University of Victoria Law

INDIGENOUS LAW RESEARCH UNIT

ILRU Case Note: In the matter of *R v. Joseph Thomas* and *R v. Christopher Brown* and Esquimalt and Ditidaht Nations

Context: Two Coast Salish men from the urban Esquimalt nation were charged under the *BC Wildlife Act* with two counts of hunting/poaching. The two men initially asserted what they believed was a treaty right to hunt on unoccupied Crown land. However, the Ditidaht[1] (in whose historic territory they had been hunting), were in favour of conservation, and the conviction of poachers. It also became clear that the two hunters had not sought permission from the Ditidaht, nor had they complied with Indigenous conventions in the manner of their hunt, breaching both Ditidaht and Esquimalt Salish legal principles, and bringing shame on the communities.

Application: The case was heard in the First Nations Court by Justice Marion Buller (now Chief Commissioner for the MMIWG Inquiry). With the consent of the Crown, the accused and the two concerned nations, the Court made space for the Esquimalt and Ditidaht communities to work together, using their respective laws and procedures, to resolve the case.

The hearing, drawing on Coast Salish procedures for dispute resolution, involved a larger number of interested parties, including Elders, Chiefs, Counsellors and other members of the Esquimalt, Cowichan and Ditidaht nations. The communities spoke to not only current treaty and provincial law, but also to older laws between First Nations respecting hunting. They agreed that seeking permission from the other community was a fundamental law that continued to have force. The hunters accepted responsibility for their conduct, and agreed to accept the resolution that would be determined by the nations.

A number of procedural steps were necessary, as the violation of law here imposed responsibilities on not only the two hunters, but the Esquimalt community as a whole. As a result, the hunters were required to visit each household in Esquimalt to tell them what they had done, and to invite them to a meeting, which would be held in the Esquimalt Long House and involving people from both nations. At this meeting (180 people in attendance), representatives of the Ditidaht were wrapped in blankets and presented with gifts as a way of acknowledging the harm that was done, and committing to the re-establishment of good relations. The hunters are to refrain from hunting for a year, and are required to do work for the community, doing maintenance and service at the longhouse at least twice a week for the year. This was to function not as punishment, but as an opportunity to be a model for youth, and to demonstrate the continuing obligations and operation of Coast Salish and Ditidaht law.

Significance: This case is a powerful and hopeful example of the application of Indigenous Law in ways that provide a meaningful resolution to a concrete problem related to hunting (whether understood from the point of view of conservation, treaty rights, or community safety). It is also a powerful example of Indigenous legal principles and procedures providing a framework for

[1] The Ditidaht are part of the Nuu-Chah-nulh First Nations. The Ditidaht and the Pacheenaht people speak closely-related dialects of a language called Nitinaht or "Ditidaht." Ditidaht, is one of three closely-related languages (Nitinaht, Makah, and Westcoast or Nuu-chah-nulh) forming the South Wakashan sub-group of the Wakashan Language Family. The Nitinaht and Makah languages are much more closely related to each other than they are to Nuu-chah-nulh. From http://www.ditidaht.ca/.

the resolution of challenges that are inter-societal. That is, this is not simply the resolution of a hunting offence under provincial law, or the application of novel sentencing principles in the context of Indigenous offenders. It shows the power of Indigenous law and procedure to create the conditions for people from different legal traditions to come together to work through a shared problem in ways that draw in a range of appropriate decision-makers, who are positioned to better identify the challenges, and construct meaningful solutions. Note that the procedures used also supported an increase in legal literacy (increased familiarity in each community with the legal terrain of the other), and the building of community relationships (Esquimalt, Ditidaht and Provincial Crown).

Even more powerfully, in the process of resolving this specific hunting/poaching claim, the two communities were able to identify a bigger systemic challenge: given the pattern of land development in this territory, the Esquimalt do not have access to many areas in which to exercise hunting rights. There is thus a pressure to hunt in the other territory with potential to impact on wildlife. The result of the case has thus also been that the two First Nations have begun discussions aimed at developing protocols to govern hunting in Ditidaht territory by Esquimalt members, to support the ability of people in urban settings to have access to hunting.

In short, what could have otherwise been a conventional sentencing in a quasi-criminal hunting case has instead produced an outcome which:

1. Attends to questions of human safety (drawing on indigenous laws and protocols governing ways, times, and places in which hunting can happen),
2. Attends to questions of conservation (drawing on Indigenous laws related to stewardship of land and animals),
3. Attends to questions of inter-community conflict, drawing on the point of contact as an occasion to work together to collectively address a shared problem of land use.

ADDITIONAL RESOURCES:

- Here is a link to a newspaper account of the case: http://www.theglobeandmail.com/news/british-columbia/nw-bc-aboriginal-hunting-0108/article28093390/
- Case Report (signed by Chiefs of the Esquimalt and Ditidhat First Nations)
- ILRU, Coast Salish Legal Traditions Report
- ILRU, Coast Salish Civil Procedure Report