COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Campbell v. British Columbia (Forest and Range)*, 2012 BCCA 274

Date: 20120621
Docket: CA038913

In the Matter of Section 2 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 and British Columbia Timber Sale Licence A80073 issued under the *Forest Act*, R.S.B.C. 1996, c. 157

Between:

Vance Robert Campbell, Marilyn James, Lola Jon Campbell, Taress Alexis and Robert Watt, Directors of the Sinixt Nation Society, Representative Body of the Sinixt Nation, on their own behalf and on behalf of the Sinixt Nation and the Sinixt Nation Society

Appellants
(Petitioners)

And

Minister of Forests and Range of British Columbia and Sunshine Logging (2004) Ltd.

Respondents
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel

On appeal from: Supreme Court of British Columbia, February 25, 2011 (*Campbell v. British Columbia (Forest and Range)*, 2011 BCSC 448, Vancouver Registry, Docket Number S107353)

Counsel for the Appellants:	D.M. Aaron
Counsel for the Respondent, Minister of Forests and Range of British Columbia and for the Attorney General of British Columbia:	G.R. Thompson M.L. Foster

Place and Date of Hearing:	Vancouver, British Columbia June 4, 2012
Place and Date of Judgment:	Vancouver, British Columbia June 21, 2012

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The underlying issue in this case is whether the petitioners had standing, as representatives of the Sngaytskstx, or "Sinixt" people (formerly also called "Lakes" or "Arrow Lakes" Indians), to seek the judicial review of a decision of the Minister of Forests and Range on the basis that he owed a duty to consult the Sinixt. The impugned decision, made by the Minister in October 2010, was to issue a timber sale licence in respect of four cut blocks in the area historically inhabited by the Sinixt. The logging has now been completed. Prior to the hearing, therefore, it is necessary to decide whether the appeal is now moot, such that it should be dismissed, or whether this court should nevertheless exercise its discretion to hear it.

The Sinixt People

[2] It is well documented that the Sinixt lived in the territory between the Monashee and Selkirk Mountains for many centuries before European contact. That contact proved disastrous: in the late eighteenth century, smallpox reduced the estimated 500 surviving Sinixt, who lived in three main clusters along the Slocan River, to approximately 200; and the establishment of the Canada-U.S. border in 1846 bisected their territory, with predictable consequences. It appears that over time, most of the Lake Indians migrated south to the Colville Indian Reservation established in Washington State in 1872, a trend exacerbated by the later establishment of Doukhobor settlements in the Lakes' territory. By 1914, only one Sinixt family was recorded as remaining in Canada. In 1953, the last registered member of the Lakes Band, Mrs. Annie Joseph, died on the Okanagan Reserve. The Band was declared extinct, following which the small reserve at Oatscott was formally transferred to the Province of British Columbia.

[3] As noted by the court below, the petitioners claim to represent the Sinixt "by authority of their *de facto* assumption of leadership roles, by virtue of their longstanding recognition by a community as its leaders, and pursuant to accepted practices, including their approbation by a council of elders and hereditary chief". This is not the only litigation they have commenced in that capacity. Spurred on in particular by archeological finds in the area of Perry Ridge in the 1980s, the petitioners, or many of them, began an action (the "Title Claim") against Canada and British Columbia in the Supreme Court of British Columbia (Nelson Registry, Docket Number 14324) in 2008. In their statement of claim, they seek aboriginal title to the area of land bounded

on the south by the 49th parallel, on the east by the Selkirk Mountains, on the north at a point at or near what is now Revelstoke, and on the west by the Monashee Mountains. We are informed that the action has not progressed beyond the filing of a statement of claim.

[4] The question of Sinixt identity has also been raised collaterally in an immigration appeal (see *Watt v. Liebelt* [1999] 2 F.C. 455); and in an appeal to this court in *The Sinixt Nation v. British Columbia Utilities Commission* (CA038418) brought under the *Utilities Commission Act*, R.S.B.C. 1996, c. 473.

The Question for Judicial Review

[5] In October 2010, the Minister granted a timber sale licence to the respondent Sunshine Logging (2004) Ltd. ("Sunshine"), permitting it to log four cut blocks on Perry Ridge, in an area entirely within the territory that is the subject of the Title Claim. The petitioners brought the present proceeding in November 2010 pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, seeking an order quashing the licence on the ground that the Minister had not consulted the Sinixt on the issuance of the licence or any related policy determination. The petition also alleged that the Crown had "failed to discharge the honour of the Crown when it failed to make a good faith determination as to whether the Sinixt are 'an Aboriginal people of Canada' as referred to in Section 35 of the *Constitution Act, 1982*". (The Crown in right of Canada was not joined as a respondent in the proceeding.)

[6] As acknowledged in their pleading, the petitioners obstructed access to the Perry Ridge forest service road in order to protest the issuance of the licence. They applied for an interim injunction restraining the respondents from acting on the licence pending the hearing of the petition. For his part, the Minister sought the dismissal of the petition on the ground that the petitioners lacked "authority to advance the claims or obtain the relief sought, and [that] they lack the requisite standing to bring the petition." (Para. 7.) Both respondents agreed that logging would not begin until the Supreme Court of British Columbia had decided the issue of standing.

[7] After a hearing over several days in early 2011, Willcock J. (recognizing the urgency of the matter) issued oral reasons dated February 25, 2011, which are indexed as 2011 BCSC 448. At para. 136 he noted and rejected the Minister's argument that the claim should be dismissed

unless the petitioners could show they "represent an aboriginal community that can claim s. 35 [of the *Constitution Act*] rights." In his words:

> ... The petitioners say this is an inappropriate test at this stage. They say the Minister has not sought a summary trial on an issue, but rather has applied to strike a claim as an abuse of process. On such an application, which would ordinarily be brought pursuant to Rule 9-5, the Minister should be obliged to show that it is plain and obvious that the petitioners cannot represent a collective entitled to a right to be consulted. They say the court should bear in mind that by their injunction they seek only to protect the right to be consulted and they do not seek adjudication of their underlying claim for rights or title. The right to consultation may be asserted by aboriginal groups with weak or dubious claims. The weakness of their claim affects the depth of the requisite consultation and not whether there is a duty to consult. They say the threshold to establish a right to consultation is low and the onus should fall on the Minister on this application to establish that it is clear and obvious that they cannot meet that low threshold. I agree with that submission. In order to succeed on this application, the Minister must establish that it is clear that the petitioners have no standing to advance the Sinixt's right to consultation. To hold otherwise would be to undermine the objectives described in *Haida*. [At para. 136.]

[8] Applying the "clear and obvious" test, the chambers judge was not persuaded the petitioners had established or could establish objective criteria that would permit a court to determine the membership of the "collective described as the Sinixt nation." (Para. 146.) He explained in part:

> The petitioners, in their submissions and evidence, say it is their intention to determine membership of the collective primarily by ancestral connection. The nature of the ancestral connection that will suffice, however, is unclear. The composition of the group to which ancestry must be traced is not defined and may not be known. The petitioners say the Colville Confederacy's blood quantum criterion for registration as a member of the Lakes Tribe is too restrictive to be used as a criterion for membership in their proposed rights-bearing group. They are unwilling to accept that criterion for establishing an ancestral connection to the Sinixt, but have not established their own.
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> The petitioners themselves would not regard proof of an ancestral connection to the members of the Arrow Lakes Band as a necessary condition for membership in the collective they seek to represent. In fact, it is one of their objectives to establish other broader criteria for membership and to represent a collective that includes descendants of individuals excluded from that now-extinct band. [At paras. 142-43.]

In the result, he dismissed the petition and implicitly also dismissed the petitioners' application for injunctive relief.

[9] A week later, Willcock J. also dismissed an application by the petitioners for a stay of his orders made February 25, 2011 on the basis that no irreparable harm had been shown. As stated at para. 40 of his reasons (indexed as 2011 BCSC 1044):

> There was no evidence before me of archaeological sites on Perry Ridge. The evidence was that there is relatively little continuing use of the land by the aboriginal group involved. There was no evidence of threatened old growth forest or culturally modified trees, little prospect of damage to archaeological sites downstream, and no evidence before me of damage to evidence that might be used in advancing a land claim.

The Court granted an injunction to Sunshine restraining the blockade of the Perry Ridge forest service road, and the logging of the cut blocks proceeded.

The 'Mootness' Application

[10] Although the petitioners filed a Notice of Appeal on March 24, 2011, they did not bring it on for hearing until June 4, 2012. Shortly before the hearing, the Minister applied for permission to adduce new evidence and to have the appeal quashed on the grounds that it had become moot "as the Respondent [Sunshine] has completed the harvesting of timber under Timber Sale Licence A80073 and the building of roads under Road Permit No. R17250 so there is no longer a live controversy or concrete dispute between the parties and the sub stratum of the appeal has disappeared". In support, the Minister sought to adduce an affidavit of Mr. Mattes, a director of Sunshine, deposing as to the completion of harvesting in the four cut blocks. Mr. Mattes deposed as well that the only remaining work for Sunshine would be slash burning and minor roadwork at the direction of the Ministry, which work was expected to be complete by June 15, 2012.

[11] On May 29, 2012, the petitioner Ms. James filed an affidavit stating her concern that the harvesting would continue to affect "Sinixt archaeological sites, fisheries and other cultural, land and resource interests on Perry Ridge". She continued:

> I believe that the Geological and Sedimentation Concerns have already realized themselves in the form of a debris torrent (the "Debris Torrent") down slope from the Harvesting.
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> I was initially informed of the Debris Torrent on May 15, 2012, when I was copied on an email exchange between Lauren Galanes and Marilyn Burgoon, a transcript of which is attached as Exhibit "A" to this My Affidavit. Ms. Galanes describes the Debris Torrent as having washed down from Dragonfly Lake (otherwise known as Perry Ridge Lake) which I know to drain easterly, via Dragonfly Creek, from the crest of Perry Ridge down slope from the site of the Harvesting.
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> I believe the Debris Torrent to have been caused by the Harvesting. My belief in that regard is based in part on the information contained in the May 2, 2011, and October 6, 2011, reports by Integrated Hydropedology Ltd., copies of which are attached as Exhibits "B" and "C" respectively to this My Affidavit.

[12] Ms. James also deposed that she believed the Minister intends to licence and permit further logging and road building on Perry Ridge. On this point, she relied on certain correspondence between the President of the Perry Ridge Water Users' Association and Ministry officials, Mr. Edney and Mr. Scown. In an e-mail dated March 15, 2012, for example, Mr. Scown had said the Ministry had "identified areas of interest further south along the ridge" and was "in the early stages of planning and completing timber recces ... As for the road contract we have not concluded our direction on this matter, as we need to gather more timber recce information."

[13] In response, the Ministry sought to file another affidavit sworn by Mr. Scown. Mr. Scown and another member of his staff had travelled on May 16 to the location of the alleged "debris torrent" and found no evidence thereof. He stated:

> I observed that Dragon Fly Creek was running normally and was clear and within the stream channel. I observed the two culverts that pass under Little Slocan FSR and I noted that they were in place, unobstructed and functioning properly. If a debris flow had occurred, the intake to the culverts would have been choked with debris and there would have been extensive erosion and washing out of the bank. No evidence of either was present. Now produced and shown to me and attached to this my Affidavit as Exhibit "A" is a true copy of a photograph taken May 16, 2012, showing the unobstructed twin culverts on the intake side of the Little Slocan FSR crossing.

Nor had he found "irreparable ground disturbance" at the north end of block 3, as alleged by Ms. James. He deposed that "all skid trails and main trails have been rehabilitated and grass seeded and are expected to fully regenerate." Various photographs recording the satisfactory state of completion of the work, and technical reports concerning the status of the cut blocks, were attached to his affidavit.

[14] In my view, the "new" evidence tendered by both parties should be admitted, given its high degree of relevance to the question of mootness now before us, and given that a refusal to admit it could, as the Minister contends, lead to an injustice.

[15] From the new evidence, I infer that Ms. James' concerns about a debris torrent and other irreparable harm are at best highly exaggerated. On the other hand, it does appear that the Ministry intends to issue further logging permits in the near- to medium- term future in the Perry Ridge area.

Mootness

[16] In my opinion, there is little doubt that the particular dispute which was the subject of the petition – i.e., whether the Crown had a legally enforceable duty to consult and accommodate the Sinixt with respect to the issuance of Timber Sale Licence A80073 – has now become academic. No "concrete controversy" remains. If the Court were to decide the issue for or against the petitioners, there would be no practical result. As occurred in *Lax Kw'alaams Indian Band v. British Columbia (Minister of Sustainable Resource Management)* 2005 BCCA 140, "The permit the Band [here, the petitioners] sought to have quashed is exhausted and the trees are gone. The subject of the proceedings no longer exists and there is no continuing utility in the appeal. It is moot." (Para. 21.) The fact that another timber cutting licence may be issued in future is irrelevant to the issuance of Timber Sale Licence A80073, which is the sole focus of the petition. Any new licence will involve a new decision by the Minister – and a separate consultation with First Nations whose rights might be affected.

[17] The real question for us is whether the Court should exercise its discretion to hear the appeal nevertheless, based on the criteria described in *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342. These criteria were stated in rather abstract terms in *Borowski* – the requirement of an adversarial context, which "helps guarantee that issues are well and fully argued by parties who have a stake in the outcome"; the concern for judicial economy; and the need for the court to adhere to its "proper law-making function".

[18] As in *Borowski*, there is no doubt in this case that an adversarial relationship exists between the parties in this proceeding, and the Minister's application to dismiss the proceeding as moot was "fully argued with as much zeal and dedication on both sides as if the matter were not moot." (*Borowski* at 363.)

[19] The matter here falls to be considered under the rubric of judicial economy. Is the determination of the petitioners' standing in the context of this proceeding necessary or desirable to resolve other controversies to which the petitioners are party, or are there likely to be other opportunities that may be taken without undue delay and expense? Is the matter one that is, in the words of *Borowski* (at 364), "capable of repetition" or "evasive of review"?

[20] Mr. Aaron on behalf of the petitioners spoke in impassioned terms of the long and difficult struggle his clients have experienced in trying to overcome the formal declaration of extinction of the Sinixt people, and the migration of most if not all the survivors either to the Colville Indian Reservation or to the Okanagan Valley in British Columbia. He submitted that an affirmative determination of standing in the present case would enable the petitioners to advance the argument that they are a "section 35 nation" in other litigation, especially the Title Claim, and would assist them in addressing related issues, including the competing claims by the Colville Confederacy and the Okanagan Band that they are the legitimate representatives of the Sinixt. Given the long period over which the existence of the Sinixt as a people has been in serious doubt, Mr. Aaron says the petitioners should not be required to wait any longer. In his phrase, "If not now, when?"

[21] Mr. Aaron also disagreed with the notion, which he inferred had been advanced by counsel for the Minister, that if the question of standing for purposes of the duty to consult was decided in the petitioners' favour, the more difficult issue of whether the Sinixt qualify as an "Aboriginal people" for purposes of s. 35 of the *Constitution Act, 1982* would then have to be addressed in this proceeding. (In fact, I did not understand Mr. Thompson to have made this argument on behalf of the Minister. Mr. Thompson instead contended that the issue in this case was simply one of "procedure" to be determined in accordance with *Western Shopping Centres Inc. v. Dutton* 2001 SCC 46 – a case that did not involve Aboriginal rights at all – and that it is completely separate from any standing issue under s. 35. It was the petitioners who, in their pleading, suggested that the Minister was required to determine whether the Sinixt were an "Aboriginal people under s. 35.")

[22] In any event, Mr. Aaron contended that the court below had "conflated" the two issues, effectively requiring that the petitioners meet the higher test of standing for purposes of s. 35 before they may assert a duty to consult in respect of the issuance of Sunshine's logging licence. Such an approach, he said, runs contrary to *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, where the Court stated that the duty to consult "arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it." (Para. 35; my emphasis.) The Court went on to note that the content of the duty varies with the circumstances, such that a "dubious or

peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties." (Para. 37.)

[23] It is precisely because of the distinction between the standing of the petitioners for purposes of a judicial review such as is sought here, and the standing of the Sinixt, if that collective still exists, under s. 35 that I believe the determination of standing in this appeal would be unlikely to advance the petitioners' larger interests in the Title Claim or elsewhere. As Mr. Thompson submitted, the determination of the complicated and fact-intensive issues that would arise under s. 35, including who among various claimants may represent the Sinixt, would require a full trial at which all interested parties (including Canada) are represented. The judicial review of a logging decision, focussing on the Minister and decided on affidavit evidence, is simply not an appropriate vehicle for addressing such issues.

[24] At the other end of the spectrum, i.e., the judicial review of future logging licences, it will be open to the petitioners to bring another petition and to assert standing on behalf of the Sinixt in this court (although not in the Supreme Court, where the issue will be *res judicata*). The argument they prepared for the present proceeding may likely be used in that event, and the petitioners will presumably be in a position to move more quickly to the Court of Appeal. In the meantime, conditions may change. The Province might well decide to consult with the petitioners, as they have with other bands in the area, regarding logging permits and related policy decisions. As well, the law may change: this court's decision in *Moulton Contracting Ltd. v. Fort Nelson First Nation* 2011 BCCA 312, for example, is being appealed to the Supreme Court of Canada and its decision may provide further guidance regarding the role of individuals in representing holders of collective rights.

[25] In summary, the question of the standing of the petitioners to assert a duty to consult regarding a ministerial decision is not "evasive of review": it may well arise again in the near future. The preparation done by counsel is unlikely to be wasted. As far as the status of the Sinixt under s. 35 is concerned, our determination of the appeal would not decide that issue, and indeed it could not be decided in the legal framework of a petition for judicial review heard on affidavit evidence in chambers. Thus if we were to attempt to determine the appeal in the present context,

little would be accomplished in terms of the Sinixts' interests, and we might indeed make an already difficult matter only more so.

[26] I would therefore decline to exercise our jurisdiction to hear the appeal, and dismiss it as moot.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Frankel"