IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Council of the Haida Nation v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development),* 2018 BCSC 1117

Date: 20180705
Docket: S-186104
Registry: Vancouver

Between:

The Council of the Haida Nation and Peter Lantin, suing on his own behalf and on behalf of all citizens of the Haida Nation

Petitioners

And:

The Ministry of Forests, Lands, Natural Resource Operations and Rural Development, and Leonard Munt, District Manager, Haida Gwaii Natural Resource District on behalf of Her Majesty The Queen in Right of the Province of British Columbia, and Husby Forest Products Ltd.

Respondents

Before: The Honourable Mr. Justice G. C. Weatherill

Reasons for Judgment

Counsel for the Petitioners:	G.L. Terri-Lynn Williams-Davidson Elizabeth Bulbrook David Paterson Jessica Black, Articled Student
Counsel for the Respondent, Husby Forest Products Ltd.:	Kevin O'Callaghan T. Ahmed H. Roskey
The Respondents, The Ministry of Forests, Lands, Natural Resource Operations and Rural Development, and Leonard Munt, District Manager, Haida Gwaii Natural Resource District on behalf of Her Majesty the Queen in Right of the Province of British Columbia	No one appearing

Place and Dates of Hearing:	Vancouver, B.C. June 27-28, 2018
Place and Date of Judgment:	Vancouver, B.C. July 5, 2018

Introduction

[1] The Petitioners seek an interim order staying certain permits authorizing the logging of trees by the Respondent, Husby Forest Products Ltd. ("Husby"), pending the determination of the Petition in this proceeding, the hearing of which is scheduled for August 27 – 30, 2018.

[2] Husby opposes the application. The remaining Respondents take no position and did not appear.

Applicable Law

[3] The applicable law is not in dispute.

Legislative Framework

[4] The *Forest Act*, R.S.B.C. 1996, c. 157 regulates the logging of Crown timber. It allows the Minister of Forests, Lands, Natural Resource Operations and Rural Development (the "Minister") to designate certain land as a Timber Supply Area ("TSA") (section 7). Pursuant to s. 5 of the *Haida Gwaii Reconciliation Act*, S.B.C. 2010, c. 17, and s. 8(1) of the *Forest Act*, at least once every 10 years, the Haida Management Council and Chief Forester, respectively, must determine an "Allowable Annual Cut" ("AAC") in a TSA, which is the target amount to be logged annually.

[5] Under the *Forest Act*, the Minister may specify that a portion of the AAC in a TSA is available to be granted for harvest and may enter into forest licences to grant rights to harvest timber. Forest licences are volume-based. Forest licences also provide the ability to apply for cutting permits that authorize the holder of the forest licence to harvest the AAC from a particular area in the TSA (sections 10(1), 12(1)(a), 14(1)(c.1) and 14(1)(e)).

[6] The *Forest Act* allows the Chief Forester to specify an "AAC partition" for a TSA which limits the harvested volume for one or more forest licences in respect of a type of timber, a type of terrain or different areas in the TSA (subsections 75.01(1) and 75.02).

Background Facts

[7] The Haida Nation comprises the Indigenous peoples of Haida Gwaii, an archipelago off the northwest coast of British Columbia that has been the homeland of the Haida Nation since time immemorial.

[8] The Petitioner, Council of the Haida Nation ("CHN"), is the governing body of the Haida Nation. The Petitioner, Peter Lantin ("Lantin"), is the President of the Haida Nation. The CHN

and Lantin are authorized to represent the Haida Nation.

[9] Husby is a full-service forest management company with timber harvesting operations on Haida Gwaii. Husby holds volume-based licences in the Haida Gwaii Timber Supply Area ("TSA 25") which allows it to harvest a specific volume of timber over the term of its forest licenses, subject to the restriction imposed through legislation and policy. Husby is one of the largest private sector employers on Haida Gwaii.

[10] For more than a century, the Haida have pursued an honourable relationship with the Crown and have engaged in political action and negotiations. The Haida Nation has asserted its rights and title in proceedings before the Federal Claims process in 1980 and before the BC Treaty Commission in 1992. The Haida have also been actively involved in seeking reconciliation with the federal and provincial governments, with some success, over the last several decades to the benefit of not only the Haida Nation but also of the non-Haida residents of Haida Gwaii.

[11] Since 1985, the Haida have taken a number of steps towards reconciliation of their claims, interests and ambitions with the Crown. They have implemented a number of interim reconciliation agreements with the governments of Canada and British Columbia for the joint management of the terrestrial and marine areas in Haida Gwaii, including:

a) the 1993 Gwaii Haanas Agreement providing for collaborative management with Canada of the Haida Heritage Site and National Park Reserve covering about a quarter of the land area of Haida Gwaii;

b) a Memorandum of Understanding with Canada for the cooperative management and planning of a marine protected area;

c) in 2004, the Haida Nation created a Haida Land Use Vision which, *inter alia*, recognized that the Haida Gwaii forests were being logged too fast and without provision for the stability and sustainability of the Haida Gwaii community as a whole;

d) in 2007, the Haida Nation entered into an agreement with the Province of British Columbia entitled the Strategic Land-Use Plan Agreement ("SLUPA");

e) in 2009 the Haida Nation and the Province of British Columbia agreed on a Reconciliation Protocol for the implementation of shared and joint management of the lands and natural resources on Haida Gwaii ("Protocol"). The Protocol was entered into without prejudice to the parties' respective divergent viewpoints for the purpose of seeking:

> a more productive relationship and a more respectful approach to coexistence by way of land and natural resource management on Haida Gwaii through shared decision-making and ultimately, a Reconciliation Agreement.

The Protocol contains several commitments towards shared and joint decision-making including:

> 6.1 The Parties are committed to working together in the interests of arriving at the best decisions regarding the lands and natural resources on Haida Gwaii.
>
> 6.7 In engaging in the shared and joint decision-making process set out in Schedule B, the Parties commit to make best efforts to seek consensus on matters addressed in the process.
>
> 6.8 The Parties intend that implementation of the decision-making framework… will constitute an incremental step in the reconciliation process through which legal rights and obligations respecting land and natural resource decision-making on Haida Gwaii can be addressed; and the 2010 Gwaii Haanas Marine Agreement which expanded the 1993 Gwaii Haanas Agreement.

[12] The Haida Nation is not opposed to commercial logging in Haida Gwaii. Indeed, the CHN owns rights to harvest timber in TFL 58 and the Haida make their living in the forest industry, which is a significant source of income for them.

[13] After the Protocol was signed, the government enacted the *Haida Gwaii Reconciliation Act* which, *inter alia*, established the Haida Gwaii Management Council ("HGMC") on which both parties are equally represented. The HGMC determines, *inter alia*, the AAC on Haida Gwaii. Decisions are made by consensus, failing which a decision is made by a majority vote (s. 3(3)). In the event of a tie, the chair of the HGMC casts the deciding vote (s. 3(4)).

[14] The parties also created a Solutions Table comprised of representatives of both sides who provide technical support to the HGMC.

[15] The HGMC is permitted to establish objectives for the use and management of land and resources in the Haida Gwaii. One of the objectives developed by the HGMC is the Haida Gwaii Land Use Objectives Order ("HGLUOO"). It provides, in part, that:

> These objectives protect important Haida cultural values, support ecosystem integrity and provide environmental benefits by maintaining the diversity and abundance of organisms on Haida Gwaii. Human well-being is maintained through policies and initiatives designed to achieve socio-economic benefits, <u>including carbon values, and timber harvest levels that support a viable forest industry</u>.
>
> [Emphasis added.]

[16] The HGLUOO outlines land use objectives for the purposes of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 and in accordance with s. 93.4 of the *Land Act*, R.S.B.C. 1996, c. 245. The objectives set out in the HGLUOO are reflected in the *Forest and Range*

Practices Act which requires that a holder of a licence to harvest timber develop a Forest Stewardship Plan (section 3(1)).

[17] The HGLUOO requires that, prior to road construction or timber harvesting in a cutblock, cultural features must be identified by a field assessment ("CFI Survey") conducted by a person certified by the CHN in accordance with the requirements outlined in the CFI Standards Manual, which was developed by the CHN to establish the standards that must be followed when conducting the CFI Survey.

[18] Given the large amount of old-growth cedar logging that has historically taken place on Haida Gwaii, the HGMC recommended to the Chief Forester that there be a limit on the amount of cedar that can be logged. In September 2012, the Chief Forester agreed with the concerns of the HGMC and provided direction that has been referred to as a "soft partition" with respect to the AAC on Haida Gwaii. Specifically, the Chief Forester recommended that cedar should not exceed 38% of the annual harvest, or 195,000 cubic metres per year. Cedar harvesting recommendations were not set for individual licensees but rather as a target applied over the entire TSA 25. The Chief Forester declined to set a limit so as to allow licensees, such as Husby, to prepare a cedar management strategy to manage the cedar supply over time.

Collison Point

[19] One of Husby's operations is located in the vicinity of Collison Point on Graham Island southwest of Masset in Haida Gwaii ("Collison Point Operation"). Collison Point contains stands of timber that are naturally abundant with cedar. These stands represent the largest contiguous source of commercially available "cedar-leading" timber on Haida Gwaii.

[20] Husby holds all necessary authorizations for its Collision Point Operation, including Forest Licence A16869 and Forest Licence A75084, which collectively permit Husby to harvest and transport up to approximately 200,000 cubic metres of Crown timber per year throughout TSA 25.

[21] Husby commenced its Collison Point Operation in 2010. It established a wharf, log dump facilities, fuel facilities, a mechanic's shop, parts and materials storage buildings and sites, and a first aid and manager's office.

[22] The Collison Point Operation runs year-round, with the exception of weather-related suspensions. Husby has developed a long-term strategy for its work at Collision Point and moves intentionally from cutblock to cutblock in accordance with that strategy. Roads are built and resources are mobilized on a specific timeline to conduct forestry operations in an efficient and cost-effective manner. Once the work in a particular cutblock is complete, Husby moves

on to the next planned cutblock in the sequence. This orderly progression of development of cutblocks leads to economic and operational efficiencies that are paramount to any forestry operation.

[23] During normal operation, when all phases of the Collison Point Operation are running, Husby employs approximately 23 company employees and approximately 15 to 20 contractors at the Collison Point Operation, the majority of whom are residents of Haida Gwaii. When reforesting harvested areas, an additional contractor and its crew of about 20 persons is hired to plant the seedlings.

[24] In 2016, out of a concern that cedar was being logged at an unsustainable rate, the HGMC began a new Timber Supply Review ("TSR") to determine the appropriate AAC. The result of the TSR is expected within the next several months.

[25] Starting in 2015, Husby began planning, surveying, and engineering for road construction and harvesting activities in new areas of Collison Point known as Cutblocks COL409, COL411, COL419, COL422 and COL794 (collectively the "New Collison Point Cutblocks"). This work was strategically queued by Husby for road construction and harvesting activities to commence in the spring of 2018.

[26] The New Collison Point Cutblocks are the subject of this Petition.

[27] All required CFI Surveys were conducted in respect of the New Collison Point Cutblocks.

[28] The road permit for COL409 was submitted to the District Manager for review on September 16, 2016 and received approval on March 27, 2017. The road permits for the other four New Collison Point Cutblocks were submitted and approved on the following dates:

a) COL411: submitted September 29, 2016, approved March 27, 2017;

b) COL419: submitted April 13, 2017, approved August 15, 2017;

c) COL422: submitted May 26, 2017, approved October 23, 2017; and

d) COL794: submitted May 26, 2017, approved October 23, 2017.

[29] On August 1, 2017, Husby submitted for approval by the Respondent District Manager, an application for a new cutting permit within Collison Point ("CP 223") which included Cutblock COL409.

[30] Also on August 1, 2017, the Chair of the HGMC wrote to the Chief Forester expressing

concern that cedar within the timber supply area was being logged at excessive rates. In October 2017, the Chief Forester acknowledged that the logging of cedar in TSA 25 "has exceeded the levels outlined in the chief forester's 2012 management unit AAC determinations". As a result, the Chief Forester established a partition of no more than 195,000 cubic metres of cedar within TSA 25's AAC of 512,000 cubic metres. However, for the partition to be binding and enforceable upon licensees, an order by the Minister is required. No such order has yet been made.

[31] In her October 24, 2017 letter to the HGMC advising of the partition, the District Forester wrote:

> I note that a new AAC determination is scheduled for the HGMA in early to mid-2018, followed as soon as practicable by determinations for individual management units by the chief forester. In addition, my discussion with the HGMC indicated that the purpose of a cedar partition would be to control the level of harvest of cedar to help ensure a continued supply of high-economic-value timber in the future. A partition for cedar would not be meant to protect cultural, traditional and spiritual values, as these have been addressed substantially through the Haida Gwaii Land Use Objective Order and the various protected areas, which cover over 50% of the Islands.
>
> [Emphasis added.]

[32] On October 27, 2017, Husby submitted a second new cutting permit to the District Manager for approval ("CP 224"). It includes Cutblocks COL411, COL419, COL422 and COL794.

[33] The members of the Solutions Table engaged in lengthy discussions regarding the New Collison Point Cutblocks. Ultimately there was no consensus reached between the parties, because the Haida members would not support cutblocks that contributed to the overharvest of cedar and the Provincial members considered that the matter of overharvesting was more properly the subject of a higher level process.

[34] On November 7, 2017, the District Manager wrote to his counterpart in the CHN summarizing a discussion between them stating in relevant part:

- Current blocks as identified above are meeting currently agreed to Legal Land Use Orders. Identified blocks are in accordance with approved FSP strategies. These strategies or targets are consistent with SLUA and the HGLUOO.
- …although the level of cedar is high (both high in cut and in available supply) in the Collison Point area, we have to understand that the number is aggregated over the TSA. Even within the aggregation, the number is still high. We must also consider that the partition was guidance to use to assess future options around cedar.
- It is important to note that within the current Protocol agreement, areas of Haida Gwaii were protected from logging, leaving areas identified outside as the operable land base and within this area, the industry is held to an ecosystem based management regime that was designed by both parties creating some of the highest

standards in BC.

- These areas identified as protected, can assist in providing for the Haida Nation's access for cedar, in relation to cultural use. Whether it is Gwaii Haanas, protected areas, cedar stewardship areas, they all can be used for cedar. I realized that this is not the Haida's wish, but must be factored into the decision.
- Within the current construct, even with the percent cedar being above the Chief Forester's guidance, the current direction and agreements guides us on our assessment of these permits. With the cedar partition being guidance and not a legal requirement, the blocks being proposed are LUOO compliant, the blocks being proposed are within the TSA and operable land base for forestry, about 70.5% of the Haida Gwaii land base [is] in some form of protection/Conservation, it is the Provincial Government's perspective that these blocks should move forward.

[35] On November 27, 2017, CP 223 was approved by the District Manager and issued to Husby pursuant to Forest Licence A16869 for a term of four years commencing on November 27, 2017.

[36] On February 5, 2018, CP 224 was approved by the District Manager and issued to Husby pursuant to Forest Licence A16869 for a term of four years commencing on February 5, 2018.

[37] Collectively, the New Collison Point Cutblocks comprise approximately 50 hectares out of the 197,342 hectares of the timber harvesting land base on Haida Gwaii. They authorized the harvesting of a total of 36,000 cubic metres of timber.

[38] CP 223 and CP 224 were approved and issued by the District Manager over the strenuous objections of the Petitioners on several bases, including that Husby has for several years engaged in overharvesting of the cedar resources and had failed to develop a cedar management strategy that aligned with the scope of the Chief Forester's expectations. The Petitioners say that the issuance of CP 223 and CP 224 was a failure on the part of the Crown to live up to its obligations undertaken over the years in the reconciliation process and undermines the collaborative relationship that has been built over decades.

[39] On March 8, 2018, Husby submitted a Haida Gwaii Cedar Management Strategy to the Province of British Columbia and the CHN.

[40] In March and April 2018, a group of people set up a camp and blockaded Husby from carrying out its Collison Point Operation. Husby was required to obtain an injunction to end the blockade.

[41] Logging operation on the Collison Point Cutblocks has been ongoing for several months. Harvesting of the timber in one of the five cutblocks has been completed. Of the 36,000 cubic metres authorized, approximately 27,000 cubic metres remains to be harvested.

[42] Husby is in the process of transitioning its logging operations from Collison Point to a new area call “Sewell” and expects that its Collison Point operations will be completed in 2019.

[43] On May 28, 2018, Husby received notice of the CHN’s intention to bring an application to stay CP 223 and CP 224. Husby agreed with CHN to suspend its timber felling operations in the disputed cutblocks pending the outcome of this application.

[44] As a result of the suspension of its cutting operations in the New Collison Point Cutblocks, Husby has had to lay off approximately 21 of its employees. Husby estimates that the total economic impact on these employees is approximately $11,340 per day.

Analysis

[45] The principles applicable to the interlocutory staying of a decision are similar to those applicable to the granting of interim injunction relief. The three-part test is: (a) whether there is a serious question to be tried; (b) whether the applicant will suffer irreparable harm if the application is refused; and (c) whether the balance of convenience favours the granting of the relief sought: *RJR – Macdonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 at pp. 334, 342; *TimberWest Forest Corp. v. Campbell River (City)*, 2009 BCSC 1862 at para. 10.

a) Serious Question to be Tried

The Petitioners’ Position

[46] The Petitioners submit that they have raised a serious issue to be tried for the following reasons:

a) the Haida Nation has asserted its title to Haida Gwaii in various legal processes and proceedings for almost 40 years. It has asserted its title in proceedings before the Federal Claims process in 1980, before the BC Treaty Commission in 1992, and has been litigating a proceeding in this Court since 2002 asserting Aboriginal Title to the lands and waters of Haida Gwaii. The respondents are well aware of the Petitioners’ claims;

b) the Supreme Court of Canada has recognized that the Haida Nation’s Aboriginal title claim is strong and has acknowledged the central role played by the cedar forests in the Haida economy and culture: *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at paras. 2 and 7; and

c) the Chief Forester’s October 24, 2017 acknowledgement demonstrates that unsustainable rates of logging of old growth cedar is threatening the long term viability of commercial logging within TSA 25 and that no further harvesting should

be permitted in the absence of an approved cedar management strategy.

[47] The Supreme Court of Canada has recognized that the Haida Nation has a *prima facie* case in support of Aboriginal title to Haida Gwaii and a strong *prima facie* case for the Aboriginal right to harvest red cedar which has long been integral to Haida culture: *Haida Nation* at paras. 2, 65, 71, and 72.

[48] The Petitioners submit that, given the Province of BC's knowledge of the strength of the Haida's case and the long-standing and advanced stage of reconciliation with the Province, the Province is required to protect the Haida Gwaii forest resources pending resolution of the Aboriginal rights and title. At a minimum, it is required to take steps to enforce the cedar partition established by the Chief Forester in October 2017.

[49] The Petitioners say that the Haida Nation has a direct interest in the use of the forest of Haida Gwaii and that, over the past three decades, the CHN has actively exercised its mandate to ensure a stable and sustainable economy for the well-being of the Haida Nation people, particularly the protection of old growth cedar. The Haida Nation entered into the Protocol to work cooperatively with the Government of British Columbia through consensus-based decision-making to effect change in forestry management in Haida Gwaii. The Petitioners submit that the District Manager's approval of CP 223 and CP 224 fails to respect the terms, spirit and intent of the Protocol.

Husby's Position

[50] Husby responds that CP 223 and CP 224 were validly issued by the provincial government and that the Petitioners have not pointed to any basis upon which the validity of CP 223 and CP 224 will or can be impugned. It submits that the Petitioners are asking the Court to intervene into and short-circuit the Ministry's decision-making process by imposing a guideline (the Chief Forester's partition) that is not enforceable by law.

[51] Husby points out that the Chief Forester's letter dated October 24, 2017 acknowledges the partition is not enforceable:

> I note that any partition I apply to the existing AAC determinations is not legally enforceable. A partition would constitute clear direction regarding utilization levels for cedar; however for it to become enforceable, an order by the Minister of Forests, Lands, Natural Resource Operations and Rural Development would be required.
>
> [Emphasis added.]

[52] Indeed, the Petitioners themselves acknowledge that the partition currently has no legal effect: *Lantin Affidavit No. 1* para. 30; *Russ Affidavit No. 1* para. 15; *Reynolds Affidavit No. 1* para. 30.

Conclusion re: Serious Question to be Tried

[53] It is clear that the Province committed to a regime of shared joint management of the Haida Gwaii forests with the Haida Nation as part of its commitment to a process of reconciliation. It is equally clear that the Province is aware both of the importance of cedar to the Haida Nation and of the concern that the resource is being harvested beyond a sustainable level.

[54] The District Manager issued the impugned permits despite no consensus having been reached by the HGMC and despite the Chief Forester's view that harvesting of cedar had exceeded the levels outlined in his 2012 AAC determinations. Moreover, it did so despite the HGMC's 2016 TSR being underway, the very purpose of which was to determine the sustainability of timber harvesting on Haida Gwaii. Finally, it did so despite the recommendation of the CHN that the impugned permits not be approved until a cedar management strategy was in place.

[55] However, it is well settled law that on a judicial review the issue is whether the government body, in this case the District Manager, acted reasonably in issuing the impugned cutting permits under the circumstances: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 41 and 47. Such a challenge under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 must be to the legality of the District Manager's decision: *Red Mountain Residents v. Simpson*, 2001 BCSC 1142 at para. 42. The Petitioners do not have a veto simply because they are not happy with a decision made after the Crown's duty to consult and accommodate had been complied with: *Haida Nation*, at para. 48. As was noted by Mr. Justice Groberman in *Snuneymuxw First Nation et al. v. R.*, 2004 BCSC 205:

> [71] … The public interest includes, in my view, a high level of respect for the decisions of the legislative and executive branches of government; the jurisdiction of the courts to enjoin impugned government action which may or may not, in the end, be found to be unconstitutional must recognize the Court's own limited institutional competence and the public interest in having publically elected bodies and officials enacting legislation and determining public policy.
>
> [72] The jurisdiction of the court, in appropriate cases, to interfere in legislative and executive decisions that are under challenge should not be too hastily exercised. The courts have a supervisory role to play, and should be wary of usurping legislative and executive roles and effectively governing by interlocutory order.
>
> [Emphasis added.]

[56] The Petitioners have not put forward any argument that challenges the legality of the District Manager's decision to issue the cutting permits. Rather, they argue that the Crown's duty to accommodate requires the Province to take steps to enforce the Partition pursuant to s. 35(1) of the *Constitution Act* and comply with its legal obligations under the Protocol.

[57] In the implementation of government policy, ministers, and their delegates are often required to make decisions that may be, in a political sense, controversial. As was stated by Esson C.J.S.C. in *Canadian Pacific Forest Products v. British Columbia (Minister of Forests)*, [1993] B.C.J. No. 1152 (S.C.) at 264-5:

> …The *Forest Act* confers upon the Minister many powers and the obligation to make many decisions. They necessarily involve the balancing of conflicting interests and conflicting policies. Almost any major decision is, in present circumstances, bound to adversely affect the interests of someone. Inevitably, some will feel, perhaps with good reason, that they have not been fairly dealt with. That does not make such decisions subject to judicial review.

[58] As was the case in *Sierra Club v. A.G.B.C.* (1991), 83 D.L.R. (4th) 708 (B.C.S.C.) at 716, the Petitioners' complaint is, in essence, not that the law has been broken but rather that they have as yet been unable to convince the District Manager to implement forest policy that is in accordance with their views concerning the excessive logging of cedar.

[59] Although the Collison Point Cutblocks contain a high concentration of old growth cedar, there is no evidence that the trees slated to be harvested in the New Collison Point Cutblocks will have any meaningful impact on the rights or title of the Petitioners. Indeed, the evidence is to the contrary. The cutblocks represent only about .025% of the area that is available for harvest in Haida Gwaii. The CFI Surveys that were conducted on the impugned cutblocks identified and marked for protection all Cultural Features (as defined in the CFI Standards Manual).

[60] It is clear from the evidence before me that the Petitioners' complaint is not specific to the New Collison Point Cutblocks but rather is about the effect that logging of old growth cedar generally will have over the long-term on Haida's culture and traditional values.

[61] I am mindful of the comments made by the Court in *RJR-MacDonald* at p. 348:

> ..Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the … test"

[62] In my view, the case put forward by the Petitioners is not frivolous or vexatious. Accordingly, I find that they have made out a serious question to be tried.

[63] I will now consider the second and third parts of the test.

b) Irreparable Harm

The Petitioners' Position

[64] The Petitioners submit that irreparable harm should be seen in the context of three

issues: (a) the cutting of cedar is irreparable by its very nature; (b) harm to the reconciliatory process and the relationship between the Haida Nation and the Province; and (c) constitutional protections and the honour of the Crown.

[65] The Petitioners submit that the cedar-leading forests of Collison Point comprise the largest contiguous stands of cedar remaining on Haida Gwaii. If logging of this cedar continues at the present rate, it could jeopardize the Haida nation's ability to exercise their Aboriginal rights respecting cedar in the future and will infringe the inherent limit of Aboriginal title by breaching *bona fide* conservation measures for a long-term supply of cedar trees.

[66] The Petitioners submit further that CP 223 and CP 224 will result in the complete elimination of these forests as a source of economic support for the Haida Nation within a matter of no more than 20 years.

Husby's Position

[67] Husby points out that only five cutblocks comprising .025% of the total area available for harvest in Haida Gwaii are at issue in this proceeding. Moreover, the Petitioners' evidence is not that irreparable harm will arise from the harvesting of trees in the five cutblocks but rather over the long term. At paragraph 22 of his Affidavit No. 1, the Petitioners' Registered Professional Forester Consultant, Nicholas Reynolds deposed:

> 22. Since 2010, approximately 2,490 hectares of forests were logged in [Collison Point]. Approximately 93% of the area logged was by Husby…or Dawson Harbour Logging. Overall, the rate of harvest is an average of 311 hectares annually over that 8 year period. There was approximately 9,000 hectares of cedar leading forest in 2007, and after logging, it is now closer to 6,100 hectares. If this rate of 310 hectares per year continues, then the mature/old cedar inventory would be depleted in approximately 20 years, or by 2038.
>
> [Emphasis added.]

[68] However, there is no evidence that this rate of harvesting will continue or that the impugned cutting permits will contribute in a meaningful way to this 20-year prediction.

Conclusion re: Irreparable Harm

[69] When damage to a natural resource is at issue, courts have been sensitive to the importance of protecting Aboriginal interests from irreversible intervention pending determination of the matter in issue: *Snuneymuxw First Nation v. British Columbia*, 2004 BCSC 205 at para. 32; *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2004 BCSC 1764 at paras. 48, 59-60; *Qikiqtani Inuit Association v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12 at paras. 32, 35, 37, and 43.

[70] Courts have recognized that the loss of land or logging of indigenous forests is a form of irreparable harm in the context of assertions of Aboriginal title where the subject matter of the litigation may be destroyed before the rights are decided: *MacMillan Bloedel Ltd. v. Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paras. 50-58, 70-74; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] 4 C.N..LR. 152 (Ont. S.C.J.) at paras. 79-80.

[71] A breach of a duty to consult may result in irreparable harm: *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario*, 2011 ONSC 7708 at para. 49; *Tlicho Government v. Canada (Attorney General)*, 2015 NWTSC 09 at paras. 68 and 71.

[72] The evidence is clear that cedar forests are central to the tradition, culture, and way of life of the Haida peoples. The Government of the Province of British Columbia has recognized the interests of the Haida Nation in this resource and committed to a process of reconciliation involving consensus.

[73] The Petitioners have proffered cogent evidence demonstrating a reasonable likelihood that harvesting of the trees in the impugned cutting permits will result in irreparable harm to them. The areas in question are the subject of the Haida's Aboriginal right and encompass the land in respect of which its Aboriginal title claim is based. The evidence suggests that old growth cedar trees, the harvesting of which is an Aboriginal right that has been recognized as a *prima facie* strong claim, are being unsustainably logged.

[74] I accept as well that allowing Husby to proceed with the harvesting of cedar at Collison Point when there is no consensus and in the face of fervent opposition cannot help but harm the reconciliation process. This type of harm has been found to be irreparable: see *Ahousaht Indian Band et al. v. Minister of Fisheries and Oceans*, 2014 FC 197 at para. 27.

[75] I conclude that the Petitioners have demonstrated a reasonable likelihood that they will suffer irreparable harm if the authorized logging of the impugned cutblocks takes place.

Balance of Convenience

Petitioners' Position

[76] The Petitioners place great emphasis on the fundamental importance of cedar to the Haida as well as need to preserve the unprecedented model of reconciliation they have with the Provincial government. They argue that, if the spirit and intent of this model of reconciliation is not respected, the Haida's trust in these agreements and their ability to continue to work under them could be seriously compromised.

[77] The Petitioners submit that the importance of achieving reconciliation with First Nations is a public interest that must be fostered: *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41; *The*

First Nation of Nacho Nyak Dun v. Yukon (Government of), 2014 YKSC 69 at paras. 182 and 219, aff'd 2017 SCC 58.

[78] The Petitioners submit that the balance of convenience favours the granting of an injunction because, for Husby, the ability to log cedar is merely a business decision prioritizing economic opportunity and that, at most, the injunction will merely result in a deferral of that opportunity – the trees will still be there to be cut. However, if the ultimate resolution of the Haida Nation's Aboriginal title case is in its favour, it will never be able to be made whole.

Husby's Position

[79] Although Husby, upon becoming aware of the Petitioners' intention to seek an injunction, agreed to suspend the cutting of timber in the Collison Point Cutblocks until the hearing of the injunction application, it continued with its related logging operations such as bucking and transportation of the logs it had already cut. It says that the impact upon it of a longer suspension is simply too great.

[80] Husby points out that it has made significant investments in its Collison Point Operation over the years and has been planning and engineering its current activities there since 2016.

[81] Husby has had to lay off a number of its employees as a result of the suspension of its operations. It submits that there is a substantial risk that many of Husby's contract workers and employees will seek employment elsewhere if an injunction is granted. Husby lost two valued employees and one contractor as a result of the blockade. The effects of an injunction on third parties, including business losses should be taken into account: *Yahey v. British Columbia*, 2015 BCSC 1302 at para. 49.

[82] Husby also points out that an interruption in its Collison Point Operation will also disrupt its processing plans and relationships with customers. It has committed to provide logs to mill at agreed times in accordance with the logging programs it has developed. If the Collison Point Operation is disrupted any further, Husby risks harming or losing its customer base.

Conclusion re: Balance of Convenience

[83] Husby has provided substantial evidence of economic loss not only to it but also to its employees that will result if it is enjoined from continuing its logging operations in CP 223 and CP 224. Moreover, the "ripple down" will be immeasurable. The potential loss of employment is a factor to consider in the balancing process: *Wiigyet (Morrison) v. Kispiox Forest District*, (1991), 51 B.C.L.R. (2d) 73 (S.C.) at 81; *Tlowitsis-Mumtagila Band v. MacMillan Bloedel Ltd.*, [1991] 2 C.N.L.R. 164 (B.C.S.C.), aff'd [1990] B.C.J. No. 3746 (C.A.).

[84] Husby has been operating at Collison Point since 2010 and has obtained all necessary

authorizations for its logging activities there. The CHN has known for several years of Husby's intention to log the New Collison Point Cutblocks, knew that Husby had constructed logging roads to them, and knew on November 27, 2017 that CP 233 had been issued. It knew since February 5, 2018 that CP 224 had been issued. It knew that Husby commenced logging operations on the first of the five impugned cutblocks no later than early April 2018. Yet it waited until May 28, 2018 to commence this proceeding. The Petitioners provided no explanation for the delay but argued in Reply that they were engaged in consultations and negotiations with Husby about its logging activities which the Supreme Court of Canada cautioned was the preferable approach instead of the injunction approach: *Haida Nation* at para. 14:

> 14. Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.
>
> [Emphasis added.]

[85] However, in this case, it had to have been clear to the Petitioners by no later than November 27, 2017 that negotiations regarding a reduction in the logging of old-growth cedar was not going to bear fruit in the short term and that Husby's logging of the New Collison Point Cutblocks was likely to proceed.

[86] The failure of the Petitioners to proceed expeditiously with their challenge to the cutting permits is a factor to be considered in assessing the extent of harm that they say they will suffer: *Siska Indian Band v. British Columbia (Minister of Forests)*, [1999] B.C.J. No. 2354 at para. 45.

[87] Having considered the nature of the harm that may result to the Petitioners, as set out

above, if the harvesting of the remaining four cutblocks proceeds balanced against the harm to Husby that will result if it is enjoined, it is my view that the balance of convenience favours Husby and the continuation of its Collison Point Operation within the impugned cutblocks.

Conclusion

[88] The Petitioners' application for a stay is dismissed, with costs.

"Weatherill G.C."