BC Supreme Court's Nuchatlaht land claim decision gives guidance on Aboriginal title litigation

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On May 11, 2023, the British Columbia Supreme Court released its decision in *The Nuchatlaht v. British Columbia*, 2023 BCSC 804. The decision, which stated the Nuchatlaht did not prove it had rights to its entire claim area, provides important guidance on how the courts will assess an Aboriginal title claim where evidence of use and occupation is stronger in some portions of the claimed area than others.

Background

The Nuchatlaht, a First Nation on the coast of British Columbia, brought an Aboriginal title claim to a land-based territory of approximately 201 square kilometres on the west coast of Vancouver Island.

They made several strategic decisions about how to approach the litigation. First, they did not introduce any oral history evidence, instead relying solely on historical, ethnohistorical and archaeological reports and evidence. Second, they framed the claim as being for the entire claim area, despite introducing evidence that focused on how various sub-groups who historically comprised the Nuchatlaht used specific areas within the claim area. They excluded private land, the seabed and any land subject to competing claims of other First Nations from the claim area, and they did not claim Aboriginal rights (see paragraph 2 of the decision).

The entire trial lasted only 55 days (contrast this with the Cowichan's ongoing title claim trial, which has already taken up more than 450 trial days).

The decision

The Nuchatlaht decision focused on the first tenet of the legal test set out in *Tsilhqot'in Nation v. British Columbia*: that "sufficient occupation" of the land must be claimed to establish title at the time of assertion of European sovereignty (see paragraph 50).

While the court acknowledged the Nuchatlaht had a strong claim of sufficient occupation for various specific sites, it ruled they failed to prove sufficient occupation for the entire claim area. Largely because of how the claim was framed and argued, the court held that it could not make declarations of Aboriginal title on a "piecemeal" basis, nor make alternate declarations that some areas may be subject to Aboriginal rights but not Aboriginal title, without a further hearing.

As a result, the court rejected the claim in its entirety, but gave the plaintiff the option to come back to the court for direction on the proper procedure to follow if the Nuchatlaht ultimately wanted to pursue a declaration for smaller areas. A press release on the Nuchatlaht website indicates that they intend to take the court up on the offer to come back, while also appealing the decision to the BC Court of Appeal.

Related decisions

To date, *Tsilhqot'in* is the only case in which the courts have declared Aboriginal title over a specific parcel of land. Since that decision in 2014, numerous First Nations have advanced their Aboriginal title claims through litigation, but there have been only a few reported decisions to date. In 2021, the Ontario Superior Court ruled in *Chippewas of Saugeen First Nation et al. v The Attorney General of Canada et al.* 2021 ONSC 4181 that the First Nation failed to prove Aboriginal title over submerged lands but left open the potential for other declarations in future phases of the trial.

Back in British Columbia, the Cowichan are in the midst of a trial of their Aboriginal title claims, while other First Nations are progressing their litigation, with further decisions likely in the next several years.

Significance

The *Nuchatlaht* decision is significant in that it directs the parties to focus on the evidence needed to prove Aboriginal title *throughout* a claimed area, and the potential consequences where evidence for some areas (for example, historic village sites) is much stronger than for others.

The case also illustrates that sufficient evidence is needed to prove Aboriginal title and choosing to rely on some, but not all, sources of evidence (for example, oral history evidence), presents a significant risk of an adverse finding.

The decision could also affect how First Nations, government and industry approach consultation on projects over which a First Nation asserts Aboriginal title, as the strength of claim — and corresponding duty to consult — may well vary within a First Nation's asserted territory.

To discuss details of the *Nuchatlaht* decision or other topics related to Indigenous law, contact any of the key contacts below.

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