#136

Indexed as:

Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)

Chief Ron Ignace, Chief of the Skeetchestn Indian Band, on behalf of himself and all other members of the Skeetchestn Indian Band; and on behalf of himself and all other members of the Secwepemc Aboriginal Nation (Appellants) the Registrar of Land Titles, Kamloops Land Title District (Respondent)

[2000] 2 C.N.L.R. 330

Court File Nos.: 28089 and 28044 Kamloops

British Columbia Supreme Court
Lamperson J.

January 20, 2000

L.J. Pinder and C. Ostrove, for the appellants.
P.J. Pearlman, Q.C. and B. Wealy, for the respondent.
P.G. Foy, Q.C. and E. Christie, for the Attorney General of British Columbia.
D. Gooderham, for Kamlands Holdings Ltd.

The appellant Indian band appealed from two decisions of the Registrar of Land Titles refusing to register first, a certificate of pending litigation and second, a caveat. Both appeals pertain to an Aboriginal title claim made by the band against approximately 1000 acres of land known as the 6 Mile Ranch. The land had been privately owned in fee simple and registered under the *Land Title Act* for several decades. In the late 1800s the province transferred all its lands contained within the "Railway Belt" to the federal government, who then offered the land for sale to settlers. Over one-half of the parcels comprising the lands in question were originally granted by the federal government patent between 1904 and 1930. In 1930 all unalienated lands were transferred back to the provincial Crown with the remaining parcels resulting from provincial Crown grants issued between 1950 and 1991. In 1995 the 6 Mile Ranch was purchased by a developer to create a destination resort. The provincial government facilitated the development by removing part of the 6 Mile Ranch from the Agricultural Land Reserve and the government further intends to transfer 34 acres of Crown land to the developer in return for the surrender of certain water licences.

The band alleges that the development would interfere with its Aboriginal title and seeks a number of declarations supporting its claim. The Aboriginal title claim has broad implications because it is directed primarily against private lands rather than Crown lands.

The issue on this appeal was whether the Registrar was correct in refusing to register the certificate of pending litigation and the caveat. The Registrar based his decision on the British Columbia Court of Appeal decision in *Uukw v. B.C.*, [1988] 1 C.N.L.R. 173. In that case, the Court held that in order to file a lis pendens, the claimant must be claiming an interest or estate in land that is capable of registration. The Court found that that even if Aboriginal title was an estate or interest in land, it was not registrable under the *Land Title Act* because it is inalienable.

Held: Appeal dismissed.

1. Aboriginal title is *sui generis* and does not lend itself to categorization under traditional real property concepts or to accommodation under the Torrens system. Further, under the Torrens system priorities are based on the date of registration rather than the date when the right is acquired and therefore cannot accommodate Aboriginal title which has its source in the occupancy and use of lands prior to the assertion of sovereignty by the Crown. Aboriginal title is not registrable under the *Land Title Act*, R.S.B.C. 1996, c.250. There is nothing in the decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia*, [1998] 1 C.N.L.R. 14, which supports the band's contention that the decision in *Uukw* no longer applies. *Delgamuukw* does not address the issue of registration of Aboriginal title, nor does it address the impact that Aboriginal rights have on privately owned lands as opposed to Crown lands. It suggests no mechanism for reconciling fee simple and Aboriginal rights.
2. Section 197(1) of the *Land Title Act* requires the Registrar to be satisfied that the applicant is entitled to be registered as owner of the charge; and under s-s.(2) the Registrar has the discretion to refuse registration of a charge if he is of the opinion that the applicant has failed to establish a safeholding and marketable title or where the estate claimed in not registrable under the Act. There was nothing indicating that the Registrar exercised his discretion improperly and therefore no basis for interfering with the decision, unless Aboriginal title is in fact registrable.
3. The band's argument that Aboriginal title is alienable and marketable because it overlaps fee simple lands and the fee simple can be transferred subject to the Aboriginal title was rejected. Aboriginal title is inalienable and can only be surrendered to the Crown and therefore it does not make sense to suggest that it is safeholding and marketable.
4. The band argued that its claim was different from that in *Uukw* in that

it did not claim sovereignty but merely sought a reconciliation of Aboriginal title with Crown title and fee simple. In its statement of claim, the band asserted, inter alia, "the right to choose what uses 6 Mile will be put". The right to control the use of private land is essentially a governmental function. Agreements can be made to restrict the use of land within the confines of the land titles system provided those restrictions devolve from the Crown grant or fee simple ownership. However, unless specified in the *Land Title Act*, the land titles system does not provide for the registration of controls on the use of lands emanating from sources other than the fee simple ownership. While not a claim of sovereignty, it is nonetheless a claim for governmental power over fee simple lands. Although not as far reaching as the claim in *Uukw*, it is similar to the *Uukw* claim. The decision in *Uukw* cannot be distinguished on this ground.

5. The band argued that one of the main purposes of the Torrens system is to create a registration system which gives notice of all interests in land and that this purpose would be furthered by the registration of the band's claim. The band's argument is inconsistent with *Uukw*, which provides that a claimant may not file a lis pendens if his claim is with respect to an interest or estate in land that is not registrable.

6. The band's argument that indefeasible fees granted by the Crown are subject to Aboriginal title because the provincial Crown cannot create a fee simple title that extinguishes Aboriginal title was rejected. The Crown may from its absolute title, grant an estate in fee simple. The Crown may except or reserve to itself certain rights. However, Aboriginal title is not an exception or reservation from the Crown for three reasons: (1) there was no evidence that it was excepted or reserved in the Crown grant in this case; (2) an exception or reservation would relate to some right owned by the Crown as grantor, and Aboriginal title is not such a right; (3) the concept of exceptions and reservation cannot apply here. An exception is an exclusion of some part of that which is given in order that it may remain with the grantor; it excludes from the grant the interest specified. A reservation is a provision in which the grantor reserves to itself a right, interest or profit in the estate granted, which has no previous existence as such, but is first called into being by the instrument reserving it.

7. Aboriginal rights claims are not an encumbrance as defined in the *Land Title Act*. The purpose of the *Land Title Act* is to establish a means to certify the ownership of indefeasible titles and to simplify transfers thereof. The definition of encumbrance in the Act indicates that only encumbrances emanating from the indefeasible fee or those specifically authorized by legislation are included. Aboriginal rights do not fit into that category.

8. The band's argument that if a statutory certificate of pending litigation was not available to it, that it had a right to a common law lis pendens.

It was not a matter for the Registrar to decide whether a common law lis pendens existed and whether it was registrable. His only authority was that granted to him by the *Land Title Act*. As this was an appeal from the Registrar, the court was also confined by the Act.

9. The same principles apply to the equitable doctrine of notice. It no longer plays a role in the land title registration system.

10. The band contended that if certain provisions of the Land Title Act prevented it from filing a certificate of pending litigation or caveat pertaining to Aboriginal title, then those provisions violated s.15(1) of the Canadian Charter of Rights and Freedoms. Charter issues of this type should only be decided after a full hearing and after proper findings of fact have been made, and not as the result of a statutory appeal from a summary decision of the Registrar.

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LAMPERSON J.:—

Background

1 This is an appeal by the Skeetchestn Indian Band ("the Band") from two decisions of the Registrar of Land Titles, Kamloops Land Title District ("the Registrar"), whereby he refused to register first, a certificate of pending litigation and second, a caveat. Both appeals pertain to an Aboriginal title claim made by the Band against approximately 1000 acres of land known as the 6 Mile Ranch.

2 Those lands have been privately owned in fee simple and registered under the B.C. *Land Title Act* for several decades. In the late 1800's, the province transferred all its lands contained within the "Railway Belt" to the federal government, who in turn offered the land for sale to settlers. Thus over one-half of the parcels comprising the 6 Mile Ranch were originally granted by Dominion Government patent between 1904 and 1930. In 1930, all unalienated lands in the Railway Belt were transferred back to the provincial Crown. As a consequence the remaining parcels resulted from provincial Crown grants issued between 1950 and 1991.

3 Kamlands Holdings Ltd. ("Kamlands") purchased the 6 Mile Ranch in January 1995 in order to create a destination resort. The development plan envisages a marina, a golf course, an equestrian center, 129 equestrian homes on quarter-acre lots, 518 townhomes, bungalows, multi-story living units, 3 hotels, and 75 condominium hotel suites convertible into 150 hotel rooms. Because the project is of major economic importance to the Kamloops area the provincial government has facilitated the development by removing part of the 6 Mile Ranch from the Agricultural Land Reserve. The government also intends to transfer 34 acres of Crown land to Kamlands in return for Kamlands surrendering certain water licences.

4 The Band alleges that the proposed development will interfere with its Aboriginal title. In its main action brought against Kamlands and the Province of British Columbia, the Band seeks the following:

(a) A declaration that the Plaintiff has aboriginal title, within the meaning of Section 35(1) of the Constitution Act, 1982, to 6 Mile;

(b) A declaration that the authorization by the Province for the development at 6 Mile by Kamlands unjustifiably infringes the Plaintiff's aboriginal title;

(c) A declaration that all titles in Schedule "A" [the entire 6 Mile Ranch] held by Kamlands are null and void;

(d) A declaration that a transfer of the 34 acres is or would be a breach of the Province's fiduciary duty to the Plaintiff and is null and void;

(e) A declaration that the exercise by B.C. Lands of the Province's fiduciary obligations in respect of the Plaintiff's title to the 34 acres is null and void;

(f) A temporary and permanent injunction restraining Kamlands and the other Defendants from interfering with the Plaintiff's aboriginal title to 6 Mile;

(g) A lis pendens over all its titles set out in Schedule "A";

(h) A lis pendens over the 34 acres;

(i) Costs; and

(j) Such further and other relief as this Honourable Court may deem appropriate.

5 Although this appeal turns on the narrow issue of whether the Registrar was correct in refusing to register the certificate of pending litigation and the caveat, the main action has broad implications because this Aboriginal title claim is directed primarily against private lands rather than Crown lands. The nature of the action and its outcome is of particular concern to persons living in certain rural areas of the province. There are two reported British Columbia cases where Aboriginal land claims involved fee simple lands. They resulted in injunctions being granted and were ultimately settled out of court. Thus the question of registration under the Land Title Act did not emerge. Consequently this is the first British Columbia case to directly confront the inherent conflict between fee simple title and Aboriginal title. The advantage of injunction proceedings as opposed to this situation is that during injunction proceedings, the court considers the harm that might occur to either party by answering these questions:

(1) Is there a fair question to be tried?

(2) Will irreparable harm follow if an injunction is not granted?

(3) Does the balance of convenience favour an injunction?

Those questions cannot be asked in these proceedings.

6 In his reasons for refusing to register the Band's certificate of pending litigation, the Registrar said:

> The estate or interest in land claimed by the plaintiff for registration in this office is aboriginal title. Section 215 of the Act requires a claim of a registrable estate or interest in land. What is claimed by the plaintiff is, in my opinion, not an estate or interest in land that is registrable under the Act. ...

7 The Registrar's reasons for refusing to register the caveat are as follows:

> To lodge a caveat pursuant to section 282 of the Act, a person must be "entitled to land" the title to which is registered under the Act. It is my view that in order for a person to be "entitled to land" that person must be claiming an estate or interest in land capable of registration under the Act. ... As well, the nature and purpose of the Torrens system, being the establishment of indefeasible titles and the conclusiveness of the register, precludes the registration of claims that are ultimately not registrable.

These rulings are based on the British Columbia Court of Appeal decision in Uukw v. B.C. (1987), 16 B.C.L.R. (2d) 145 [[1988] 1 C.N.L.R. 173] (C.A.).

8 The Court at p. 151 [B.C.L.R.; pp. 179-189 C.N.L.R.] specifically adopted *Heller v. Registrar*, Vancouver Land Registration District (1960), 26 D.L.R. (2d) 154 at 159-60 (B.C.C.A.), which quotes the following passage from *Fels v. Knowles* (1907), 26 N.Z.L.R. 604 at p. 620:

> The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. *Nothing can be registered the registration of which is not expressly authorized by statute.* Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest. [My emphasis.]

9 The Court of Appeal held that in order to file a lis pendens, the claimant must be claiming an interest or estate in land that is capable of registration. At p. 153 [B.C.L.R.; p. 185 C.N.L.R.] the Court said, "It is not sensible that the statute would provide for

registration of a certificate of lis pendens with respect to a claimed estate or interest in land which, if established, is not entitled to be registered."

10 The Court of Appeal found that even if Aboriginal title was an estate or interest in land, it was not registrable under the *Land Title Act* because one of the defining characteristics of Aboriginal title was inalienability. The Court said at p. 154 [B.C.L.R.; pp. 186-87 C.N.L.R.]:

> Dickson J. [in Guerin] spoke of the "general inalienability" of the Indian title. The respondents' argument concedes that it is alienable only to the Crown. That being so, it cannot be registered under the *Land Title Act*. The registrar will register an indefeasible title or charge upon being satisfied that the applicant has established a good safe holding and marketable title. One need not be concerned with the precise definition of "marketable" in this context. It is enough to observe that aboriginal title can have no place in a Torrens system which has the primary object of establishing and certifying the ownership of indefeasible titles and simplifying transfers thereof. I conclude that s.213 requires the claim of a registrable estate or interest in land and what is claimed in this case is not registrable.

11 For those reasons the Court concluded that the *Land Title Act* did not accommodate Aboriginal title or a charge claiming Aboriginal title. It therefore declared the certificates of lis pendens null and void. It should be noted that the Supreme Court of Canada refused to hear an appeal from the *Uukw* decision.

12 The Band has advanced a number of reasons why its certificate of pending litigation and caveat should be registered. Each of those grounds will be discussed in turn.

Has *Delgamuukw* Overtaken *Uukw*?

13 The question is whether *Uukw* still applies in light of recent developments in the law pertaining to Aboriginal rights. *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 [153 D.L.R. (4th) 193, [1998] 1 C.N.L.R. 14, 220 N.R. 161], is the leading authority in this regard. The following is a synopsis of the law pertaining to Aboriginal title as it relates to this case.

14 A distinction must be drawn between Aboriginal rights and Aboriginal title. The latter is a species of Aboriginal rights. Aboriginal rights can vary depending on the degree of connection that the Aboriginal group has with the land in question. Those rights can range from the right to engage in certain site specific activities to Aboriginal title that encompasses exclusive use and occupation of the land itself.

15 Fee simple title and Aboriginal title are quite different concepts. Aboriginal title is *sui generis*. Although its content cannot be determined by traditional real property rules, it can be distinguished from fee simple title in that:

(1) It is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown.

(2) It is held communally.

(3) It arises from occupation or possession of the land prior to the assertion of Crown sovereignty and crystallizes at the time sovereignty is asserted.

(4) It has an inherent limit in the sense that land so held must be used in a manner that is reconcilable with the claimant's attachment to the land.

16 Aboriginal title gives the right to exclusive use and occupation of the land itself; it is a burden on the Crown's allodial title and cannot be extinguished by the provincial Crown. Both the federal and provincial Crowns can infringe Aboriginal title provided they meet certain conditions. At page 1107 [S.C.R.; p. 75 C.N.L.R.] in *Delgamuukw* Lamer C.J.C. said:

> The aboriginal rights recognized and affirmed by s.35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., Sparrow) and provincial (e.g. Côté) governments. However, s.35(1) requires that those infringements satisfy the test of justification ...

17 According to the Chief Justice two requirements must be met to justify infringement of Aboriginal title. They can be summarized as follows:

(1) It must be in furtherance of some legislative objective that is compelling and substantial and reconcilable with Aboriginal rights and the broader community of which they are a part.

(2) It must be consistent with the special fiduciary relationship between the Crown and Aboriginal peoples. The nature of the fiduciary duty is a function of the factual and legal context of each particular situation.

18 At page 1111 [S.C.R.; p. 78 C.N.L.R.] in *Delgamuukw*, Lamer C.J.C. said:

> The general principles governing justification laid down in Sparrow, and embellished by Gladstone, operate with respect to infringements of aboriginal title. In the wake of Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly

> broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive" aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis in original.]

19 Although the Supreme Court of Canada has to a large extent defined the meaning of Aboriginal rights and how governments must discharge their fiduciary duties to Aboriginal people, the Court has not stated how conflicts between Aboriginal title and indefeasible titles should be resolved.

20 The Band submits that the decision in *Delgamuukw* has overtaken the Court of Appeal decision in *Uukw*. It should be noted, however, that *Delgamuukw* is mute on the question of whether Aboriginal title can or should be registered. The fact that Aboriginal title is *sui generis* means that it does not lend itself to categorization under traditional real property concepts or to accommodation under the Torrens system. As counsel for the Registrar puts it, "the *sui generis* nature of aboriginal title reinforces and supports the analysis of the Court of Appeal in *Uukw* that aboriginal title has no place in the Torrens system." In my opinion, there is nothing in the *Delgamuukw* decision which supports the Band's contention that *Uukw* no longer applies.

The Statutory Regime has Changed Since *Uukw*

21 The Band argues that *Uukw* is outdated because subsequent changes to the *Land Title Act* now allow the Band to give notice to third parties of its claim against the 6 Mile Ranch. When *Uukw* was decided section 193 of the *Land Title Act*, R.S.B.C. 1979, c.219 stated:

> On application being made for the registration of a charge, the registrar, on being satisfied that a good safeholding and marketable title to the charge has been established by the applicant, shall register the title to the charge claimed by the applicant by endorsing it in the register.

22 Section 197 which replaces the former section 193 reads:

197.(1) On being satisfied from an examination of an application and any instrument accompanying it that the applicant is entitled to be registered as the owner of a charge, the registrar must register the charge claimed by the applicant by entering it in the register.

(2) Despite subsection (1), the registrar may refuse to register the charge claimed if the registrar is of the opinion that

(a) a good, safeholding and marketable title to it has not been established by the applicant, or

(b) the charge claimed is not an estate or interest in land that is registrable under this Act.

23 Based on these changes to the *Land Title Act* the Band contends that the Registrar has the option to register a charge even though it is not marketable. However, it should be observed in this context that section 197(1) requires the Registrar to be satisfied that the applicant is entitled to be registered as owner of the charge. Under subsection (2) the Registrar nonetheless has the discretion to refuse registration of a charge if he is of the opinion that the applicant has failed to establish a safeholding and marketable title or where the estate claimed is not registrable under the Act. The Registrar exercised his discretion, as he is entitled to do, on the grounds set out in section 197(2). It should be noted in this context that marketability is still an essential element with respect to the registration of a fee simple interest pursuant to section 169(1) of the Act. There is no reason to say that the Registrar exercised his discretion improperly. Hence there is no basis for interfering with his decision, unless Aboriginal title is in fact registrable, which in my view it is not.

Is Aboriginal Title Marketable and Therefore Registrable?

24 Because Aboriginal title is inalienable and can only be surrendered to the Crown it makes little sense to suggest that it is safeholding and marketable. The Band argues that Aboriginal title is alienable and marketable because it overlaps fee simple lands and that the fee simple can be transferred subject to the Aboriginal title. That does not mean that the Aboriginal title itself is marketable. The transferee of the fee simple does not acquire the Aboriginal title; it remains with the Aboriginal group in question. Aboriginal rights cannot be sold, mortgaged or be otherwise alienated to third parties. They are not marketable. Aboriginal title simply does not fit into the current land registration system.

25 An alternate argument advanced by the Band is that its Aboriginal title is "free from doubt" because it does not compete with other Aboriginal claims and that therefore the Band can surrender portions of its Aboriginal title to the Crown who can then alienate those portions to third parties for the benefit of the Band. Even if this were done the lands in question would still be subject to certain limitations because such transfers would have to take into account the welfare of future generations. Thus the Band's attachment to the land, and the "*sui generis*" character of Aboriginal title, is still a factor. It is speculative to say that this Aboriginal title if it exists is marketable. Even if Aboriginal rights were to be included in the current system it would have to be done on a case by case basis.

Is The Title Claimed Here Different From That In *Uukw*?

26 The Band submits that the ruling in *Uukw* was influenced by the fact that the plaintiff there claimed jurisdiction over the land and the right to govern it. If that were so, provincial legislation including the Land Title Act would no longer apply. The Band here says that it does not claim sovereignty but merely seeks a reconciliation of Aboriginal title with Crown title and fee simple title. Is that so? Paragraph 10 of the Statement of Claim states:

> According the Secewpemc law, custom and usage, the lands at 6 Mile were, at 1846 and to the present, under the control and jurisdiction of the Kamloops Division.

27 In paragraph 15 of the Statement of Claim the Band asserts that:

> The Plaintiff's aboriginal title to 6 Mile includes inter alia, the following:
>
> (a) an estate or interest in the land at 6 Mile;
> (b) the right to exclusive use and occupation of 6 Mile;
> (c) the right to choose what uses 6 Mile will be put;
> (d) the right to the economic use of 6 Mile. [My emphasis.]

28 The right to control the use of private lands is essentially a governmental function. Agreements can be made to restrict the use of land within the confines of the land titles system provided those restrictions devolve from the Crown grant or fee simple ownership. Restrictive covenants and building schemes are examples of that. However, unless otherwise specified in the *Land Title Act*, the land titles system does not provide for the registration of controls on the use of lands emanating from sources other than the fee simple ownership. The imposition of controls is typically a government function. Zoning bylaws and the agricultural land reserve legislations are examples of this. Thus, the claim to control the use to which the 6 Mile Ranch is put is, although not a claim of sovereignty nonetheless a claim for governmental power over fee simple lands. In the final analysis the claim here, although not as far reaching, is similar to the claim in *Uukw*. Consequently, the decision in *Uukw* cannot be distinguished on this ground.

Does the Torrens Objective of Giving Notice Warrant the Registration of the Lis Pendens and Caveat in this Case?

29 The Band says that it is not seeking to register its Aboriginal title (a substantive right), but merely wishes to give third parties notice of its claim by filing a lis pendens and caveat under the *Land Title Act*. It contends that one of the main purposes of the Torrens system is to create a registration system which gives notice of all interests in land and that this purpose would be furthered by the registration of the Band's claim. Counsel points out that a certificate of pending litigation as opposed to a caveat does not prevent

the transfer of land. In reality, however, no prudent person would purchase land or advance money pursuant to a mortgage over lands that are subject to the outcome of the pending litigation.

30 In any event, the Band's argument on this point is wholly inconsistent with *Uukw*, which states that a claimant may not file a lis pendens if his claim is with respect to an interest or estate in land that is not registrable.

Is Aboriginal Title Registrable Under S.23?

31 Section 23(2) of the *Land Title Act* reads:

> An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:
>
> (a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown;

The argument is that Aboriginal title should be treated as reserved by the Crown. It is submitted on behalf of the Band that the indefeasible fees granted by the Crown are subject to Aboriginal title because the provincial Crown cannot create a fee simple title that extinguishes Aboriginal title.

32 In this regard I agree with the written submissions of counsel for the Registrar who at paragraph 62 says:

> ... The Crown is the absolute owner, and may, from its absolute title, grant an estate in fee simple. As part of that grant, the Crown may except or reserve to itself certain rights. Aboriginal title is not an exception or reservation from the Crown for three reasons. First, there is no evidence that it was excepted or reserved in the Crown grant in the case at Bar. Second, an exception or reservation would relate to some right owned by the Crown as grantor. Aboriginal title is clearly not such a right. Finally, the concept of exceptions and reservations cannot apply here. An exception is an exclusion of some part of that which is given in order that it may remain with the grantor. An exception excludes from the grant the interest specified. A reservation is a provision by which a grantor reserves to itself a right, interest or profit in the estate granted, which has no previous existence as such, but is first called into being by the instrument reserving it. It implies something in the nature of a rent, but is frequently

used to signify some incorporeal right which the grantor is to retain: *MacDonell Estate v. Scott Worldwide Inc.* (1997) 149 DLR (4th) 645 (NSCA) at pp. 650-651.

[Emphasis in original.]

Is Aboriginal Title Registrable as an Encumbrance?

33 Another argument advanced by the Band is based on Haida Nations v. B.C. (Minister of Forests), [1998] 1 C.N.L.R. 98 (B.C.C.A.). In that decision Aboriginal title was held to be an "encumbrance" against Crown timber, within the meaning of section 28 of the Forest Act. The question here, however, is whether Aboriginal rights claims are an encumbrance as defined by the *Land Title Act*. While the Forest Act contains no definition of "encumbrance" section 1 of the *Land Title Act* says:

> "encumbrance" includes a judgment, mortgage, lien, Crown debt or other claim to or on land created or given for any purpose, whether by the act of the parties or any Act or law, and whether voluntary or involuntary;
>
> "charge" means an estate or interest in land less than fee simple and includes:
>
> (a) an estate or interest registered as a charge under Section 179, and
>
> (b) an encumbrance.

34 It is evident from the Haida Nations decision that judicial opinion is divided on how contentious words in a statute should be interpreted. Esson J.A. discussed this issue in considerable detail. He and Southin J.A. favour the traditional or plain meaning test articulated by Lord Atkinson in Victoria (City) v. Bishop of Vancouver Island, [1921] A.C. 384 at p. 387:

> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

35 Huddart J.A. prefers what has been referred to as "the modern test." Her opinion is succinctly stated in the headnote the applicable portion of which reads:

> The work of interpreting begins when one is called upon to construe a statute and must include the analysis of all potential meanings in context to avoid a reading derived from judicial intuition with hidden assumptions. The "golden rule" of literal construction and the contextual approaches

> permit the interpreter of a statute to avoid the work of interpretation by giving primacy of place to plain or ordinary grammatical meaning. Nevertheless, this is a case where the plain meaning method of interpretation is justified. The meaning of "encumbrance" is so well fixed when used with regard to an interest in land that the accepted meaning must be applied.

36 Regardless of what test is used it seems that the purpose of the Land Title Act is to establish a means to certify the ownership of indefeasible titles and to simplify transfers thereof. The definition of encumbrance in the *Land Title Act* indicates that only encumbrances emanating from the indefeasible fee or those specifically authorized by legislation are included. Aboriginal rights do not fit into that category. That situation is not unusual. Licenses, short-term leases and zoning bylaws are all forms of encumbrance on land that cannot [be] registered under the *Land Title Act.*

Is There a Right to a Common Law Lis Pendens?

37 The Band contends that if a statutory certificate of pending litigation is not available to it, it has a right to a common law lis pendens. Because this is an appeal from the Registrar pursuant to s.311 of the Land Title Act it must come within the ambit of the Act.

38 It is not a matter for the Registrar to decide whether a common law lis pendens exists and whether it is registrable. His only authority is that granted to him by the *Land Title Act*. Since this is an appeal from the Registrar, this Court is, with respect to this decision, also confined by the Act.

Does the Doctrine of Notice Apply?

39 The same principles apply to the equitable doctrine of notice. It no longer plays a role in the land title registration system. That is apparent from section 29 which provides that:

> 29.(1) For the purposes of this section, "registered owner" includes a person who has made an application for registration and becomes a registered owner as a result of that application.
>
> (2) Except in the case of fraud in which he or she has participated, a person contracting or delaying with or taking or proposing to take from a registered owner
>
> (a) a transfer of land, or
>
> (b) a charge on land, or a transfer or assignment or subcharge of the charge, is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or

charge other than

(c) an interest, the registration of which is pending,

(d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement, or

(e) the title of a person against which the indefeasible title is void under section 23(4).

Is There a Violation of S.15 of the Charter?

40 The Band contends that if certain provisions in the *Land Title Act* prevent it from filing a certificate of pending litigation or caveat pertaining to Aboriginal title, then those provisions violate s.15(1) of the Charter which reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

41 The arguments advanced can be summarized as follows:

(a) Any person claiming an interest in land can give notice of and protect that interest by way of filing a caveat or lis pendens.

(b) It is indisputable that Aboriginal nations have an interest in their territorial lands as a result of their Aboriginal title.

(c) If Aboriginal nations are not entitled to protect their interest in land by filing a caveat or lis pendens, they have fewer remedies available to them in law than other citizens to protect their legal interests from third party interference.

42 In short, the argument is that the *Land Title Act* discriminates on the basis of race. This is a constitutional issue with broad implications that transcend the immediate and private interests of these parties. In Stoney Creek Indian Band v. Alcan Aluminum, [1999] B.C.J. No. 2196 (Q.L.) [reported infra at page 345] (C.A.), the Court of Appeal said that constitutional decisions should not be made in summary proceedings. Although that case pertained to a Rule 18A decision, the same principles apply here. Charter issues of this type should only be decided after a full hearing and after proper findings of fact have been made, and not as the result of a statutory appeal from a summary decision of the Registrar. The court's inquiry into a claim of discrimination must be contextual and purposive. That cannot be done in the abstract.

Conclusion

43 The Torrens system is designed to register interests in land that have a clear identity recognized by the rules of real property law. It is a real property regime based on fee simple grants by the Crown. A fee simple interest can be fragmented into smaller units. Other registrable interests in the land result from the fee simple interest. However, Aboriginal title is not derived from fee simple. It is *sui generis* and does not lend itself to categorization. It is not alienable; it can only be surrendered to the Crown. Aboriginal title does not fit within the scheme of current real property law in that it is not an interest in land contemplated by the *Land Title Act* which only accommodates traditional common law or equitable interests in the land. Aboriginal title has no "identity recognized by the ordinary rules of the common law." Furthermore, under the Torrens system priorities are based on the date of registration rather than the date when the right is acquired and therefore cannot accommodate Aboriginal title which has its source in the occupancy and use of lands prior to the assertion of sovereignty by the Crown. For those reasons, Aboriginal title is not registrable under the *Land Title Act*.

44 The same considerations apply to a caveat. From a practical point of view the principal difference between a caveat and a certificate of pending litigation is that the caveat has a predetermined life span during which nothing can be registered. Property subject to a certificate of pending litigation can be dealt with, although subsequent dealings may be subordinated to the claim being advanced.

45 The Supreme Court of Canada decision in *Delgamuukw* does not address the issue of registration of Aboriginal title. Nor does it cast any light on the impact that Aboriginal rights have on privately owned lands as opposed to Crown lands. According to *Delgamuukw*, it is possible for two Aboriginal groups to have Aboriginal title over the same land provided those interests can be reconciled and coexist. *Delgamuukw* does not say that this is so with respect to fee simple title. It suggests no mechanism for reconciling fee simple and Aboriginal rights.

46 This case pits Aboriginal title against fee simple title. Most of the fee simple lands in this province are derived from Crown grants issued in an era when government knew less about their obligations to Aboriginals than now. Many of these lands have been developed at substantial cost to their owners. Can this be ignored? Can Aboriginal rights extend to fee simple lands? Is it possible to reconcile Aboriginal title and fee simple title at this late stage? Should the fee simple title be declared null and void as requested by the Band or is the Band's claim reduced to a claim in damages if Aboriginal rights were in fact wrongfully and irrevocably infringed by fee simple grants? These are only some of the questions that arise in this litigation.

47 *Delgamuukw* does not address most of those questions, nor does it by implication or otherwise overrule *Uukw*. Consequently, the appeal from the decision of the Registrar is dimissed.

Appeal dismissed.