


UNRESOLVED ABORIGINAL TITLE CLAIMS: RISK ALLOCATION AND BCTS

"Business" is sometimes described as the art of turning uncertainty into opportunity. But two recent decisions of the BC Court of Appeal suggest that the risks of doing business in the BC Timber Sales (BCTS) program amid the uncertainty of unresolved Aboriginal title claims has started to become too much. In *Moulton Contracting Ltd. v. British Columbia*, a BCTS logger was unable to access the harvest site on account of a blockade that members of the Fort Nelson First Nation (FNFN) erected to reflect their dissatisfaction with consultation they received from BCTS. Moulton was therefore unable to complete the Timber Sale Licence (TSL) and initiated legal action against the Province and the FNFN.

The BC Supreme Court found that BCTS personnel knew that the FNFN members intended to "stop the logging" and failed to pass that information along to Moulton before it entered the TSL. The court held the Province liable to Moulton for breach of an implied term of the TSL whereby the Province represented to Moulton that it was unaware of any First Nations' dissatisfaction with the Province's consultation. The court also found the Province concurrently liable in negligence, and awarded approximately $1.75M in damages to Moulton against the Province on account of foregone business opportunities.

The Court of Appeal overturned the lower court's decision, ruling that BCTS had no legal obligation to inform Moulton of any First Nations dissatisfaction with the consultation process. The court further held that the exclusion of liability clauses in the TSL documentation (clauses included in virtually all TSLs) insulated the Province from any such claim. The court's unambiguous message to BCTS loggers in relation to Aboriginal title claims was "buyer beware."

Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc concerned a lawsuit that the Saik'uz and Stellat'en First Nations (SSFN) commenced against the operator of a dam (Alcan). The SSFN claimed that the dam created a nuisance and interfered with rights associated with lands subject to their Aboriginal title claims. Since the claims were based upon unproven Aboriginal title, Alcan applied to court for summary dismissal of the claims. While the BC Supreme Court sided with Alcan, the Court of Appeal held that the SSFN could commence a civil action based upon Aboriginal title rights before it had a lawfully established its Aboriginal title. SSFN could then prove its Aboriginal title as part of their case.

So, with this decision in hand, First Nations who claim Aboriginal title may commence civil law suits based upon unproven Aboriginal title rights. In the case of a TSL, they could potentially use interim legal procedures such as injunctions to prevent logging from taking place. In effect, this decision may allow First Nations to use the courts to stop logging if they have the resources to do so: no blockade required.

As the Supreme Court of Canada reminded us in last summer's decision in *Tsilhqot'in v. British Columbia*, the Crown may only infringe upon Aboriginal title lands if the infringement is "justified" in accordance with a complicated legal test or, potentially, with the title holder's consent. Getting to either of these two outcomes before a claim of Aboriginal title is lawfully resolved requires the resources necessary to undertake a strength-of-claim analysis to assess the risk associated with a given claim to Aboriginal title, and to accommodate First Nations whose title claim is strong. BCTS has the resources necessary to assess strength-of-claim and to provide accommodation where the logging opportunities it sells potentially interfere with Aboriginal title claims. Nevertheless, BCTS passes the risk associated with Aboriginal title claims onto the logger on an "as is, where is" basis.

This philosophy is fine for those with the resources to play that game. But most BCTS loggers do not—at least, not in terms of Aboriginal title claims. One potential strategy for BCTS loggers is to enter joint venture or partnership arrangements with First Nations to pursue BCTS logging opportunities. But, again, to effectively implement this strategy requires pre-existing relationships and resources. Instead, BCTS loggers are likely to become more and more dependent upon partnerships with major licensees who have a long-term presence in BCTS operating areas, the relationships, and the resources to better manage the uncertainty of Aboriginal title claims. Likely, the only way to avoid this dependence is either a speedy resolution of Aboriginal title claims, or for BCTS to issue harvesting rights with some form of warranty to protect BCTS loggers from the uncertainty of Aboriginal title claims. Neither seems likely.

Until this situation changes, and in light of recent court decisions, the bonus bids BCTS receives should begin to decrease (if they haven't already) as a result of increased risk and a smaller pool of bidders. This will result in lower BCTS revenues. More importantly, this may also begin to effect the stumpage received from major licensees due to the role that the BCTS bids play in the market pricing system used to determine stumpage rates. Perhaps once this uncertainty begins to affect Crown revenues, government will take steps to maintain the value of its BCTS harvesting opportunities. In the meanwhile, one would expect that if a BCTS logger is unable to perform its obligations due to Aboriginal title claims, BCTS would grant relief from deposit forfeiture.

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