lax Kw'alaams*, and in that case the trial judge simply quoted with approval from the Trial Judge's reliance on *Biss* in the present case, without any further review or discussion of *Biss*.[31]

22. Contrary to Canada's submission, the Plaintiff never characterized the decision of the English Court of Appeal in *Harrison-Broadley* as "subsequently narrowing the ratio in *Biss*".[32] Rather, *Harrison-Broadley* demonstrates that Harman L.J.'s *obiter* statement of the law in *Biss* is too categorical and in reality the law is more nuanced and flexible. In *Harrison-Broadley*, heard the same month as *Biss*, Harman L.J. himself

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[27] Canada's Response Factum (Plaintiff's Appeal), paras.95-96; Rt. Hon. The Lord Woolf & Jeremy Woolf, *Zamir & Woolf*, *The Declaratory Judgment,* 3rd ed. (London: Sweet & Maxwell, 2002) p. 284.
[28] Canada's Response Factum (Plaintiff's Appeal), para. 103; Trial Decision, Joint Appeal Record, v. II(a), p. 193, para. 124.
[29] *Halsbury's Laws of England* (4th & 5th ed.) (LexisNexis: 2010), Consolidated Table of Cases, p. 218 ("Biss v Smallburgh RDC" and v. 46(3), Town and County Planning, p. 44, para. 1032.
[30] Canada's Response Factum (Plaintiff's Appeal), para. 101.
[31] *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2008] 3 C.N.L.R. 158, 2008 BCSC 447, , para. 109.
[32] Canada's Response Factum (Plaintiff's Appeal), para. 92; Plaintiff's Appeal Factum, para. 121.

noted that "it is, if necessary, within the power of the court, although a declaration be not asked for, to grant one".[33]

23. Canada dismisses the Plaintiff's reliance on a "Hong Kong case" (*Lau Wing Hong*) that rejected *Biss*.[34] Aside from the fact that this Court and the Supreme Court of Canada have considered authorities from Hong Kong courts,[35] Canada misses the point. The Plaintiff does not present *Lau Wing Hong* as a binding authority, but rather for its common sense proposition that the *obiter* statement in *Biss* is impractical and unworkable as a strict rule of law because in certain cases "[i]t would be unnecessarily demanding to require the party to plead in the prayer every precise possible variation of the underlying factual dispute that could be ultimately found to be proved".[36]

24. Notably, Zamir & Wolf, the authority relied on by Canada, make this same point, stating that "[i]n practice it frequently happens that it is only after the court has determined the facts that it will be possible to decide in what terms a declaration should be granted".[37] Prominent texts on declaratory relief in Canada and Australia affirm similar flexibility in granting declaratory relief, in direct contradiction to the *obiter* statement erroneously relied upon by Canada and the Trial Judge.[38]

B. Issue II: Trial Judge's error in assessing occupation of the non-Proven Title Area without considering the fact of Tsilhqot'in exclusive physical control

25. Canada argues that Aboriginal title requires proof of both (a) regularity of use; and (b) exclusivity of use. The Plaintiff does not disagree with this position. However, the authorities make it clear that assessing the degree of occupation required to establish title is a contextual determination, entirely dependent on the facts of each case. It was an error of law for the Trial Judge to assess the regularity of Tsilhqot'in use

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[33] *Harrison-Broadley v. Smith,* [1964] 1 All E.R. 867 (C.A.) at 873.
[34] Canada's Response Factum (Plaintiff's Appeal), paras. 90, 104.
[35] See, *e.g.*, *C.P. Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, [1987] S.C.J. No. 29, paras. 14, 37, 45, 50, 55; *Hagerman v. United States of America* (1990), 50 B.C.L.R. (2d) 169 (C.A.), [1990] B.C.J. No. 2058, p. 8 [QL].
[36] *Lau Wing Hong & Others v. Wong Wor Hung & Another*, [2006] 4 HKLRD 671, at para. 145.
[37] Rt. Hon. The Lord Woolf & Jeremy Woolf, *Zamir & Woolf*, *The Declaratory Judgment,* 3rd ed. (London: Sweet & Maxwell, 2002), p. 284
[38] Lazar Sarna, *The Law of Declaratory Judgments,* 3rd ed. (Toronto: Carswell, 2007), p. 101-102; PW Young, *Declaratory Orders,* 2nd ed. (Sydney: Butterworths, 1984), p. 54.

of the non-Proven Title Area while categorically excluding a directly relevant factor; namely, the high degree of control exercised by the Tsilhqot'in over these lands.

26. Courts have long recognized that the degree of occupation required to establish title varies with the circumstances, and in particular whether the claimant has acted in relation to the lands as one would expect of an owner.[39] In some of these cases, title was established despite minimal direct acts of occupation (in contrast to the present case). These precedents cannot be explained on Canada's theory of title.

C. Issue III: Consequences of Aboriginal title

27. Because of his errors on the preliminary issue, the Trial Judge's findings of Aboriginal title to the Proven Title Area bind the Parties. The Plaintiff has further argued that Aboriginal title is established to the entire Claim Area on the findings of the Trial Judge. In either case, the Trial Judge's conclusions on the consequences of Aboriginal title are no longer *obiter* and constitute binding determinations of these issues.

28. The Plaintiff supports the Trial Judge's conclusions as to the consequences of Aboriginal title in this case, as explained in Reply to British Columbia.[40] For the reasons explained therein, Canada's insistence that the Supreme Court of Canada has conclusively decided that the Provinces can infringe Aboriginal title from the direct application of their own laws is misleading and incorrect. The Court has not directly considered or heard argument on this issue, or reviewed the considerable authority leading to the opposite conclusion.

29. Contrary to Canada's submission, the Court's decision in ***R. v. Morris*** seriously undermines its position that the Provinces can directly infringe Aboriginal title. In *Morris*, the Court held that provincial laws cannot infringe treaty rights under s. 35 because

[39] See Plaintiff's Appeal Factum, paras. 184-87 and authorities cited therein; see also: *Red House Farms Ltd.* v. *Catchpole* (1976) 244 E.G. 295 (C.A.) (*per* Cairns L.J.).
[40] Plaintiff's Reply to British Columbia (Plaintiff's Appeal), paras. 38-54.

those rights lie at the core of federal jurisdiction under s. 91(24).[41] There is no question that Aboriginal title also lies at the core of s. 91(24).[42] In response, Canada says treaty rights are different than Aboriginal title, which is no doubt true. What Canada has not done is explain how these rights differ in a way that is of any relevance to the constitutional analysis: *i.e.* how can it be that the Provinces are constitutionally barred from infringing treaty rights, regardless of the justification offered, but completely free to infringe Aboriginal title? Aboriginal title is no less integral or important to Aboriginal identity and culture.[43] In both cases, infringing provincial laws impermissibly intrude into the core of federal jurisdiction and are constitutionally inapplicable as a result.

All of which is respectfully submitted this _____ day of October 2010.

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David Rosenberg, Q.C.

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Jack Woodward

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Jay Nelson

[41] *R.* v. *Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, para. 14, 45, 49-50, 53, 60 (*per* Deschamps and Abella JJ.); 91, 100 (*per* McLachlin C.J. and Fish J.); see also: *R.* v. *Morris,* 2004 BCCA 121; 25 B.C.L.R. (4th) 45, paras. 17-29 (*per* Lambert J.A.), 115 (*per* Thackray J.A.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 182.
[42] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 178, 181; see also: *R.* v. *Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, para. 91 (*per* McLachlin C.J. and Fish J.)
[43] See, *e.g.*, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 137, 150; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85, para. 46; *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 19

LIST OF AUTHORITIES

Cases

Other Authorities