

Aboriginal Law Bulletin

January 2010

Fasken Martineau DuMoulin LLP

B.C. Court of Appeal upholds trial decision dismissing *Lax Kw'alaams'* claim for right to commercial fishing near Prince Rupert

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January 2010

On December 29, 2009, the B.C. Court of Appeal upheld the earlier B.C. Supreme Court decision that dismissed the Lax Kw'alaams Indian Band's claim for the right to a commercial fishery on the north coast of B.C., just north of Prince Rupert.

Background

At trial before Madam Justice Satanove (*Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2008 BCSC 447), the Lax Kw'alaams were successful in proving they are an aboriginal group descendent from the Coast Tsimshian who had lived and fished in the Prince Rupert area at the time of contact with Europeans. They also demonstrated that the harvest and consumption of fish resources remained an integral part of their distinctive culture.

However, the Law Kw'alaams had failed to demonstrate to the Court that trade in any fish or fish products other than eulachon grease could properly be described as integral to their distinctive culture (para. 496). The Court held that it would be "stretching the concept of an evolved

aboriginal right too far" to say that the Coast Tsimshian's practice of trading in eulachon grease was equivalent to a modern right to fish commercially in all species in the claimed territories (para. 502).

In the result, the Court dismissed the Lax Kw'alaams' claim for a declaration that they held an aboriginal right to harvest and sell on a commercial scale all species of fish in their claimed territories.

The Appeal

The Court reviewed the decision of the Trial Judge and the arguments on the appeal and grouped the arguments into six main issues.

1) The relationship between an aboriginal right to harvest and any particular species harvested. The appellants relied on *Powley* to argue that aboriginal rights are not, as a matter of principle, species-specific. Madam Justice Newbury, speaking for the Court of Appeal, adopted a "contextual" approach for the finding of aboriginal rights. The Court found that the facts of each case will determine the nature and breadth of the practice, custom or tradition in question (para. 35).

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In some cases, the practice by its very nature will refer to only one species, while in other cases the practice will be a wider one and may include a particular purpose or specific location. As an example, the Court of Appeal pointed to *Gladstone*, where the right involved only herring spawn on kelp.

Quoting from the argument of an intervenor the Court noted (para. 37):

By way of illustration, he notes that a distinctive feature of many North American families is that at Christmas, they cook a turkey. It would not be sufficiently descriptive of the cultural practice simply to say that they ‘eat’ or ‘prepare food’. Similarly, if there were an Aboriginal custom of harvesting maple sap, it would not make sense to delineate that practice as ‘harvesting sap from trees.’

In this instance, the Court of Appeal found that trading in eulachon grease happened to be tied to one species of fish and traded in a particular manner. It found no error in the trial court’s overall conclusion.

2) The Court’s examination of whether the traditional practice of fishing of eulachon could be separated from a modern right to fish generally. The appellants contended that there was no principled basis to distinguish eulachon fishing from other kinds of fishing (para. 41). The Court found that the appellants’ submission overlooked the distinction between Coast Tsimshian activities with respect to eulachon (as a luxury item), and the subsistence harvesting of salmon, halibut and other fish. Overall, the Court was not persuaded that the commercial fishery sought by the Lax Kw’alaams could be said to be the “logical evolution” of the trading

practices with respect to the eulachon grease (para. 45).

3) The weight of evidence around the Coast Tsimshian’s historical rights to fish for eulachon was not found by the Court of Appeal to have affected the outcome of the case.

4) A technical issue of pleadings. The appellants argued that the Trial Judge misapprehended the pleadings by failing to consider all lesser rights that may be subsumed in trade on a commercial scale, including an aboriginal right to harvest and sell fish for sustenance purposes. The Court held that in a civil action, the plaintiffs must state what rights they are claiming in their pleadings. The Court stated (para. 65):

It should not be necessary for a court to try to piece together various obscure references in a pleading in order to discern what is being sought.

5) The appellant’s argument (made in the alternative) that Canada breached its trust-like or fiduciary obligation by restricting or denying their ability to harvest fisheries resources. In respect of this argument, the Court said as follows (para. 77):

Once a claim to an existing Aboriginal right protected by s. 35(1) of the *Constitution Act* has failed, it is not open to the Aboriginal group to assert a fiduciary duty on the part of the Crown to found the same right, nor could it be inconsistent with the honour of the Crown not to do so. Whether exclusive or in common with others, the Lax Kw’alaams’ assertion of a constitutionally-protected right to fish commercially failed. There is thus no cognizable right on the part of the Lax Kw’alaams nor

anything approaching a “private law duty” owed to them by the Crown which could give rise in this case to rights that are different from the rights of other Canadians...

6) The intervenor’s argument that the trial level court applied the wrong (i.e., *Van der Peet*) test for aboriginal rights. However, the Court held that there has been no “sea of change” in the approach taken to consider aboriginal rights (para. 71).

Analysis

In their decision, the Court of Appeal refined some issues in relation to the law of aboriginal rights which had been in need of some clarity.

The degree to which a right is related to a species can have significant effects on the modern right which is recognized by the Court. The Court of Appeal accepted that in this case the modern right must be species-specific due to the context. However, in the recent case *Ahousaht Indian Band v. Canada (Attorney General)* 2004 BCSC 1494, the Trial Judge accepted a broad characterization of the modern right, “to fish for any species of fish within the environs of their territories and to sell that fish” (para. 489). This decision is under appeal and it will be interesting to see what the Court of Appeal does with the characterization when it comes before them.

The Court of Appeal held that once it is decided that there is no relevant aboriginal right, there “is thus no cognizable right on the part of the Lax Kw’alaams nor anything approaching a “private law duty” owed to them by the Crown which could give rise in this case to rights that are different from the rights of other Canadians.”(para. 77) This arguably clarifies that beyond Aboriginal rights, there are no further aboriginal interests recognized at law

and therefore no further aboriginal interests that must be taken into account in the consultation process.

Finally, the Court of Appeal has reminded us again¹ that pleadings are not just a technicality and that an aboriginal group must very carefully plead exactly the rights it means to claim at the outset of trial, as the Court will hold them to their pleadings.

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¹ *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700

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