IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Nuchatlaht v. British Columbia,* 2024 BCSC 628

Date: 20240417
Docket: S170606
Registry: Vancouver

Between:

The Nuchatlaht

Plaintiff

And

His Majesty the King in Right of the Province of British Columbia and The Attorney General of Canada

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 3 on May 7, 2024.

Before: The Honourable Mr. Justice Myers

Reasons for Judgment – Limited Claim Areas

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Place and Date of Trial:	Vancouver, B.C. March 11-13, 2024
Place and Date of Judgment:	Vancouver, B.C. April 17, 2024

[1] These reasons follow on my earlier reasons in which I dismissed the Nuchatlaht's claim for Aboriginal title to their total claim area, but held out the possibility that they might be able establish title to more limited areas: 2023 BCSC 804.

Background

[2] The Nuchatlaht claimed Aboriginal title to approximately 201 square kilometers of Nootka Island. After a 54-day trial, I concluded that the Nuchatlaht had not proved its claim to the overall claim area. However, in the concluding paragraphs of the judgment, I said that the Nuchatlaht may be able to demonstrate title - based on the trial evidence - to smaller areas. I allowed them the opportunity to apply for leave to make that argument, and for a determination of the procedure to be followed if leave was granted.

[3] At a hearing in August 2023, British Columbia and Canada consented to the Nuchatlaht being able to argue for title to limited areas, based on the evidence presented at the trial. I made a corresponding order. The Nuchatlaht adjourned an alternative application to reopen their case in its entirety and call new evidence, which is an option I did not hold out to them in my judgment. As acknowledged by the Nuchatlaht, a new trial, in which they would include oral history evidence (not adduced in this trial), would easily be a years' long hearing and would take up to two years to prepare for.

[4] In March 2024, I heard the arguments relating to limited claim areas. These are my reasons on that issue. Although I provide further background here, this case is too complicated for this to be a stand-alone judgment. These reasons must be read in conjunction with my earlier decision, including the terms defined in it.

[5] The Nuchatlaht emphasized throughout the trial that their claim was made on a territorial basis and that they were not obligated to show specific tracts of intensive use, for example, villages, farming or specific fishing sites. Recognising that as correct, the issue was whether the Nuchatlaht demonstrated sufficient occupation

over the total claim area. In *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in*] the court provided guidance on the issue:

> [38] To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.

[6] After reviewing the evidence, I found that there were specific areas where sufficient occupation in 1846 had been established, which I set out in paragraph 478. However, most of these had been turned into reserves, which the Nuchatlaht had, along with fee simple lands, excluded from their claim.

[7] With respect to the total claim area, I said:

> [481] Can I infer use and sufficient occupation of the whole Claim Area from this evidence? I do not think so. I am cognisant that in *Tsilhqot'in*, the Supreme Court stated in para 50. (quoted in full above):
>
> > … Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.
>
> [482] However, the problem here is that evidence of this type of use and control and concept of ownership is absent for most of the Claim Area:
>
> a) With respect to the interior, there is almost no evidence of use by the Nuchatlaht. Further, Dr. Drucker said that the Nu-cha-nulth treated the interior and coastal areas differently in terms of ownership and had far less knowledge of the interior. As I concluded earlier, I do not accept Mr. Dewhirst's view that Dr. Drucker's observation regarding "remote inland areas" does not apply to Nootka Island.

b) Regarding the coastal area, there are too many gaps for me to conclude that the whole coastal area was sufficiently occupied or used in a manner to constitute occupation. Other than the villages and camps, I have no evidence of specific coastal use. Nor do I have any evidence of Nuchatlaht (or Nuu-chah-nulth) fishing practices, other than the coastal round which involved moving from one established settlement or camp to another: see Drucker quoted above at para. 113. Those settlements or camps are included in the Nuchatlaht-occupied sites that I have identified. The dentalia fishing grounds noted on Drucker's Map 3 as Area A, sites 12, 14 and 16, are outside the Claim Area.

[483] There is no evidence of the territory of any local chief's *hahoulthle* beyond the village sites which may be inferred as being in the relevant local Chief's *hahoulthle*. While I have concluded that the Nuchatlaht is the rights holder to the territories of the former Nuchatlaht local groups, that cannot expand the title to include lands which were not sufficiently occupied to meet the current test of Aboriginal title.

[484] I am also cognizant that in *Tsilhqot'in* the Supreme Court said at para. 38 that "…the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes…" This evidence is also lacking with respect to the whole Claim Area. Moreover, as I said above, in the latter part of the paragraph the court said that a strong presence over the land is required.

[485] Whether this be called a territorial claim or not, I do not think that Dr. Drucker's boundary can fill the evidentiary gap.

[8] I concluded:

[495] I conclude the plaintiff has not proved its claim for Aboriginal title to the overall Claim Area.

[496] That said, when I outlined the areas of occupation, I frequently used the language "near or adjacent to" reserves or accepted settlements. There may be areas of sufficient occupation or use that are near the reserves or fee simple land over which the plaintiff may be able to establish its claim to Aboriginal title. For example, if there are CMT sites that are adjacent to a reserve, the plaintiff may have a claim to them and the area between them and the reserve.

[497] However, the claim was not presented in that manner. I do not think it is open to me to make more piecemeal declarations without hearing from the parties. And even if that were open to me, I would not have the capability to do so without more detailed maps showing precise locations along with further submissions.

[498] It may be that this case demonstrates the peculiar difficulties of a coastal Aboriginal group meeting the current test for Aboriginal title, given the marine orientation of the culture. For example, there will probably not be trails between one coastal location and another, given that the means of transport was primarily by canoe. This may be indicative of the need for a

> reconsideration of the test for Aboriginal title as it relates to coastal First Nations. That would be for a higher court to determine.
>
> [499] If the plaintiff wishes to seek a declaration for smaller areas, it should set a further hearing to canvass the procedure to be followed. I stress that I am not pre-judging any of the issues or whether a pleading amendment would be necessary. I am merely leaving it open to the plaintiff to come back before me to canvass these issues should it wish to do so. I ask that the plaintiff advise me of its position on this within 14 days, or alternatively advise how much additional time it requires.
>
> [500] If the plaintiff does not wish to advance this argument, the order will be that the action is dismissed.
>
> [501] If costs need to be spoken to, a date should be arranged as soon as possible.

[9] I note that the terms “interior” and “coastal” were not used as terms of art by the experts or by me in the judgment. Nor was there any precise dividing line between the areas.

[10] One of the main rationales for allowing the Nuchatlaht to return to argue for limited claim areas is that the boundaries of the relevant reserves, while encompassing uncontroverted areas of sufficient occupation in 1846, may not have encompassed the entire adjacent areas of sufficient occupation. After all, the reserve boundaries were not set according to the current concept of Aboriginal title. To be clear, this is not to say that the Nuchatlaht had to show settlements and the like to establish sufficient occupation over the claim area. Rather, this is in the context of them having failed to show sufficient occupation in the wider sense (as contemplated by *Tsilhqot’in*) over the total claim area.

[11] The sites referred to in para. 478 of my judgment were:

a) The sites identified by Dr. Kennedy set out in para. 449:

- nucaal (nutcal / nuja·l / neŭchāt’l) / lupatcsis (klŏpātchăssīs)
- u’asis / Port Langford
- apaqtu (apa·qtū)
- kimahtis / Rosa Harbour
- o’astea (?u?a·sCa / owossitsa /fishery at Snug Cove / Owossitsa Creek / Owossitsa Lake)
- Brodick Creek / Snug Cove
- ki’nmatis at Rosa Harbour (“other side of the Opemit IR 4 Peninsula”)

- ki'matis (similar / same as Ei'was ath location at ki'nmatis
- šu·ma·tḥ / cō'ōma
- long beach site in Mary Basin near yutckhtok

b) The CMT areas, which plaintiff grouped into sites it referred to as sites 1-4. These are all near the accepted Nuchatlaht settlement and reserve sites, except for the site in group 2, which is located around Belmont Point on the north shore of Nuchatlitz Inlet not far from the entrance to Port Langford.

c) The three McKenna-McBride Commission requests (1914) which, as I said, are close to or adjacent to the Owossitsa, Shoomart and Sophe reserves.

[12] These approximate locations were shown on the map following para. 454 of my reasons. Because of their proximity, I did not differentiate between the CMT sites, McKenna McBride sites and the village sites, except for the CMT site near Belmont Point.

Parties' Positions

[13] The Province conceded that "there is an evidentiary basis for the court to draw inferences of Aboriginal Title near or adjacent to reserves and accepted settlements." It submitted that:

> Aboriginal title in this case may only be declared over a tract of land that is:
>
> a) within the Claim Area (this excludes fee simple land, reserves, submerged land and foreshore land, and the sites described by Dr. Kennedy as kimahtis / ki'nmatis / ki'matis / Rosa Harbour);
>
> b) near or adjacent to a Nuchatlaht reserve or accepted settlement -- to the extent the accepted anthropological and archaeological evidence for the period between 1780 and 1846 and the geography and topography support reasonable inferences of sufficient use and occupation.
>
> Applying the preceding criteria, the Province submits that inferences of Aboriginal title may be possible in each of the categories of general areas listed in paragraph 478 of the Judgment. …

[14] I agree with this submission.

[15] The areas over which the Province acknowledged the appropriate findings could be made were proximate to demonstrated areas of sufficient occupation, CMT sites and the coastline. The Province drew the boundaries of these areas at the 100 meter elevation contour, to recognise the coastal nature of the Nuchatlaht culture and the other evidence I referred to distinguishing between the interior and coastal areas.

[16] The Nuchatlaht agree, of course, that they are entitled to at least these areas but submit for a larger area on four major bases.

a) The territorial boundaries should be defined by watersheds based on the Nuchatlaht's perspective of their territory.

b) The territorial boundaries should be defined by watersheds based on *Canada v. The Colony of Newfoundland* [1927] UKPC 25 ("*Labrador Boundaries*). This case was not referred to until this latest hearing.

c) Repeating their argument made at trial, the Nuchatlaht are entitled to the complete claim area because the boundary is shown in maps by Drucker and others. In oral argument, the Nuchatlaht referred to DksR53 and emphasized that it was one of the largest CMT sites in British Columbia.

d) The doctrine of *terrus nullius* (that no one owned the land prior to European assertion of sovereignty) does not apply in Canada. Therefore, since there are no competing claims, I should award the entire claim area to the Nuchatlaht.

Analysis

[17] The scope I left the Nuchatlaht for further argument was a narrow one. The Nuchatlaht have gone beyond that including casting new arguments for the entire claim area. However, because of the significance of this case, I will nevertheless address those arguments.

Watershed boundaries

[18] The Nuchatlaht's argument in support of boundaries defined by watersheds is based on what I noted in paragraph 283 of my reasons:

> [283] The territories of local Chiefs were marked by mutually recognized boundaries in the form of natural landmarks, such as points of land, waterfalls, streams, islands, islets, the kelp line, reefs, rocks, bays, beaches, and other distinctive landforms. Man-made markers were not used. For inlets claimed by multiple groups, the mid-channel line, together with other markers, often delineated their respective territories. Offshore boundaries extending for many kilometers out to sea were projected from visible territorial boundary markers on land as well as the alignment of distinctive mountain peaks. Inland boundaries were more vaguely defined, but tended to follow watersheds divided by heights of land. (emphasis added)

[19] The Nuchatlaht argue:

> On this basis, the plaintiff says that where the court has accepted site-specific evidence of exclusive Nuchatlaht occupation in 1846, the Court can and should conclude that from the Nuchatlaht perspective and on a balance of probabilities, the watershed surrounding that site would have been Nuchatlaht-owned, either by the same local chief who owned that site or by some combination of that chief and other Nuchatlaht local chiefs. The plaintiff says that this is the most culturally appropriate way to define the "territories" that were occupied in 1846, given what is known about Nuu-chah-nulth patterns of land ownership.

In conjunction with this, they provided maps showing proposed boundaries.

[20] Accepting that the Nuchatlaht perspective is important, based on the evidence I cannot accept this argument.

[21] Whether there was sufficient occupation (as conceived in *Tsilhqot'in)* of the complete claim territory was, of course, a key issue. In my judgment I said:

> [424] To ground a claim for Aboriginal title, there must be "sufficient occupation." The latter part of the above quoted paragraph from *Tsilhqot'in* makes it clear the analysis is a nuanced one. Certainly, only a temporary physical presence is not sufficient. The use or occupation must be more substantial than a claim for Aboriginal rights, as the Supreme Court said in *Marshall;Bernard*:
>
> > [77] The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the

> absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land: *Adams, Côté*.

[22] The watershed argument was not, in and of itself, a major focus at the trial. However, watersheds were referred to in relation to the argument regarding the interior of the claim area. As I said in my trial judgment, the evidence regarding use of the interior claim area was based almost entirely on CMT's and the statement in Dr. Drucker's monograph (and repeated by Mr. Dewhirst) that inland boundaries were more vaguely defined but tended to follow watersheds divided by heights of land. [1]

[23] Beyond that, evidence of use of the interior land by the Nuchatlaht was lacking. As I pointed out in paragraph 323, the only interior CMT site relied on by the Nuchatlaht was DkSr-53, in which only 5 of the 65 samples pre-dated 1846. Starting at para. 343, I dealt with the Nuchatlaht concept of ownership of the interior, which was that remote inland areas were not regarded as property of the chiefs of the local groups. I set out Drucker's view that the "Nootkans" were unfamiliar with the interior, as compared to having a "pilot's knowledge" of the coastal area and concluded that this was applicable to Nootka Island, contrary to the argument of the Nuchatlaht.

[24] As noted by the Province, there was no expert evidence regarding the definition of specific watersheds, and there are watersheds within watersheds.

[25] A fundamental conclusion I reached was that the Nuchatlaht had not demonstrated sufficient occupation over the total claim area, and particularly the interior, to ground a claim of Aboriginal title. Framing the claim as one over of a series of watersheds (which encompass vast areas of the interior) does not change this analysis. Amongst other things, it does not delineate between use that can

[1] Dr. Drucker's monograph was based on field work done in 1935-1936. Due to his service in WW2, it was published in 1951.

support a claim for aboriginal title and use that can support a claim for aboriginal rights.

The *Labrador Boundaries* decision

[26] As a fresh point, the Nuchatlaht rely on the *Labrador Boundaries* decision in support of defining their territory by watersheds. They say this is an example of "hinterland theory" in international law.

[27] I do not find this decision to be applicable here. The Privy Council was asked by a reference to determine the boundary between Canada and Newfoundland based on "the terms of Statutes, Orders in Council and Proclamations." The Privy Council referred to the doctrine of international law by which the occupation of a seacoast carries with it a right to the "whole territory drained by the rivers which empty their water into its line" (p. 12).

[28] Ascertaining Aboriginal title here is a different exercise. My role is to apply the test set out in *Tsilhqot'in* and other cases. Having found that there was no evidence of sufficient occupation of the interior area, I do not think it is open to me to award that area based on a principle of international law. That would be a matter for a higher court.

Boundary shown by maps

[29] The Nuchatlaht's argument on this point is a repeat of what they argued after the trial, which I primarily dealt with starting at para. 440. (There are other references to it in the judgment.) There is no reason for me to reconsider the matter now. I reiterate my view that the post-Drucker maps referred to by the Nuchatlaht are all based on Drucker and are not independent research, and that the historic maps are not accurate enough or sufficiently probative to fill the evidentiary gap related to sufficient occupation. As I said at para. 444, "I do not think Dr. Drucker's notation of the boundary can by itself establish sufficient use or occupation of the total Claim Area…" The same applies to the historical maps.

[30] The emphasis on DkSr-53 (above para. 23) was, again, a repeat of what was argued at trial. There is no reason for me to reconsider this now.

Terra Nullius

[31] This is another argument made for the first time at this hearing. In *Tsilhqot'in* at para. 69, the court held that the doctrine of *terra nullius* never applied to Canada. Therefore, the Nuchatlaht say, there can be no land on Nootka Island that is not subject to Aboriginal title. Given there are not overlapping claims, all I need do is to define the boundary between the Nuchatlaht and the Mowachaht.

[32] That is overly simplistic. The fact that there are no overlapping claims now does not mean that the complete claim area was sufficiently occupied by the Nuchatlaht in 1846. For example, Aqi is an area where Dr, Kennedy said she could not ascertain ownership in 1846. Once again, my task is to determine sufficient occupation in 1846, along with the other issues. On the current state of the law I do not think it open to me to accept the Nuchatlaht's argument.

Conclusion: territory which meets the criteria for Nuchatlaht Aboriginal title

[33] In my view, with some relatively minor exceptions, the Province's map delineates areas with respect to which the Nuchatlaht have met the criteria for Aboriginal title. They are mostly adjacent to the areas I referred to in in para. 11 above. The sites on the western end of the island between Nuchatlitz and Esperanza Inlets were, in turn, adjacent to each other making for an inference of contiguous use and occupation in the same or similar manner to those areas I accepted met the test for Aboriginal title but were excluded from the claim because they were reserve land. Given the evidence, it would be artificial to restrict the area of sufficient occupation to the reserve boundaries.

[34] The province drew the boundary for all areas at the 100-meter elevation contour. Again, with some exceptions, I agree with this, because apart from the areas in Mary Basin and Inner Basin, the land increases in elevation gradually from the shore until the 100-meter mark, and then rises more steeply after that. Confining

the boundary to the 100-meter contour reflects the distinction between the coastal and interior areas. It also includes most o the relevant CMT sites.

[35] I would modify the Province's proposed boundary to include the following:

a) DkSr 42 and the part of DlSr 59 that has been left out;

b) the islands in Owossitsa Lake, which the Province appears to have excluded, although the lake in its entirety would be within the awarded territory; and

c) recognising this as somewhat arbitrary, the islands near the western coast of the bay, and in the bay, in which Opemit and Nuchatl are located (the maps do not name the bay) that are within the lines I have drawn on the map at appendix 1. One of these islands is intersected by the line because the western part of it is off the map, but the whole island is to be included. The fee simple islands are, of course, excluded.

[36] There will no doubt be details to iron out in establishing the precise boundaries. I hope that by this stage those can be agreed to.

[37] I do not make a formal declaration here, because the Province wanted to make submissions with respect to its terms, and in favour of a delay in to its coming into effect. Once again, I hope the parties could reach an agreement on that. If not, they can come back before me. This should be done as soon as reasonably possible.

"E.M. Myers J."

Appendix A