Private Prosecution

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June 17, 2008

Evidence List

a) Introduction

- Summary of Charges
- Definition of Charges
- Summary of Haida v. B.C. - 'Duty to Consult and Accommodate'
- Summary of Colour of Right

b) Documents

1) R v. Noel 2001 NBAC 80 (CANLII) - Extortion
2) Supreme Court – Haida v. B.C.
3) Ontario Attorney General's Colour of Right submission
4) 1536412 Ontario Ltd. Endorsement
5) 1536412 Ontario Ltd. Factum
6) Dave Eccles Affidavit
7) 1536412 Court Order of June 10, 2008
8) Brantford Motion
9) Brantford Court Order
10) News Reports

c) Video

1) Video of Dan Valentini – Owner of Hagerville property
2) Video of Dave Eccles telling Ruby & Floyd to leave

d) Witnesses

1) Jeff Parkinson – video
2) Dave Eccles – Owner of property in Cayuga
[redacted] [Witness didn't appear in court]
4) Duck Sloat – Haldimand Council member – [Appeared at Court but unavailable when called to the stand]

Summary of Charges

Ruby Montour

1 Count of Extortion s346.1

2 Counts of Mischief –Interfere with lawful use, enjoyment or operations of property 430(1)(c)

1 count of Intimidation 423(1)(g)

Floyd Montour

1 Count of Extortion s346.1

3 Counts of Mischief –Interfere with lawful use, enjoyment or operations of property 430(1)(c)

1 count of Intimidation 423(1)(g)

Definition of Charges

Extortion:

346. (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

R v. Noel 2001 NBAC 80 (CANLII) para 11:

> It is to be noted that the offence of extortion includes within it the notion of an attempt. It essentially involves four elements:
>
> (i) a threat;
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> (ii) an intent to obtain "anything" by means of the threat;
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> (iii) an inducement or attempted inducement; and
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> (iv) the absence of reasonable justification or excuse for the use of the threat and the making of the inducement.

Mischief:

430. (1) Every one commits mischief who willfully

(*a*) destroys or damages property;

(*b*) renders property dangerous, useless, inoperative or ineffective;

(*c*) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or

(*d*) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

Intimidation:

423. (1) Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing,

(*g*) blocks or obstructs a highway.

‘Duty to Consult and Accommodate’

Haida Nation v. British Columbia

Several Supreme Court decisions have held the Crown to a high standard in consulting with native peoples and accommodating their concerns. The *Haida Nation* case, below was intended by the Court to set out a framework for fulfilling these duties in cases where land is subject to a “credible but unproven claim.’ The action was brought by a native group against the Province of British Columbia and a forestry company named Weyerhaeuser with respect to its contract to cut timber on Crown land under claim.

Haida Nation v. British Columbia (Minister of Forests) [2004]

http://scc.lexum.umontreal.ca/en/2004/2004scc73/2004scc73.html

B. *The Source of a Duty to Consult and Accommodate*

25. Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests

37. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate.

(Intro, para 6) “…the [Crown’s] duty to consult and accommodate applies to the provincial government.”

Do third parties have a duty to consult and accommodate?

The ‘Duty to Consult’ as set out in *Haida* is often quoted by native media and people as imposing an obligation on landowners to consult with them before improving their properties. Developers have been accused by natives of breaking the law by failing or refusing to do so, and have had their worksites shut down by illegal occupations under threat of violence should they continue to work without paying demanded fees.

The Supreme Court, however, specifically addressed this issue, providing clear statements that third parties have NO duty to consult or accommodate, that only the Crown is obligated to do so, and only the Crown is liable for failing to do so.

Limitations on the duty to consult and accommodate

- 56. “…third parties are under no duty to consult or accommodate Aboriginal concerns…”
- 10. “The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people’s concerns….”
- (Intro, para 5) Third parties cannot be held liable for failing to discharge the Crown’s duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown.

- 55. Finally, it is suggested…that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result.

- (Intro, para 4) The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith.

- 42. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.

- 50. "…the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests."

- 48. This process [of consultation] does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather what is required is a process of balancing interests, of give and take.

- 53. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. However, the ultimate legal responsibility for consultation and accommodation rests with the Crown.

Summary

- The Crown – federal and provincial governments – has a duty to treat native people honourably and to consult with them for credible claims that are not yet proven.

- Natives must act in good faith and not frustrate the consultation process.

- The Crown is not under a duty to reach an agreement, only to consult in good faith.

- It is the Crown that has the duty and legal liability to consult and accommodate the concerns of aboriginals, <u>not</u> third parties such as municipalities and private property owners.

- Natives cannot impose a duty or liability on third parties such as builders they are not subject to simply because it's easy or convenient.

- Natives do not have veto over development.

Applying the Haida Nation decision - TRTFN v. British Columbia

Taku River Tlingit First Nation v. British Columbia, [2004]

http://scc.lexum.umontreal.ca/en/2004/2004scc74/2004scc74.html

The *Taku River Tlingit First Nation* (TRTFN) decision by the Supreme Court applied the *Haida Nation* precedent in dismissing an action brought to stop Redfern Resources Ltd. from building a road through their traditional territory in connection with their reopening of an old mine.

> (Intro, para 3) The TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its inclusion in the Province's treaty negotiation process. While the proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title, the potential for negative derivative impacts on the TRTFN's claims is high.
>
> 22. On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN in making the decision to reopen the Tulsequah Chief Mine. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

Summary

- The Court ruled that the Province had done their best to consult and accommodate, and that it was under no duty to reach an agreement with the TRTFN even though there was a strong case supporting the land claim, and even though there was a potential for serious damage to the TRTFN interests.

- The Court refers to the "Province's" duty and the "Crown's" obligations throughout the TRTFN decision, reflecting the Haida doctrine that third parties, i.e. Redfern Resources, had no duty to consult or accommodate Aboriginal concerns.

Conclusions

The guidance offered by the Supreme Court of Canada in *Haida Nation* and *Taku River Tlingit First Nation* appears to support several general conclusions:

- The Crown – provincial and federal governments – have the duty to consult and accommodate, not third parties.

- Native groups cannot impose a duty on third parties – be it a municipality, business, individual or land owner - to live up to the obligations of the Crown. They have no right to demand money in return for the right to build. No right to trespass and occupy private property or commit other criminal acts. No right to interfere in the operation of a business. They must take up their dispute with the Crown, not with the third party.

- Third parties are subject to the laws of the Crown, not to the demands – legal or illegal - of native groups.

- The business of the province does not come to a stop when a land claim has been made.

Colour of Right

Lawyers for the Ontario Ministry of the Attorney General submitted a legal opinion At the Ipperwash Inquiry regarding 'Colour of Right' on June 28, 2006. They defined the term 'Colour of Right' as:

> As a defence to a criminal charge, colour of right involves a lack of *mens rea*. In that sense, colour of right is "an honest belief in a state of facts or law which, if it existed, would be a legal justification or excuse." If upon all the evidence it may fairly be inferred that the accused acted under a genuine misconception of fact or law, there would be no offence committed because there is colour of right.
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> Attorney General's submission to Ipperwash Inquiry, June 28/06, Part 1 – Submissions on the Evidence, Colour of Right, p. 17

Moral convictions and/or the denial of Canadian sovereignty

It takes more than just a belief to have the Colour of Right defence. The Attorney General addressed the moral belief that someone may have in their rights with the following statements, as submitted to the Ipperwash Inquiry:

> 50) The case of *R. v. Drainville* dealt with a protest over the construction of a road over lands in the Temagami area that the accused believed belonged to aboriginal people. In rejecting the defence of colour of right, the judge addressed the issue of moral claims and the rule of law:
>
> > "As noble and honourable his motives might be, they are really irrelevant in our considerations pertaining to "colour of right". Unless it can be demonstrated to this Court, that his honest belief in the existence of a state of facts, in this case title to the subject lands, is based on a mistake of fact or law, his defence cannot succeed on moral conviction alone. Moral convictions though deeply and honestly felt, cannot transform illegal actions into legal ones; only the "rule of law" must prevail."
> >
> > *R. v. Drainville* (1991), 5 C.R. (4th) 38 (Ont.Ct.(Prov.Div.)) at pp. 12-13
>
> 51. The test for the presence of an honest belief is subjective, but there must be an air of reality to the claim before the defence is put to the jury.
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> *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.). - *R. v. Robertson (1987), 58 C.R. (3d) 28 (S.C.C.).*
>
> 52. In *R. v. Roche*, the Court considered the "air of reality" requirement in relation to an aboriginal protest over land at the Goose Bay Airport. The court found that denial of the fact of Canadian sovereignty over the land and jurisdiction of the Canadian courts was "not a reasonable or practical assertion in the 1990's", and therefore did not assist the accused in asserting an air of reality.

It should be noted that the Attorney General quoted the legal case of R. v. Roche to point out that it doesn't matter whether aboriginals deny the fact of Canadian sovereignty or reject the jurisdiction of Canadian courts.

> 56. An aboriginal right does not exist merely because it has been asserted to exist. In the context of colour of right, there must be some basis for a belief in the existence of aboriginal title beyond a bare assertion.
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> *R. v. Billy [2005] B.C.D. Crim. 250.30.55.00-02 (B.C.S.C.) at pars.11, 15*

57. The case of *R. v. Billy* involved the blockade of the road to Sun Peaks, which had existed as a public highway for more than 20 years. The accused were convicted of intimidation at trial, and their appeal was dismissed. The appellate judge had this to say about the protesters' bare assertion of ownership:

> "Asserting aboriginal title on a roadway that has existed for some time, as the appellants in this case do, is not sufficient to raise a prima facie case as to their entitlement. The trial judge commented that the appellants' claim was based on a "presumed entitlement" and that they "posit an entitlement to….lands which, rather than having title, they claim title.
>
> …..The trial judge rightly concluded that a bare claim of ownership of the land was insufficient [to establish colour of right]."
>
> *R. v. Billy [2005] B.C.D. Crim. 250.30.55.00-02 (B.C.S.C.) at pars.14, 15*

58. The case of *R. v. Penashue* also involved a protest at the Goose Bay airport by Innu. Aboriginal protestors gained entry to the airbase that had been in existence for over 40 years by rushing the gate and going under barriers, despite warnings by a security guard and a request by the R.C.M.P. that they leave the airbase. The trial judge reviewed the law with respect to colour of right and rejected the defence. In his decision, the learned judge observed that only legal means can be used to protest wrongs or assert rights:

> "It is clear from the evidence that the accused was involved in a protest. Furthermore, even using a subjective test, while he felt he and his people owned the land it is clear he also knew that by fences, signs, a barricade, etc., that he was not authorized or permitted to go inside the fence and to do so would likely mean he was committing a breach of the law. I do not feel the accused honestly believed he was not doing something unlawful when he went onto the base…
>
> **If the acts of the accused amounted to a defence in this case this would basically mean that if one believes in a cause, no matter what surrounding circumstances exist, illegal means can be used to promote that cause. There are obviously lawful methods to reacquire property that has been improperly possessed including civil proceedings…**
>
> **Certainly no one can breach the criminal law even to protest a civil wrong committed against them. Only legal means can be used to protest such acts.**
>
> *R v. Penashue (1991), 90 Nfld. & P.E.I.R. 207 (Nfld.Prov.Ct.) at pars. 27, 28, 38*

'No one can breach the criminal law even to protest a civil wrong…':

The judge in the *R. v. Penashue* case above states that 'no one can breach the criminal law even to protest a civil wrong committed against them."

Considering that 'colour of right' is a defence anyone could use, anyone with a strong belief in a cause could do illegal activities and justify it through a 'colour of right defence', which is what the judge in the case above points out. The court system allows you to bring cases forward to get results and thus personal criminal action versus civil legal action doesn't fall under the defence of 'colour of right'.

Let's say I allowed my neighbour to use my lawnmower and he refused to return it. Clearly it is owned by me and he is unlawfully refusing to return it, but does that mean I have the right to smash the window in his house so that I can enter his home and get my lawnmower from his basement?

We have civil courts and the police for such matters.

Burial site and Colour of Right:

Furthermore, according to the Attorney General, the mere fact that there is a burial site on your land doesn't give Native people the 'colour of right' over your land.

67. Lawyers involved at the IMC meetings were of the opinion that the existence of a burial site in the Park did not create a colour of right issue or affect the availability of legal remedies, particularly an injunction.

Hutchison, Transcript of Evidence, Aug. 29/05, pp. 74-76
Jai, Transcript of Evidence, Aug. 30/05, pp. 205-206
McCabe, Transcript of Evidence, Sept. 29/05, p. 231
Christie, Transcript of Evidence, Sept. 26/05, p. 75

Ministry of the Attorney General conclusion re 'Colour of Right' in Ipperwash

73. It is submitted that the Province was aware of the issue of colour of right when the Interministerial Committee met in September of 1995, and that counsel fairly raised the possibility that the Aazhoodena might wish to argue they had colour of right when he appeared in court to seek an injunction.

74. **There is no jurisprudence, even as it has evolved to date [June 2006], that supports the view that the concept of "colour of right" entitled the Aazhoodena to act as they did in occupying Ipperwash Provincial Park in September, 1995.**