

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Tseshaht First Nation v. Huu-ay-aht  
First Nation,***  
2007 BCSC 1141

Date: 20070727  
Docket: S-074630  
Registry: Vancouver

Between:

**Tseshaht First Nation, also known as the Tseshaht Indian Band**

Plaintiff

And:

**Huu-ay-aht First Nation, also known as the Huu-ay-aht Indian Band**

Defendant

Before: The Honourable Mr. Justice Meiklem

## **Reasons for Judgment**

Counsel for the Plaintiff

K. Ramji  
C. Macfarlane

Counsel for the Defendant

J.J. Arvay, Q.C.  
S. Dubinsky

Date and Place of Hearing:

July 25-26, 2007  
Vancouver, B.C.

[1] The plaintiff seeks an interlocutory *quia timet* injunction to restrain the defendant from carrying out a ratification vote which is scheduled for Saturday, July 28, 2007 in respect of a Final Agreement reached under the British Columbia Treaty Process and initialled by the defendant and four other Indian Bands on December 9, 2006.

[2] Short leave was granted for the hearing of the application and the imminence of the scheduled ratification vote dictates that these reasons will be more concise than I would prefer them to be. The parties are assured that all submissions have been considered.

[3] The essence of the plaintiff's application is that the provisions of the Final Agreement are inconsistent with an agreement entered into between the plaintiff and the defendant and a third party, the Uchucklesaht Tribe regarding land selection, resource management and harvesting rights on Tzartus Island in Barclay Sound.

[4] The Western Overlap Agreement ("WOA") was entered into on February 18, 2000 at a time when the Huu-ay-aht and Tseshah and the Uchucklesaht Tribe were all at a common treaty table under the umbrella of the Nuuchahnulth Tribal Council ("NTC") which represented 13 First Nations and Tribes in the area. In order for the First Nations to meet the requirements of the treaty process they were required to identify their overlaps with other First Nations and were required to have begun addressing the overlaps. The treaty commission's policy was to leave it to the First Nations to address their overlap issues in their own way. The Huu-ay-aht, Tseshah

and Uchucklesaht entered into the WOA in order to address the overlap issue and proceed with treaty negotiations.

[5] The negotiators for the NTC and the governments of British Columbia and Canada initialled an agreement in principle on March 10, 2001 but in the consultation and approval process only half of the First Nations that were members of the tribal council approved the agreement in principle. The Tseshaht were amongst the First Nations that did not approve the March 2001 agreement in principle. Five of the First Nations that had approved the agreement in principle, including the defendant, came together to form the Maa-nulth First Nations. The Maa-nulth First Nations approached British Columbia and Canada about negotiating a final agreement based on the 2001 agreement in principle and this ultimately led to the Maa-nulth agreement in principle in October 2003 and to the Maa-nulth final agreement in December 2006.

[6] I will now set out portions of the WOA that are relevant to the plaintiff's anticipatory breach allegation:

THE HUU-AY-AHT FIRST NATION, TSESHAHT AND  
THE UCHUCKLESAHT TRIBE:

AGREEMENT

REGARDING TZARTUS ISLAND

Our Nations agree that it is our wish to record our agreement regarding Tzartus Island and therefore that in perpetuity:

A. THE HUU-AY-AHT FIRST NATION HEREBY:

1. Acknowledges that there will be no contest to the interests of Tseshaht with regard to land selection and resource

management on that part of Tzartus Island that is to the west of the line shown on the attached map;

2. Confirms that treaty settlement land for the Huu-ay-aht First Nation on Tzartus Island will exist only on that part of Tzartus Island that is to the east of the line shown on the attached map;
3. Acknowledges:
  - a. That there will be no contest to the interests of the Uchucklesaht Tribe with regard to a trapline held by a citizen of the Uchucklesaht Tribe on the date when this agreement is signed; and
  - b. That this trapline area includes all of Tzartus Island;
4. Confirms our respect for the traditional resource harvesting rights of Tseshaht and the Uchucklesaht Tribe on Tzartus Island.

...

D. OUR THREE NATIONS HEREBY JOINTLY AGREE:

1. That a joint resource management board should be formed with equal representation from our Nations;
2. The purpose of the joint resource management board will be to manage the traditional food resources in the area outlined on the attached map and to deal with any disputes that may arise regarding total allowable food harvests in that area.

[7] The Final Agreement includes provisions which provide each of the signatory First Nations with constitutionally protected rights, privileges and opportunities relative to delineated First Nation Areas which I understand are the areas claimed by each First Nation as its traditional territory. The First Nation Area of the Huu-ay-aht First Nation includes the whole of Tzartus Island and smaller islands located off the western shore of Tzartus Island.

[8] The plaintiff's statement of claim identifies four provisions in the Final Agreement that the plaintiff alleges are inconsistent with the WOA provision that the Huu-ay-aht would not contest the interests of the Tseshaht regarding resource management on the western portion of Tzartus Island. Specifically those provisions are (a) the exclusive right granted to the Maa-nulth Nations to harvest inter-tidal bivalves off the western shore of Tzartus Island which is wholly within the Huu-ay-aht First Nation Area; (b) resource management rights and opportunities throughout the Huu-ay-aht First Nation Area; (c) the opportunity to add land from the First Nation Area to the First Nation lands in fee simple; and (d) resource revenue sharing.

[9] The defendant argues that none of these provisions are inconsistent with the express terms of the WOA. In the defendant's submission the Huu-ay-aht did not agree that they would refrain from asserting their own interests with respect to the west side of Tzartus Island; they simply agreed that they would not challenge the interests of the Tseshaht with regard to land selection and resource management and agreed that treaty settlement land for the Huu-ay-aht First Nation on Tzartus Island would exist only on the east side.

[10] The parties take fundamentally different views of the nature of the WOA. Les Sam, Chief Councillor of the Tseshaht First Nation has deposed that the Tseshaht "have treated" the agreement as a settlement of the mutually agreed upon boundaries between Tseshaht territory and the Huu-ay-aht territory. The statement of claim pleads that the spirit and intent of the WOA was to clearly mark the mutually agreed territorial boundary between the two First Nations on Tzartus Island. Robert

Dennis, Chief Councillor of the Huu-ay-aht First Nation deposes as follows in his July 20, 2007 affidavit:

31. I participated in the discussions that were facilitated by the NTC, and I signed the Overlap Agreements on behalf of the Huu-ay-aht. The purpose of the Overlap Agreements was to allow the parties to move forward in the treaty process. They constitute a political protocol that was entered into at a time when the Huu-ay-aht and the Tseshahht were both in treaty negotiations together. The intent was to establish an understanding between the parties as to how they would pursue the negotiations and manage the overlap areas pending the conclusion of a treaty. There was never an understanding between the Huu-ay-aht and the Tseshahht that the Overlap Agreements would restrict the parties if one of them withdrew [from] the treaty process.
32. The Overlap Agreements also confirmed the mutual respect of the parties for the traditional resource harvesting rights of each other in the areas of the overlaps. The parties agreed to form a joint resource management board to manage the traditional food resources in the area of the overlaps and to deal with any disputes that might arise in those areas. The intent was to allow our traditional practices to determine how we managed the shared resources in the area of the overlaps. The Huu-ay-aht have attempted to establish a joint management board as contemplated by the Overlap Agreements, but the Tseshahht have not co-operated.
33. The Overlap Agreements were not intended by the parties to set or alter the boundaries of the traditional territories of the Huu-ay-aht, Tseshahht or Uchucklesaht. They were never intended to determine in any way the aboriginal title or aboriginal rights of any of the parties.
34. The Overlap Agreements have not been ratified by the Band Council, the membership of the Huu-ay-aht, or the ha'wiih (hereditary chiefs). As elected Chief, I have no authority to alter the boundaries of Huu-ay-aht territories. That authority rests with the ha'wiih and the Ta'yii Ha'wilh, Chief Peters. As a Nuuchah-nulth Nation, the Tseshahht are fully aware of this law, and would have known in 2000 when I signed the Overlap Agreements that I had no authority to alter the boundaries of Huu-ay-aht territories.

35. I disagree with Chief Sam's statement in paragraph 9 of his first affidavit that the Tseshah have treated the Western Overlap Agreement as a settlement of the mutually agreed boundaries between Tseshah territory and Huu-ay-aht territory. For example, the Tseshah obtained a forest license through a company called Tsemac that grants them harvesting rights on the east, and supposedly Huu-ay-aht, side of Tzartus Island. The Tseshah have also obtained a forest development permit under their Forest and Range Agreement with the Province for land which is south of Coleman Creek, within the supposedly Huu-ay-aht territory under the Northern Overlap Agreement.

[11] In my view Chief Dennis's characterization of the document as a political protocol not intended to restrict the parties if one of them withdrew from the treaty process is a strategic understatement. I note that Mr. Dennis's July 5, 2007 letter to the Tseshah First Nation to the attention of Chief Les Sam and councillors stated "Our shared territory agreements, signed in 2000, set out how we will work together in these overlap areas." (Emphasis added)

[12] Chief Dennis asserts in paragraph 43 of his July 20, 2007 affidavit:

43. As set out below, the Huu-ay-aht intend to exercise their opportunities under the Final Agreement in a manner which is consistent with the Overlap Agreements, even though the Tseshah withdrew from the common NTC treaty table with the Huu-ay-aht. The approach of the Huu-ay-aht has been, and will continue to be, to seek the support of the Tseshah to develop a collective strategy enabling both First Nations to achieve their objectives. The Huu-ay-aht will continue to respect the interests of the Tseshah on matters relating to land selection and resource harvesting on the west side of Tzartus Island.

And in paragraph 45:

45. The Huu-ay-aht encourage the Tseshah to continue consultations with the Crown and to seek accommodation of Tseshah concerns arising from the Maa-nulth Final Agreement. In accordance with the Western Overlap Agreement, the Huu-

ay-aht will not contest accommodation with respect to land selection or resource management which the Tseshah seek from the Crown on the west side of Tzartus Island.

[13] Chief Dennis has therefore clearly acknowledged the status of the WOA as a binding agreement. This is appropriate in light of the language which speaks of an agreement “in perpetuity”, and does not restrict the agreement to the duration of the parties sitting together at a common treaty table.

[14] On July 19, 2007 the Huu-ay-aht Band Council passed the following resolution:

WHEREAS the Tseshah First Nation has commenced an action against the Huu-ay-aht First Nation in the Supreme Court of British Columbia, alleging that the Maa-nulth First Nations Final Agreement (the “Final Agreement”) is inconsistent with the Huu-ay-aht First Nation, Tseshah First Nation and Uchucklesah Tribe Agreement Regarding Tzartus Island (the “Overlap Agreement”);

WHEREAS the Tseshah intend to apply to the Court on July 25, 2007, for an injunction against the Huu-ay-aht holding a treaty ratification vote on July 28, 2007;

WHEREAS the Huu-ay-aht dispute the Tseshah’s allegations;

WHEREAS the Huu-ay-aht wish to assure the Tseshah that the Final Agreement is not inconsistent with the Overlap Agreement, and that the Huu-ay-aht intend to exercise their treaty rights and opportunities under the Final Agreement in a manner which honours their protocol with the Tseshah under the Overlap Agreement;

BE IT RESOLVED THAT:

1. The Huu-ay-aht will not exercise their Maa-nulth First Nation Fishing Rights in respect of inter-tidal bivalves in the area

identified as Part 1, Plan 3 of Appendix P of the Final Agreement (Meade and Geer Islets).

2. The HUU-ay-aht will, in the exercise of their resource management opportunities under Chapter 6 of the Final Agreement, not contest the interests of the Tseshah in resource management of the west side of Tzartus Island, and respect the traditional harvesting rights of the Tseshah on Tzartus Island.
3. The HUU-ay-aht will not ask Canada and British Columbia to consent to adding a parcel of land on the west side of Tzartus Island to the HUU-ay-aht treaty settlement lands under the Final Agreement.

[15] The plaintiff is naturally concerned about the longevity of the statement of intent in the Band Council considering that the Band will be dissolved once the treaty is completely ratified and brought into effect. Nevertheless, the existence and passage of the Band Council is certainly relevant in considering whether to characterize the act of holding a ratification vote on July 28, 2007 as an anticipatory breach of the WOA. Clearly the Band Council Resolution and Chief Dennis's affidavit negate the theory that the vote is an unequivocal indication of an intention not to honour the WOA.

[16] The Tseshah argue that the Band Council Resolution is a concession by the HUU-ay-aht that the Final Agreement actually breaches the WOA. I do not agree with that characterization.

[17] The plaintiff seeks an interlocutory injunction preventing the defendant from proceeding with the ratification vote on the Final Agreement until the Final Agreement is amended to be consistent with the WOA. The plaintiff's submissions, consistent with the content of a July 5, 2007 letter from Chief Les Sam to Chief

Robert Dennis, is that the amendment to bring about consistency would include moving the current western boundary of the Maa-nulth First Nations Area for the Huu-ay-aht First Nation eastward to traverse across Tzartus Island at the same location as the line on the WOA. This would of course have the effect of actually eliminating the western overlap and would be an outright ceding of the western portion of the Huu-ay-aht traditional territory. In my view there is no chance whatever that a court would place that interpretation on the WOA. None of the plain language of the agreement supports that interpretation. The joint resource management provisions support the contrary and there is no evidence that it was ever intended to be a boundary agreement.

[18] I agree with the defendant's argument that the WOA does not contain any covenants on the part of the Huu-ay-aht First Nation to refrain from its own resource harvesting rights or other interests on the west side of Tzartus Island.

[19] In my view the Final Agreement can co-exist with the WOA. The WOA can form the basis of cooperative management of the respective interests of the Tseshah and Huu-ay-aht on Tzartus Island.

[20] As I pointed out to counsel in the course of the hearing, an interlocutory injunction in the terms sought affects the rights of the parties to the Final Agreement that are not parties to this action. Counsel from that point forth pursued the matter of an interim injunction for a matter of approximately three months to provide an opportunity for the parties to pursue a resolution of their differences.

[21] In my view there is not a serious question to be tried in respect of whether the ratification vote amounts to an anticipatory breach of the terms of the WOA. In my view the Final Agreement can co-exist with the WOA. To the extent that there is any potential inconsistency or potential future conflict, Mr. Dennis's affidavit and the Band Council Resolution negate any reasonable apprehension of imminent breach.

[22] There is a serious question to be tried as to the interpretation and enforceability of the WOA, but that question is not one that provides the basis for the extraordinary remedy of a *quia timet* injunction.

[23] Even if I am wrong in determining that there is no fair question to be tried on the anticipatory breach, the balance of inconvenience overwhelmingly favours the position of the defendant.

[24] The harm that the Tseshah fear if the injunction is not granted and the ratification vote is held (predicated on their belief that the ratification is itself an anticipatory breach) is itemized in their argument as follows (a) there will be a wrongful entrenchment of the Huu-ay-aht's position regarding its treaty rights on the western half of Tzartus Island; (b) it will severely infringe on the Tseshah's aboriginal title and rights to the western half of Tzartus Island; (c) it will make it even more difficult for the Final Agreement to be amended; and (d) it will likely result in a second ratification vote if the Final Agreement does need to be amended.

[25] In my assessment of the Final Agreement, the defendant is correct in arguing that the non-derogation provisions of the Final Agreement are a complete answer to the suggestion that the Tseshah's aboriginal title and rights to the western half of

Tzartus Island will be severely infringed. In any event, the Tseshaht's claim to aboriginal right and title to the western half of the Island does not arise from the WOA but rather from traditional use; the Huu-ay-aht's overlapping claim to aboriginal right and title to the whole of the Island arises in the same manner. The Final Agreement does not materially alter the status quo in respect of the resource management rights and opportunities of the Huu-ay-aht on the western half of the Island. The Final Agreement does not confer authority over resources to the Huu-ay-aht and they are provided only with an opportunity to make recommendations and offer input to federal and provincial decision-making bodies. If anything, this is less empowering over resource management vis a vis the plaintiff than the provisions of the WOA.

[26] I accept the argument that the ratification may make subsequent amendment of the Final Agreement marginally more difficult to achieve, but the July 28 vote is only the first of five ratification votes that are necessary by the First Nations and the defendant points out that the continued existence of this action to declare the enforceability of the WOA provides a continued incentive to reach accommodation.

[27] I have already set forth my opinion that the Final Agreement and the WOA can co-exist. It occurs to me that a form of accommodation short of amendment of the Final Agreement may well be better suited to deal with the overlap issue, which the treaty process requires the competing First Nations to address. I suggested to the parties that a possible accommodation might be a consent order of the court clarifying and validating the WOA. While I have found there is a serious question to be tried in respect of interpreting and enforcing the WOA, the middle-ground

interpretation of that agreement as a long-term co-management agreement is an obvious solution of mutual benefit, given the respect each party has for the other's traditional resource harvesting rights.

[28] As to the plaintiff's argument of the likelihood of the need for a second ratification vote, this is not a factor of harm or inconvenience weighing on the side of the plaintiff. If the July 28 vote is enjoined, the result is just as expensive as the holding of two ratification votes, because nearly all the considerable expense (estimated at \$500,000) of the July 28 vote has already been incurred. This is, in other words a neutral factor.

[29] I find that there is no appreciable harm to the interests of the Tseshaht that will occur if the Huu-ay-aht ratification vote proceeds on July 28.

[30] On the other side of the coin, there is the obvious significant financial harm of costs thrown away on preparation for the vote to be held tomorrow and I accept that considerable harm may be done to the treaty negotiation process generally and the Maa-nulth Nations Final Agreement specifically if the process is enjoined pending the trial of what I see as, if not doomed to fail, a very weak case to have the Final Agreement amended to redraw the lines of the Huu-ay-aht First Nation Area on the basis that the present area includes territory legally ceded to the plaintiff in the WOA.

[31] For the reasons set out above, the injunction application is dismissed with costs to the defendant on Scale B.

"MEIKLEM J."