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Modern Treaties, Shared Territories and Party Status in Aboriginal Title Litigation

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Case commented on: *Malii v British Columbia*, 2024 BCSC 85 (CanLII), aff'd *Nisga'a Nation v Malii*, 2024 BCCA 313 (CanLII)

Overlapping claims and shared territories present challenges in the negotiation of modern treaties that are best worked out by the Indigenous Nations themselves, drawing on their own laws and protocols. But this does not always prove possible and one party or another may initiate litigation in the courts of the settler state. Unfortunately, this is not uncommon and there are now dozens of cases dealing with overlapping claims or shared territories in the context of modern treaty negotiations. One group of cases deals with the scenario in which Nation A is moving to finalize a modern treaty with the Crown, while Nation B takes the view that the territory encompassed by the proposed treaty is territory that Nation B also used more or less intensively. Nation B therefore files a competing claim and also seeks injunctive relief to prevent finalization or ratification of the proposed treaty. The courts have typically rejected applications for injunctive relief and the substantive claims may drag on for years if not decades. A case in point is the *Benoanie* litigation in which the applicant Nations with reserves in Northern Manitoba and Saskatchewan sought to enjoin ratification of the Nunavut Agreement: *Fond du Lac Band et al v Canada (Minister of Indian and Northern Affairs*, 1992 CanLII 2404 (FC).

But the existence of overlapping claims and shared territories raises concerns for the counterparty, the Crown – federal, provincial, or territorial – that the treaty may prejudice the interests of other parties that are not at the negotiating table and to whom the Crown may owe duties. As a result, modern treaties frequently, if not invariably, include clauses designed to protect the interests of nations in the position of Nation B. Nations in the position of Nation A accept these provisions, perhaps begrudgingly, because the Crown generally takes the position that it requires either a nation-to-nation agreement before ratification or a set of protective clauses (for the benefit of Nation B); without one or the other, there is no deal.

The protective clauses usually have two elements. One element is a set of clauses providing that in the event of litigation launched by another nation (e.g., Nation B) that results in a final and binding judgment in favour of Nation B that a provision of the treaty adversely affects the constitutionally protected rights of Nation B, the treaty parties accept that Nation A's treaty right may only operate to the extent it does not adversely effect the declared rights of Nation B and that the treaty parties may need to make best efforts to amend the treaty. A second element, the *quid pro quo* for accepting the first element, are clauses that provide Nation A with the opportunity to make submissions as a party in any case that raises questions as to the interpretation or validity of the treaty.

These provisions inform a second category of overlap/shared territory cases, which cases include the decision that is the subject of this post: *Nisga'a Nation v Malii*. The decision concerns the Nisga'a Nation (Nation A in my typology) and the Gitanyow Nation (Nation B). The Nisga'a Nation and Canada and British Columbia concluded a modern treaty in 2000 following the decision of the Supreme Court of Canada in the *Calder* case (*Calder et al v Attorney-General of British Columbia*, 1973 CanLII 4 (SCC)).As the Court of Appeal summarized, the "Nisga'a Treaty, among other things, grants the Nisga'a certain rights over, as well as fee simple title to, geographic areas that overlap, in part, with the geographic area of the Gitanyow's claim" (BCCA at para 4). The Nisga'a treaty was ratified on the Crown side by provincial and federal legislation: the *Nisga'a Final Agreement Act*, RSBC 1999, c 2 (BC *NFAA*), and the *Nisga'a Final Agreement Act*, SC 2000, c 7 (federal *NFAA*).

In 2003, the Gitanyow Nation filed a notice of civil claim (NOCC) seeking a declaration of Aboriginal rights and title to an approximately 6,200 square kilometre area known to the plaintiff Gitanyow as Gitanyow Lax'yip, located in the mid-Nass River and Kitwanga River watershed in northwestern British Columbia. According to Justice Stephens who heard the original application that is the subject of this post:

> The evidence indicates that there is a relatively modest geographic overlap between the Claim Area and the Nisga'a Treaty lands where the Nisga'a hold fee simple title (the "Nisga'a Lands"), and a more considerable overlap with the "Nass Wildlife Area" and "Nass Area" under the Nisga'a Treaty where the Nisga'a have harvesting and other rights. (BCSC at para 23)

Given that geographic overlap, the Nisga'a Nation brought an application to be added as a defendant to the action (along with the governments of Canada and British Columbia). While the original Gitanyow NOCC included a claim for a declaration to ratify conditionally, or otherwise refuse to ratify, fee simple titles, tenures, or any other rights or interests in relation to the Gitanyow Lax'yip, this claim, as well as claims for interim and permanent injunctive relief had been deleted from Gitanyow's fourth further amended notice civil claim (fourth FANOCC). The fourth FANOOC also removed express references to the Nisga'a Treaty or Nisga'a treaty rights. Both defendants (BC and Canada) had consented to the filing of the fourth FANOOC and the issues were adjudicated on that basis. (BCCA at paras 36 & 37)

Both Justice Stephens and the British Columbia Court of Appeal rejected the Nisga'a Nation's application for party status – at least for the time being. At the same time, the decisions have created an opportunity for the Nisga'a Nation to exercise the participation rights guaranteed by the Nisga'a treaty to make submissions with respect to the proper interpretation of the treaty should that be necessary as part of adjudicating the Gitanyow's claim.

The Nisga'a Nation based its application for party status both on specific provisions of the Nisga'a treaty (the *lex specialis*) and, in the alternative, on the general rules of court. The Court of Appeal granted leave to intervene on the appeal of the Nisga'a Nation's joinder application to the Northern Gitxsan Hereditary Chiefs representing seven Gitxsan huwilp (houses) (the Northern Gitxsan),

(*Nisg̲a'a Nation v Malii,* 2024 BCCA 206 (CanLII)). The Court summarized the intervenor's position as follows:

> … the [Nisga'a Nation's] appeal should be dismissed because nothing in the Gitanyow action affects the Nisg̲a'a in such a way as to require its participation as a party. They [the Northern Gitxsan] say the preferred method for reconciliation of interests is negotiations and that joining the Nisg̲a'a to the action would be an impediment to such negotiations. (BCCA at para 21)

The *Lex Specialis*

The applicable *lex specialis* consists of three instruments: the Nisga'a treaty itself and the provincial and federal ratification legislation (see above). The relevant treaty provisions are found in Chapter 19, Dispute Resolution:

> 41. If, in any judicial or administrative proceeding, an issue arises in respect of:
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> a. the interpretation or validity of this Agreement; or
>
> b. the validity, or applicability of:
>
> i. any settlement legislation, or
>
> ii. any Nisg̲a'a law
>
> the issue will not be decided until the party raising the issue has properly served notice on the Attorney General of British Columbia, the Attorney General of Canada, and Nisg̲a'a Lisims Government.
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> 42. In any judicial or administrative proceeding to which paragraph 41 applies, the Attorney General of British Columbia, the Attorney General of Canada, and Nisg̲a'a Lisims Government may appear and participate in the proceedings as parties with the same rights as any other party.

The federal and provincial ratification statutes both offer additional details as to the notice requirements, but they each include text that mirrors chapter 19, articles 41 and 42 of the treaty.

A preliminary question, at least, on appeal, was the issue of whether the interpretation exercise should begin with the treaty or with the ratification/implementation legislation. I have always thought that interpretation should begin with the treaty itself. After all, the treaty is the constitutionally protected instrument, and modern treaties, including the Nisga'a treaty, invariably include a supremacy clause along the following lines:

> Federal and provincial laws apply to the Nisga'a Nation, Nisga'a Villages, Nisga'a Institutions, Nisga'a Corporations, Nisga'a citizens, Nisga'a Lands, and Nisga'a Fee Simple Lands, but:

a. in the event of an inconsistency or conflict between this Agreement and the provisions of any federal or provincial law, this Agreement will prevail to the extent of the inconsistency or conflict; and
b. in the event of an inconsistency or conflict between settlement legislation and the provisions of any other federal or provincial law, the settlement legislation will prevail to the extent of the inconsistency or conflict. (Nisga'a Treaty at ch 2, art 13)

But in this case, Justice Stephens as the case management judge preferred to focus on the ratification/implementing legislation. Justice Stephens offered no reasons for that preference (BCSC at para 73). The Nisga'a Nation took issue with this on appeal, alleging that this was an error of law that required correction. While the Court of Appeal declined to "accept the Nisga'a's argument" (BCCA at para 32), Justice Abrioux did offer additional (and convincing reasons) for considering the ratification/implementing legislation – at least in this case. In particular, Justice Abrioux noted that the Nation itself had acknowledged that the implementing legislation "effectively mirrored" the treaty provisions (BCCA at para 32), and went on to note that:

> The implementing legislation provides specifics as to how the notice should be served. It does not explicitly or by implication engage with the core question about whether an issue arises in respect of the interpretation or validity of the Nisga'a Treaty or the validity or applicability of any settlement legislation or any Nisga'a law. While the judge did not expressly consider ss. 41 and 42 and instead focused on the Party-Conferring Provisions, he did refer to ss. 41 and 42 and the discussion in *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215 in considering the effect of the Nisga'a Treaty. It cannot be said that these provisions played no role in his analysis of the issue. (BCCA at para 33)

In my view, this was a case in which a court could and should have looked to the legislation for the necessary implementing details. But the starting interpretive prism should always be the treaty itself. It is the treaty and not the legislation that provides the principal interpretive context. The treaty is a consensual document. The legislation, even if informed by the treaty, is a unilateral act of one party to the treaty. It should at most be a subsidiary interpretive aid.

Furthermore, I observe that the Court of Appeal, having ruled that Justice Stephens committed no error in focusing on the implementing legislation, the Court of Appeal deals exclusively with the treaty text rather than the legislation (BCCA at paras 39 – 53). I think that there is a message there for subsequent cases.

As for the merits of the Nisga'a's claim to participate as a party as of right on the basis of chapter 19, articles 41 and 42 of the treaty, the Court of Appeal framed the issue in terms of whether these sections had become operative at the time of the hearing of the application. In other words, on the basis of the fourth FANOCC, would adjudication of Gitanyow's claim necessarily involve "the interpretation or validity" of the Nisga'a treaty? The Nisga'a Nation's position was that the provisions were triggered "because the Gitanyow still seeks a declaration that it holds Aboriginal title to the entirety of the Gitanyow Lax'yip and other Aboriginal rights within the meaning

of s. 35 of the *Constitution Act, 1982*." (BCCA at para 41) More specifically, in order for the Gitanyow to establish title, it would be necessary for them to establish:

> … that it occupied the Claim Area before the assertion of European sovereignty, and that its occupation was sufficient, continuous, and exclusive. Accordingly, the Nisga'a submit that if the Gitanyow were successful in establishing Aboriginal title over portions of the Nass Area, the ruling would directly and necessarily affect the interpretation or validity of the provisions of the Nisga'a Treaty that continue Nisga'a Aboriginal rights in that portion of the Nass Area, and the validity and applicability of Nisga'a laws therein. (BCCA at para 46)

The Gitanyow, however, emphasised that it had restricted its claim to relief against only the province and Canada and thus the trial court would not need to engage with the interpretation or validity of the Nisga'a treaty. The Court of Appeal evidently accepted that contention noting that:

> Those provisions, considered within the context of the Treaty as a whole, do not provide a general right to the Nisga'a to receive notice of and participate in a proceeding as a party simply because its rights or interests could be affected by that proceeding, specifically the declaration as to Aboriginal title and other s. 35 rights. The Nisga'a, British Columbia and Canada could have negotiated such a term but did not do so. Instead, the treaty right is expressly limited to the categories enumerated in s. 41.
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> Accordingly, the judge was correct in concluding that the Gitanyow's Fourth FANOCC did not directly raise any issues regarding the interpretation or validity of the Nisga'a Treaty or the validity or applicability of any Nisga'a laws in its claim. Further, the amended pleadings do not directly invite the court to make determinations about the Nisga'a Treaty or Nisga'a law. As such, the judge properly found that the Gitanyow was not directly raising any issues that engage the Party-Conferring Provisions at this time: RFJ at para. 86. (BCCA at paras 47 & 48)

Consequently, and subject to possible further amendments to the pleadings, "it is only when the Gitanyow establishes its s. 35 rights in the underlying 'judicial proceeding' that the Dispute Resolution provisions would 'become operative'." (BCCA at para 52)

In sum, both Justice Stephens and the Court of Appeal concluded that the Nisga'a Nation's application to be joined as a party was premature. But equally, both recognized that it was possible that Nisga'a participation rights might be triggered as the litigation unfolded, depending in part on the positions taken by the defendants (BC and Canada). It was this concern that led Justice Stephens to order and direct:

> …no less than 60 days before the trial of this action, or such further date as may be ordered by this Court, the parties are ordered and directed to schedule and appear at a judicial case management conference to address the topic of the issuance of any statutory notice to the Nisga'a under s. 20 of the *Nisga'a Final Agreement Act*, SC 2000, c.7 and s. 8 of the *BC Nisga'a Final Agreement Act*, RSBC 1999, c. 2, the timing of any such notices and for direction from the Court as to the Nisga'a's participatory rights at the trial of this action as

> a statutory party (the "**Judicial Management Conference**"); (BCSC at para 93, emphasis in original)

Recognizing the heightened degree of deference owed to the decisions of a case management judge, the Court of Appeal concluded that Justice Stephens had not erred in making this order.

Lex Generalis: The Rules of Court

In addition to relying on the Nisga'a treaty provisions, the Nisga'a Nation also sought party status on the basis of the general law, specifically two provisions of the Rules of Court: Rule 6-2(7)(b) and (c) (Supreme Court Civil Rules, BC Reg 168/2009). Rule 6-2(7)(b) provides that the court has the discretion to add a party if that person ought to have been joined as a party, or if that person's participation is necessary to effectually adjudicate matters in the proceeding. Rule 6-2(7)(c) gives the court the discretion to add a party if there is a question or issue between the parties that is related to connected to the proceeding and that "it would be just and convenient to determine as between the person and that party." Justice Stephens refused to add the Nisga'a Nation under either paragraph and the Court of Appeal declined to interfere with that discretionary decision.

Once again, the Court of Appeal emphasised that discretionary decisions of a case management judge are entitled to deference and confirmed that it would not interfere unless the judge misdirected themselves, erred in law or principle, failed to give sufficient weight to relevant considerations, or if the result is so plainly wrong on the facts as to result in an injustice. That was not the case here. Both courts were clearly influenced by an earlier joinder decision of the Court of Appeal in an aboriginal title matter in *Kwikwetlem First Nation v British Columbia (Attorney General)*, 2021 BCCA 311 (CanLII) (*KFN*). In that case British Columbia was attempting to have Canada joined as a party defendant (i.e., the decision did not deal with overlapping territories). The case management judge in *KFN* rejected the application and the Court of Appeal, in a decision (as here in *Malii*) also authored by Justice Abrioux, declined to interfere.

In establishing the context for the decision in *KFN*, Justice Abrioux emphasised the length and complexity of Aboriginal title cases which is "self-evidently a challenge for ensuring access to justice for Indigenous litigants and for serving the public interest in having Aboriginal rights claims determined on their merits." (*KFN* at para 28) The *KFN* court also advised that "courts can, and must, approach pleadings in s. 35(1) claims flexibly, with due regard to proportionality, access to justice and reconciliation." (*KFN* at para 36) As with the present case, the *KFN* decision also acknowledged that a plaintiff in a title case is free (and perhaps should be encouraged) to narrow its claims (through FANOCC) in the interests of reducing complexity. Thus, in *KFN* the plaintiff had evidently gone through such an exercise itself in deciding not to join Canada at the outset and the Court of Appeal concluded that it would not interfere with "the judge's decision *to permit the KFN to choose the manner in which it seeks to advance its claims, and in particular not to include Canada as a defendant*." (*KFN* at para 25, emphasis added) In this case too, the Court of Appeal was convinced that the Gitanyow had narrowed the issues before the court in an appropriate way and that it was not necessary to accord the Nisga'a Nation party status across the entire spectrum of the Gitanyow's claim. At the same time, the orders of the case management judge (confirmed by the Court of Appeal) offer the Nisga'a Nation the assurance that if the litigation raises questions

as to the interpretation or validity of the Nisga'a treaty the Nisga'a Nation's right to make submissions as a party in relation to those matters will be respected.

Conclusion

Indigenous title litigation is always complex, time-consuming and expensive, and all of those factors lead to access to justice issues. The interests of third parties, whether those parties are fee simple title holders, the holder of Crown resource rights, or other Indigenous Nations, further complicates matters. This is not surprising. After all, when we are dealing with property and title issues, we are dealing with *in rem* rights and claims that bind the whole world. Modern treaties attempt to strike a balance between the interests of treaty parties and the interests of those who are not parties to the negotiated treaty. This is a case about how to interpret those balancing provisions. And in my view, the Court has struck an appropriate balance that protects the interests of the "first to negotiate" (the Nisga'a) while at the same respecting the right of neighbouring Nations to pursue their litigation interests against the Crown in a way that meets their needs and strategies.

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