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Aboriginal Title Claim Against a Private Party Allowed to Continue

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Case Commented On: *Ominayak v Penn West Petroleum Ltd*, 2015 ABQB 342

Some forty or so years ago the Lubicon Lake Band and Chief Bernard Ominayak commenced an action for aboriginal title, and, in the alternative, a treaty reserve entitlement claim. Chief Ominayak also brought a petition before the United Nations Human Rights Committee (HRC) under the Optional Protocol of the *International Covenant on Civil and Political Rights* alleging a breach by Canada of Article 27 of that Covenant dealing with the cultural rights of minorities.

In the end, at least so far as I know, the title and treaty entitlement claim died after the Band failed in its attempts to obtain an interlocutory injunction: see *Lubicon Indian Band v Norcen Energy Resources Ltd*, [1985] 3 WWR 196 (Alta CA) – a matter I commented on very early in my academic career here. Chief Ominayak did however succeed, if that is the right word, in his petition before the HRC on the grounds that the degree and intensity of resource extraction occurring in the traditional territory of the Lubicon Cree was so extensive as to deprive the Lubicon of access to the material aspects of their culture. In another sense however, the petition was a failure since Ominayak's concerns have never been adequately dealt with. It is true that Alberta has settled a treaty entitlement claim with at least some of the Lubicon Cree, but there remains an outstanding question (to which this litigation attests at para 5) as to whether or not the Lubicon Cree with whom Alberta negotiated were properly mandated to agree to the settlement.

In any event, time moves on, and the Lubicon Lake Cree, represented in this matter once again by the Lubicon Lake Cree Nation led by Bernard Ominayak, have commenced two actions, one against the Crown (federal and provincial, the "Crown action") filed in June 2013 (at para 2) and a second action (the subject of this decision and this post) against Penn West in November 2013 (at para 15, the "Penn West action"). In this application Penn West applied to strike the action against it on the basis that it was an abuse of process (since the matters raised were "virtually" the same as the matters raised in the Crown action) and on the basis that in part at least it represented a collateral attack on regulatory decisions made by the Energy Resources Conservation Board (ERCB) as the predecessor of the current Alberta Energy Regulator (AER or Regulator).

Justice Simpson concluded that there was no abuse of process since there was no duplication of proceedings. Neither could the entire action be struck on the basis of collateral attack although Justice Simpson did order that the pleadings be amended so as to remove the attack on the validity of the permits.

Justice Simpson concluded that there could be no duplication of proceedings since (at para 38) "while many of the facts plead are identical, the causes of action are not. In fact, they cannot be, since the claims in the Crown action are against different defendants and involve public, not private, law claims." While this conclusion seems justifiable if not self-evident, I am less sure about the public/private law distinction that Justice Simpson relies upon to support his conclusion, since an argument about competing property claims is perhaps best characterized as a private law argument. That said, to the extent that an aboriginal title claim is based on the property laws of a pre-existing legal system (as acknowledged in both *Delgamuukw*, [1997] 3 SCR 1010 and *Tsilhqot'in*, 2014 SCC 44) then it does have aspects of a claim in public law. Better then I think simply to have said that there can be no duplication when the defendant in the two actions is different rather than to distinguish the actions on the basis of public and private law.

As for the collateral attack argument, Justice Simpson concluded that those parts of the statement of claim that questioned the validity of Penn West's regulatory approvals should be struck on the grounds that the plaintiffs should have raised this issue by way of judicial or appellate review of the relevant decisions. While again there is merit in the conclusion I wonder if it is not stated too broadly. For example, it appears that one of the grounds on which the plaintiffs contest the validity of the approvals is on the basis of a failure to consult. Since there is at least some evidence that Ominayak indicated that he had no concerns with Penn West's proposed program, it seems reasonable to conclude that consultation was a potential issue in proceedings before the Board or the Regulator in issuing the necessary well licences. Therefore, any determination as to the sufficiency of the consultations should have been raised by way of application for leave before the Court of Appeal to the extent the matter involved a decision by the Board or the Regulator (and now, in light of s 21 of the *Responsible Energy Development Act*, RSA 2000, c R 17.3 and the role of the Aboriginal Consultation Office (ACO), by way of judicial review of the departmental or ACO decision). On this see previous posts here, here and here, illustrating as well how convoluted this area is and how arguments as to preferred forums change over time and in a very adversarial and self-interested way. However, a claim based on aboriginal title might also have more deep-seated implications for decisions made by the energy regulator. For example, suppose that the plaintiffs succeed in establishing aboriginal title in this case and that that title includes oil and gas rights (see *Delgamuukw*). Surely at that point the Lubicon are entitled to say (assuming the applicability of the province's *Oil and Gas Conservation Act*, RSA 2000, c. O-6 (*OGCA*) as per *Tsilhqot'in*) that Penn West is not entitled to hold a well licence under s 16 of the *OGCA* by virtue of a lease from the Crown. While it is certainly the case that the AER and its predecessor can make a determination in any particular case whether or not a licensee has a property interest for the purposes of s 16 (see for example the coalbed methane proceedings, AEUB Decision 2007 – 024), there is nothing that compels a party to try oil and gas property law questions before the AER or the ERCB – and indeed any such requirement might well breach s 96 of the *Constitution Act, 1867*. In many cases of course the shoe is on the other foot and the Crown and other parties urge that these more fundamental questions are best dealt with in the ordinary courts rather than in regulatory, quasi-criminal, or judicial review proceedings: see, for example, *R v Lefthand*, 2007 ABCA 206, esp per Slatter JA).

Thus, while it is reasonable to use the collateral attack doctrine to preclude a later attack on issues directly related to the particular regulatory decision (e.g. the consultation issues in this

matter), the doctrine surely cannot be used to *require* a party to raise issues "upstream" of the regulatory matter in question (on the language of upstream in this context see *Skeetchestn et al v Registrar of Land Titles*, 2000 BCSC 118, aff'd 2000 BCCA 525). This distinction might be addressed in the formal order since Justice Simpson concludes his judgement by inviting the parties (at para 64) "to make representations as to how the Statement of Claim should be amended to remove references to the invalidity of the approvals" if counsel cannot agree.

And finally, while the collateral attack doctrine seems to have some purchase with respect to consultation issues it does not seem to me to be particularly helpful or indeed relevant to colour the reasoning with allusions to the possibility of corruption or the claims made for the "openness and transparency" of the "tribunal process" (is that the AER/ERCB or the ACO, or the relationship between them all that we are talking about?):

> To allow a collateral attack on the open and transparent tribunal process with the additional protection of judicial review and appellate review, would give rise to a high degree of risk for corruption. If the process can be collaterally attacked, it would create great temptation for corporations to offer payoffs to claimants or provide contracts to them for little or no service so as to avoid collateral attacks (at para 56).

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