12 of 28 DOCUMENTS

Case Name:

Canadian Forest Products Inc. v. Sam

Between
Canadian Forest Products Ltd., Plaintiff, and
Richard Sam, Angeline Vincent, Samantha Vincent, Julian Bowes, Ken Sam, John Doe, Jane Doe and Persons Unknown, Defendants
And between
Hagwilneghl, also known as Ron Mitchell and Kelah, also known as Mabel Crich, on behalf of themselves and on behalf of all of the Members of the House of Ginehklaiyex, Plaintiffs, and
Canadian Forest Products Ltd. and Her Majesty the Queen in Right of the Province of British Columbia, Defendants

[2011] B.C.J. No. 956

2011 BCSC 676

Dockets: S098601 and S100409

Registry: Vancouver

British Columbia Supreme Court

Smithers, British Columbia
J.R. Dillon J.

Heard: July 5-9 and October 18-20, 2010.
Judgment: May 25, 2011.

(137 paras.)

Counsel:

Counsel for Canadian Forest Products Ltd.: M.S. Oulton.

Counsel for Richard Sam, Angeline Vincent, Samantha Vincent, Julian Bowes, Ken Sam, Hagwilneghl (Ron Mitchell), Kelah (Mabel Crich) and the House of the Ginehklaiyex: P.R. Grant.

Counsel for Her Majesty the Queen in Right of British Columbia: K. Phillips.

Reasons for Judgment

J.R. DILLON J.:--

Introduction

1 The plaintiff in action no. S098601, Canadian Forest Products Ltd. ("Canfor"), seeks an interim injunction to prevent the named defendants from physically obstructing or otherwise impeding in any way the logging operations of Canfor or its contractors on cutblocks VALL0006, VALL0008, and VALL0016 under cutting permit 324 ("CP324") issued to Canfor in the Morice Timber Supply Area near Topley, British Columbia (the "operations"), and from physically obstructing access or use by Canfor of the road known as the Holmes-Red Top Forest Service Road ("Red Top Road") or any other access to Canfor operations, and from physically preventing or interfering in any way with Canfor in the conduct of road building or timber harvesting and activities connected thereto with the operations, and from intimidating or interfering in any way with Canfor's employees acting in the course of their duties in carrying out logging operations. Canfor claims against the named defendants for trespass and nuisance to their *profit a prendre*, interference with economic relations, conspiracy to injure, intimidation, and unlawful blocking of a public road.

2 The defendants in action no. S098601, Richard Sam, Angeline Vincent, Samantha Vincent, Julian Bowes, and Ken Sam (collectively called the "Sam defendants"), have counterclaimed for an interlocutory injunction to restrain Canfor from taking any steps to extend roads through the traditional territory of the Ilh K'il Bin or to engage in logging activities in the area known as the Redtop. These defendants claim a permanent injunction and a declaration that a 2001 agreement between Her Majesty the Queen in Right of the Province of British Columbia (the "Crown") and Kelah (the "2001 agreement") renders CP324 unlawful.

3 The plaintiffs in action no. S100409, Hagwilneghl and Kelah on behalf of all Members of the House of Ginehklaiyex (collectively called the "Kelah plaintiffs"), seek an interlocutory injunction to restrain Canfor from engaging in any timber harvesting or related activities in the Redtop area, including road construction in and transport of associated machinery, materials, or personnel to the area. The Kelah plaintiffs claim against Canfor for a permanent injunction, for a declaration that the 2001 agreement renders CP324 unlawful, and for damages for trespass, obstruction, intimidation and wrongful conversion of property. The Kelah plaintiffs claim against the Crown for a declaration that the 2001 agreement binds the Crown, for a declaration that the Kelah plaintiffs have aboriginal title to the entirety of the Kelah territory or at least to certain portions of same, for a declaration that the Crown has unjustifiably infringed upon the plaintiffs' aboriginal title, for a permanent injunction restraining the Crown from taking any steps to authorize timber harvesting in the Redtop area, trapline #TR0608T006 or the Kelah territory generally, for damages for infringement of aboriginal title, for breach of agreement, and for wrongful conversion of resources, and for an order for restoration of alienated aboriginal title lands of the Kelah territory or for compensation.

4 In short, there are competing interim applications here for injunctive relief as a short term solution in a forestry resource management/aboriginal title dispute. By agreement of the parties, both applications were heard at the same time.

5 Canfor is an integrated forest products company and major forest licensee with British Columbia timber harvesting and processing operations focused in the interior of the province, particularly in the Morice Timber Supply Area (the "TSA") near Houston. Canfor holds Forest Licence A16828 ("FL A16828" or "the forest licence") in the TSA which entitles Canfor to harvest volumes of timber within approved operating areas of Crown land and as authorized in cutting permits issued under FL A16828.

6 Kelah and Hagwilneghl are both Wet'suwet'en Chiefs.

7 Hagwilneghl is the Head Chief of the House of the Ginehklaiyex of the Lakisilyu clan of the Wet'suwet'en nation. The Wet'suwet'en nation is an aboriginal people within the meaning of s. 35(1) of the ***Constitution Act, 1982***. The Wet'suwet'en nation has five clans, including the Lakisilyu clan. There are three houses of the Lakisilyu clan, including the House of Ginehklaiyex. Ron Mitchell is Hagwilneghl, taking this title in accordance with Wet'suwet'en law in the fall of 1988. Ron Mitchell acted as a translator in the trial in ***Delgamuukw v. British Columbia*** (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) [***Delgamuukw BCSC***].

8 Kelah is a Chief in the House of the Ginehklaiyex. Each Wet'suwet'en house has one or more house territories with a Chief responsible for each territory. One of the Ginehklaiyex territories is the Ilh K'il Bin ("Kelah territory"). The chief responsible for the Kelah territory is Kelah. Mabel Crich took this title from her mother according to Wet'suwet'en law in 1978. Mabel Crich testified at trial in ***Delgamuukw BCSC***.

9 Richard Sam, Angeline Vincent, and Ken Sam are Wet'suwet'en and the children of Kelah. Samantha Vincent is Wet'suwet'en and the granddaughter of Kelah. Julian Bowes is the husband of Angeline Vincent.

10 The Morice TSA is Crown land which overlaps with the claimed traditional territory of the Wet'suwet'en. The TSA includes an area called the Redtop which is also within Kelah territory. The Redtop takes its name from Redtop Creek and is located roughly between Robert Hatch Creek canyon and Richfield Creek canyon off the Granisle Highway, approximately 10 kilometres north of Topley, British Columbia and 30 kilometres east of Houston. The only access to cutblock VALL0016 in the Redtop is via the Red Top Road, a forest service road that intersects with the Granisle Highway and that was the subject of the 2001 agreement. The CP324 cutting area is completely within the Kelah registered trapline area.

11 Canfor states that, since November 2009, the Sam defendants have prevented Canfor and its contractors from accessing the Redtop through Red Top Road. Canfor characterizes this action as "an impermissible attempt to exercise a veto over licensee activity in the asserted traditional territories", as an abuse of process or collateral attack on CP324, and as circumvention of the consultation process contemplated in ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511 [***Haida***]. Canfor says that its harvesting plans will not significantly impact the Redtop. Further, it states that success of the Kelah plaintiffs' application is not in the public interest as it would bring the forestry industry to a halt. The Sam defendants have acquiesced, delayed, and engaged in the impermissible self-help remedy of a blockade.

12 The Kelah plaintiffs have replied by stating that this is a unique case. The Kelah plaintiffs' claim is based upon the 2001 agreement and the aboriginal title of the Wet'suwet'en. They have taken all necessary steps to comply with the law including following the guidance of the Supreme Court of Canada in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010 [***Delgamuukw***] by entering into an agreement with the Crown in 2001. They filed their claim in 1977, went through the court process, and have re-entered treaty negotiations. The 2001 agreement was intended to protect the Redtop through deactivation of the Red Top Road and the right to be consulted. Kelah can trace territorial occupation of the Redtop to pre-contact times and Kelah's family has continuously resided on and used the lands. Kelah has a registered trapline that covers the area. The Kelah plaintiffs were not informed of CP324 until after it was issued. Further, Canfor failed to engage the traditional holders of the rights to the Redtop, contrary to known and established Wet'suwet'en custom. The *status quo* requires that the 2001 agreement be respected. Further, the Kelah plaintiffs say that survival of the Wet'suwet'en relationship to their territory, their *yintah*, is at stake. The claim for aboriginal title in the Redtop is strong and will be rendered meaningless by timber harvesting in the area.

13 The Crown takes no position on either application.

Facts

(a) The Wet'suwet'en relationship to the Redtop lands

14 To fully appreciate the background facts to these applications and to ultimately assess factors of irreparable harm

and balance of convenience, it is important to understand the relationship of the Wet'suwet'en to the land, and, in particular, to the lands in question here, known as the Redtop. It is the relationship to particular lands that defines the social structure of Wet'suwet'en society, that places the land as the foundation of cultural identity, and that determines the structure of governance.

15 The Wet'suwet'en occupation and use of land is organized by the clan and house system upon which the law and essential social structure is ultimately based. The five Wet'suwet'en clans are each composed of several houses, 13 in all. A house is a matrilineage of people related through their mothers. Each house has one or more territories which together comprise the Wet'suwet'en territory. Each house has a chief and a sub-chief who collectively make up the head chiefs of the Wet'suwet'en. Each Wet'suwet'en chief has rights and responsibilities specific to the particular territory over which that chief is given a duty to protect. The rights and responsibilities are confirmed, coordinated, and directed to the common good, in other words, governed, through the feast.

16 The feast is central to Wet'suwet'en society and government. As acknowledged in ***Delgamuukw*** at para. 14, the feast has a ceremonial purpose but is also used for making important decisions. Today, it is used to make clear who has succeeded to the chiefs' titles, which are associated with jurisdiction over discrete Wet'suwet'en territories. Importantly, the feast confirms the relationship between each house and its territory and confirms the boundaries of each territory (***Delgamuukw v. British Columbia*** (1993), 104 D.L.R. (4th) 470 at 608 (B.C.C.A.) [***Delgamuukw BCCA***]. It operates as a forum in which Wet'suwet'en law is both enacted and upheld. It is through the feast that the various houses and clans interact at an official level. Territories are important to the feast as the host clan gathers goods and food for the feast from its territories.

17 Each chief is responsible for the lands and resources within his or her territory. As described by Antonia Mills in *Eagle Down is our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) at p. 112, each chief must manage, conserve and harvest the resources on his or her territory. She said:

> Today, the head chiefs both give permission for people to use the territory and oversee how people use it. They direct people to the areas in their territories that they know can sustain a harvest, allowing other areas to lie fallow. They direct how many animals can be taken. To do this, they must know the territory well, be aware of the conditions of the animals, and know who is on the territory.

18 Kelah is the chief responsible for the territory known as Ilh Ki'l Bin which includes the Redtop. All of the Redtop lies within the traditional territory over which aboriginal title is asserted by the Wet'suwet'en and which was described by Kelah in her testimony in ***Delgamuukw BCSC***. Kelah bears the primary stewardship responsibility for and holds ultimate decision making authority for the Redtop. The boundaries of Kelah territory are well know to Kelah as passed down to her and as shared by other Wet'suwet'en house territories. Kelah and her family have continuously resided on the territory since pre-contact days. Particular steps have been taken to preserve it, including acquisition of lands through pre-emption and registration of a trapline in the 1920s. The trapline is presently held by Kelah. The continuity and close relationship with the land has been passed down to Kelah and from her to other generations. Kelah and her family have, at times, been denied or given up Indian status in order to remain on the land.

19 The Redtop contains mixed stands of balsam, spruce, pine, poplar and juniper. There are natural salt licks used by big game, particularly moose. Although much of the forest has been affected by the mountain pine beetle epidemic, the forest still functions as an ecosystem for many species. Kelah uses the natural resources for housing, medicine, hunting and trapping, and food. The collection of food, particularly berries and meat, from the lands preserves Kelah's status within the Wet'suwet'en social hierarchy. This relationship to the land defines the way of life for Kelah and the house of Ginehklaiyex.

20 Within this context, an important fact is that the Redtop is the last remaining untouched area within the Ilh Ki'l Bin. It is accessible only by foot. Other parts of Kelah territory have been logged, given over for grazing leases, or used

for other development. These other areas are cut with roads. The trapline area is larger than, but includes, the Redtop. Part of the trapline area has already been used for logging. The Redtop is the only productive hunting area left in Kelah territory. It is the only area left where Kelah and the generations that follow her can carry on traditional activities and pass on their knowledge of the land.

21 Kelah and her family have never taken the position that no logging could take place within Kelah territory or even within the trapline territory. Much of the Kelah territory is laced with Forest Service Roads leading to cutblocks. When representations were made at various times relevant to these applications that no logging could take place, it was always meant that no logging could take place in the Redtop.

(b) The Morice Timber Supply Area, the Redtop and Forest Licence A16828

22 The Morice Timber Supply Area covers approximately 1.5 million hectares from the most northerly tip of Babine Lake to Ootsa and Whitesail Lakes in the south. It is within the traditional territories of eight First Nation groups, including the Wet'suwet'en. Some of these First Nations have signed Forest and Range Agreements with the Ministry of Forests and Range (the "MFR", previously known as the Ministry of Forests). All of the Redtop lies within the Morice TSA. It is administered for MFR by the Nadina Forest District in Burns Lake. In 2001, the Redtop area in question was administered within the Small Business Forest Enterprise Program ("SBFEP"), one program operated by MFR.

23 The epidemic mountain pine beetle infestation is a critical issue within the TSA. While this infestation is part of a natural process, it has recently reached an unprecedented level. Approximately 40 percent of the total merchantable pine volume in the provincial timber harvesting land base is affected, including 74% of the pine that is covered in Canfor CP324, or 87% of the total forest within the Redtop. Stands of timber killed by mountain pine beetle have a limited time during which one can economically recover lumber from harvested logs. As a result, the MFR conducted a review of the timber supply and allowable cut in the TSA, resulting in the current allowable annual cut that emphasizes the harvesting of mountain pine beetle infested stands. In the January 2008 document related to the rationale for allowable annual cut in the Morice TSA, the Chief Forester for the TSA projected that the 'stand shelf-life' was approximately 4 to 7 years generally in the TSA as a result of the infestation. Because of the extent and potential implications of the mountain pine beetle outbreak, Canfor targeted CP324 in its harvesting plans.

24 Canfor holds FL A16828, which is a contract with the Province of British Columbia for a term of 15 years that allows Canfor an allowable annual cut of 940,424 cubic metres per year of Crown timber from areas of Crown land within the TSA. The forest licence is replaceable within the meaning of s. 15 of the ***Forest Act***, R.S.B.C. 1996, c. 157, so that the timber supply area remains the same with each replacement. Canfor may submit an application for a cutting permit to operate on certain areas of Crown land located within a forest development unit of an approved forest stewardship plan. Pursuant to the terms of the forest licence, the District Manager of a TSA may consult aboriginal groups, impose conditions on a cutting permit, or refuse to issue a cutting permit if the cutting permit would result in an impact to aboriginal interests that may require consideration of accommodation. However, the District Manager must notify the licensee within 45 days of application for the permit if consultation is being carried out or if the permit is to be denied because of consideration of accommodation.

(c) Events up to 2005 including the 2001 Agreement

25 The Wet'suwet'en began involvement in treaty negotiations with British Columbia and Canada in 1977. When negotiation failed, they litigated in ***Delgamuukw BCSC*** and ***Delgamuukw BCCA*** before heading back to the negotiation table in 1994. When negotiation failed again, the Wet'suwet'en went to the Supreme Court of Canada with the Gitxsan. A new trial was ordered in ***Delgamuukw***. But, the Court expressed confidence that a negotiated agreement was the best approach. Chief Justice Lamer emphasized the central role that negotiation aimed at agreement would play in order to give effect to the basic purpose of s. 35(1) of the ***Constitution Act, 1982***. He said at para. 186:

> **186** Finally, this litigation has been both long and expensive, not only in economic but in human

> terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, supra, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

Mr. Justice La Forest said at para. 207:

> **207** On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake ...

26 Following the decision in ***Delgamuukw*** in 1997, the Wet'suwet'en again went back to treaty negotiations. However, as described by Hagwilneghl, while nothing advanced in negotiation, the Wet'suwet'en territories were allocated for mining and forestry operations, leading the Wet'suwet'en Chiefs to eventually withdraw again from the process. In the meantime, a political accord was reached between the Wet'suwet'en, Canada, and British Columbia in 2000 and the 2001 agreement was negotiated.

27 As a preface to describing the circumstances leading up to the 2001 agreement, the circumstances at the time of making the agreement, and the evidence of subsequent conduct, it should be known that this evidence was presented by all counsel without reservation. Particularly, it was not argued that this evidence was not relevant and therefore inadmissible.

28 A forest service road in the location of the Red Top Road was authorized to be built under a forest development plan in 1999. It is not known what consultation process took place with the Wet'suwet'en or with Kelah regarding this authorization. However, they had received copies of the maps in the forest development plan. In the fall of 2001, Kelah first learned that construction of the Red Top Road was underway. The MFR had contracted with a third party to build the road and remove the wood on the right of way under the small business forest development program. Kelah had not been consulted about the planning of the road or notified of its development. Richard Sam contacted MFR to advise that there had not been proper consultation and demanded that harvesting activities stop. When there was no positive response to this request, Richard Sam advised that if operations did not cease, they would blockade the road the next day. The blockade was set up. A meeting then immediately occurred between the MFR, Kelah, Richard Sam and others. As reported by Richard Sam and confirmed in a letter sent from the MFR that day, a representative of MFR told Kelah that the purpose of the road was to provide access into high and extreme hazard areas at risk of beetle infestation. No mention was made of the three cutblocks slated for harvest in the area. The only harvesting discussed was wood on the right of way for the road. Kelah then met with the Wet'suwet'en Chiefs who supported the blockade. Two further meetings then took place between Kelah and MFR representatives at which time MFR pointed out, among other things, that it had previously sent Kelah and the Wet'suwet'en information about the road and Kelah expressed the view that there had been inadequate consultation, that there was to be no further development in this traditional territory, and that the family had an interest in salvaging. Kelah insisted that she had been misled by the MFR when they sold the wood in the right of way for the road without her knowledge. The processing and hauling of wood was stopped and the blockade was maintained while a solution was sought.

29 By this time, the Wet'suwet'en official negotiators were involved as well as the provincial treaty negotiation office and various ministries. The negotiation of a solution was to be under the spirit of the 2000 political accord and was seen by all as a test of that accord. Negotiations were to involve the chief negotiator for the Wet'suwet'en, along with Kelah

and other members of her family, and representatives of MFR. A meeting took place on December 4.

30 According to notes taken at this meeting by ministry personnel, Kelah began by pointing out that this was the last area of her traditional territory that remained untouched. She expressed concern that she had not been consulted about the road. MFR acknowledged that there had been lack of communication, that this matter had 'slipped through the cracks', and that it was MFR's intention to consult with and explore options with Kelah. MFR committed to work with Kelah's family in the future. The purpose of the road was re-stated to be to improve ability to fight the beetle attack. There was discussion about "deactivation" or prevention of access to the road, with differences in terminology used. "Deactivation", as meant by MFR, referred to returning the road to its pre-construction state. With respect to road access, the parties were agreed that there was to be no access through the road and that steps were to be taken to accomplish this. The MFR committed to change the forest development plan to "drop the one bloc on the FDP and remove the plan." The MFR agreed to "have meaningful consultation" with the Crich family before any additional blocks were put back on the forest development plan. Other matters pertaining to forest health, cultural heritage, and beetle strategy were discussed. The MFR re-stated its commitment to implementing access control at the road junction, to removal from the forest development plan of the block from the end of the road, and to consultation with the Crich family on all proposed blocks in future forest development plans in the territory.

31 For Kelah's family, the main accomplishment of the December 4 meeting was a commitment from MFR to end access through the Red Top Road for the purpose of logging. There was no disagreement as to the intention that the blockade would end when access to the Red Top Road ended. There was no discussion of a limited term to this resolution. Kelah considered that her Redtop territory was permanently protected from logging because the only access was through the Red Top Road. The MFR had agreed to end access through the road and to remove the cutblock from the FDP. There was to be consultation about other logging within Kelah's territory, Kelah not being opposed in principle to logging within other areas of her territory except the Redtop.

32 From the MFR point of view, as stated by Bill Warner, the District Manager for the Morice Forest District, it had chosen to back away from the current FDP and development of the Redtop area in the interest of resolving the physical blockade that had been established. It had assessed whether the government would likely obtain an injunction and had determined that a private contractor working the area had a better chance of establishing harm.

33 With this background established, the parties met again on December 5, 2001. No lawyers were present. The blockade was resolved through written agreement drafted by Bill Warner. A document entitled "Points of Agreement Morice Forest District/Critch (sic) Family" was signed by Bill Warner, Mabel Crich, and Angeline Vincent. Relevant parts of the 2001 agreement are:

> Points of Agreement
>
> Morice Forest District/Critch (sic) Family
>
> > The following points of [sic] were agreed to in a meeting held at the Office of the Wet'suwet'en December 4 2001. The meeting was held to respond to issues raised by the Critch (sic) family. ...
> >
> > **1 Respectful Approach**
> >
> > The Critch (sic) Family and the MOF agree to maintain a respectful approach to all discussions and meetings.
> >
> > **2 Forest Development Plan**

It was agreed that the SBFEP would drop the block currently on the FDP at the end of the Redtop FSR. In addition the SBFEP will consult with the Critch (sic) family on the blocks currently on the FDP that affect their trapline area. The Critch (sic) Family will be consulted on any new proposed blocks in the trapline area.

The ongoing stewardship contracts were discussed. It was agreed that the SPFEB would contact the license holders to advise them that they should contact Mabel Critch (sic) to advise her of their plants.

Timeline

The FDP will be amended to drop the one block at the end of the Redtop FSR prior to Jan 30, 2002

The meetings to discuss further consultation will be initiated by Jan 15 2002

The stewardship licensees will be contacted by December 15, 2001.

...

9 Acess

The MOF agrees to implement some measure of access control at the junction of the Granisle highway and the Redtop FSR. Once the right-of-way wood has been removed a temporary access control measure will be put in place at the junction of the Granisle highway and the Redtop FSR. The MOF will then propose a more substantial access control measure in an FDP amendment.

At this time the MOF cannot commit to the specific details of the access control. The primary reason is that it is unknown what is the most practical method.

Timeline

Some measure of access control will be put in place this winter after the right of way wood is removed. A proposal for additional measure will be presented to the Critch's (sic) prior to April 15, 2002.

10 Blockade

Upon signing this document the Critch (sic) family agree to immediately remove the blockade on

the Redtop FSR.

11 Dispute Resolution

The development of a dispute resolution process was discussed at the meeting. There was general agreement that such a process would beneficial. The Office of the Wet'suwet'en and the MOF will jointly develop such a process.

Contracting Matters

Though not discussed at the meeting the following points are important for the Critch's (sic) and the MOF.

* Contract rates will be mutually agreed to, and will be based on rates derived through a competitive process.
* Direct award contracts will be consistent with MOF policy on direct award contracts.
* It is in the interest of both parties to ensure work is completed to an acceptable quality and meets the contract standards. Normal contract management practices will be used.

"MOF" refers to the Ministry of Forests. SBFEP was the predecessor to BC Timber Sales.

34 The blockade was removed. Lock blocks were installed on the Red Top Road. The block at the end of the Red Top Road, the only cutblock at the time, was dropped from the FDP by amendment. Deactivation of the road was underway in 2002 with a temporary access barrier placed across the road so that crews could access the road for this purpose. The plan was to leave the lock blocks in place and deactivate the road, rather than de-construct the road. No amendment was made to the FDP to reflect the more substantial access control measures that had been agreed upon.

35 By 2002, discussions started to break down as Richard Sam said that the 2001 agreement meant that there was to be no logging in the entire Kelah trapline territory, while Ingrid Russell for MFR said that there was to be no harvesting only in the Redtop area accessed by the Red Top Road. MFR disclosed to Kelah at a meeting of July 24, 2002 that MFR was considering a new initiative that would award timber sales directly to First Nations and enquired how Kelah's demands fit with the Wet'suwet'en demands. Richard Sam was "flabbergasted" that the ministry appeared to ignore the 2001 agreement and pointed out that the inclusion of any cutblocks in the Redtop area was contrary to the 2001 agreement. Kelah made it clear at that time that the Wet'suwet'en could not make decisions for Kelah over her trapping territory, which includes the Redtop, and said that she sought all of the cutting blocks within the trapping territory removed from the FDP within 5 years. There was a direction within MFR to avoid processing applications within Kelah's trapline territory "for the time being". Discussion ensued and it was eventually agreed that the office of the Wet'suwet'en would be the main contact for Kelah and that the Crich family would be advised of any changes to the FDP as a result of their concerns. However, the family had reiterated that contact was to be with them directly by early 2003, a position rejected by MFR despite the fact that a dispute resolution process with the Crich family had not been established as contemplated in the 2001 agreement. In August 2003, MFR informed the Crich family that the plan was for BC Timber Sales to advertise timber sales open to registered bidders in the Kelah territories. MFR noted and knew that this would not meet Crich family expectations and would likely result in a blockade. The parties were at an impasse by October 2003 and no further discussions occurred. The ministry suspended efforts after concluding that differences

were not resolvable given the "positional rhetoric".

36 Also in 2003, MFR developed a plan, legislated in March 2003 as the ***Forestry Revitalization Act***, S.B.C. 2003, c. 17, to create new forest sector opportunities, particularly within First Nations and small businesses and local communities, by taking back the allowable annual cut that had been allocated to major licensees such as Canfor and reallocating these to BC Timber Sales. Canfor was notified in February 2004 of the reduction in its allowable annual cut, for which it was to be compensated as part of the reallocation process. 124,060 cubic metres was to be reduced from FL A16828.

37 Also, by February 2004, the Redtop was identified by internal MFR memorandum as a "Notional First Nations Area" not under "current restraint" because no First Nation tenure covered the entire area. Bill Warner had decided that the 2001 agreement did not apply and was, in any event, of short term duration. He explained in his April 2010 affidavit that the 2001 agreement was meant to be an agreement only between SBFEP and the Crich family. It was a "short term measure to address the issues necessary to remove the blockade", regardless that there was no term to the agreement. It was not meant to be a broad based government to government agreement, regardless of reference to the Ministry of Forests (MOF) in the agreement, to his signature on behalf of the Morice Forest District, and to the involvement of the Wet'suwet'en chief negotiator. He stated that he did not have authority to bind the ministry, notwithstanding that extensive discussion had taken place between various interested ministries, including MFR, about resolution of this situation and that the government's chief negotiator in the Treaty Negotiations Office had immediately expressed satisfaction with the agreement reached between the Ministry of Forests, the Wet'suwet'en, and the Crich family as demonstrative that the 2000 political accord worked. Warner said that the agreement was not intended to apply to "... any Bill 28 (Forestry Revitalization Act) take back, Forest and Range Practices Act operations, ... [or] to other major licensees, such as Canfor", regardless to the fact that there was no limitation expressed in the agreement and that Bill 28 was a 2003 legislative initiative.

38 By June 2004, MFR was aware that it had not completed its obligation under the 2001 agreement to amend the FDP to provide for substantial access control of the Red Top Road. In fact, by then, it planned to amend the FDP to remove the lock blocks and utilize the road. MFR knew that this action would "most assuredly result in another blockade". In July and August 2004, MFR was actively reviewing operating areas within the Morice Timber Supply Area to determine areas that could be reallocated for compensation of loss of the allowable annual cut to Canfor. The Redtop was identified by MFR as available for inclusion in the compensation package because it was not considered to be under "current restraint". None of the correspondence or memoranda regarding reallocation referred to the 2001 agreement at any time. It was known that reallocation of BC Timber Sales tenures within the Crich family territory would result "in a backlash". Although Canfor knew of the history of blockade, no ministry personnel informed Canfor of the existence of the 2001 agreement, according to the government's communication log.

Events 2005-2009

39 At the start of 2005, the Redtop area was part of the operating area held and administered by BC Timber Sales, the successor to SBFEP. BC Timber Sales held the Redtop operating area and could auction volume within the area to eligible bidders. Canfor was not eligible to bid under the reallocation system. The Crown conceded in argument before me that BC Timber Sales was not able to grant Canfor the operating area in the "normal course". Meetings occurred between Canfor and MFR in early 2005 to discuss the timber reallocation project, but the Wet'suwet'en and Kelah were not part of, nor were they informed of, these discussions. The tentative decision to reallocate the Redtop to Canfor was made on March 14, 2005.

40 The Wet'suwet'en were notified by letter of March 17, 2005 of the pending apportionment, but the details of the notification are unclear. Consultation occurred between March and May 27, without a meeting. The MFR closed consultation on May 27 even though it was known that there was disagreement about the MFR's consultation obligations. There was no direct involvement of the Crich family.

41 The final decision to allocate the "vacant Red Top area" to Canfor was made at a meeting between Canfor and MFR representatives on June 1, 2005, with the action plan to sign an agreement in principle in the near future and to finalize boundaries. The MFR and Canfor finalized the negotiated transfer of the Redtop operating area to Canfor in October 2005. An agreement in principle was executed in October 2005. By this time, MFR had concluded that the Wet'suwet'en had been given sufficient opportunity to state its concerns and further consultation was unnecessary. Formal written agreement reached in March 2006 reflected reallocation of operating areas in lieu of payment of compensation for loss of volume under FL A16828 in the amount of $238,526. Neither Kelah nor the Wet'suwet'en were informed of the transfer of the Redtop operating area before the transfer occurred or immediately afterwards.

42 By this transfer, Canfor gained control of the Redtop area because, as a practical matter, only Canfor could now obtain cutting permits in the area. Cutting permits are not specifically subject to public review outside of the prior ministry approval of a Forest Stewardship Plan ("FSP"). In principle, this released MFR from further consultation requirements with the Wet'suwet'en or Kelah as the Redtop was now under the control of a third party.

43 Before Canfor could obtain cutting permits in the Redtop, it had to obtain approval of a FSP that contains a forest development unit showing the area on which timber is to be harvested and roads constructed. Maps are provided and results and strategies must be forecast to meet government requirements under various forestry legislation. Canfor distributed its 2006 FSP to affected stakeholders for review and comment on January 18, 2006. It included a map that outlined the operating area that included the Redtop, but without indication of proposed cutblocks or roads. Prior to formal submission of the FSP on May 16, 2006, Canfor representatives, Bryan Jakubec ("Jakubec") and Jim McCormack ("McCormack"), met with Richard Sam at his request. Richard Sam told Canfor that transfer of the operating area had occurred without consultation and in disregard of the 2001 agreement. He told Canfor that the Crich family was opposed to logging in the Redtop area. It was not until much later that Richard Sam realized that there was a misunderstanding: the area that he referred to was the much smaller traditional Redtop area that is under scrutiny here and not the larger operating area that Canfor referred to as the Redtop. As a result of this confusion, Richard Sam's demands for compensation for logging elsewhere in the Redtop were misunderstood. Canfor knew by this meeting that there was a possibility of a blockade if logging occurred within the Redtop. Canfor committed to providing Richard Sam with notice of any proposed cutblocks and roads at issue prior to Canfor's cutting permit submission for the area.

44 Canfor decided to proceed with development of its harvesting plans for the Redtop in April 2007. MFR approved Canfor's FSP on May 15, 2007, and FL A16828 was awarded in November 2007. Jakubec sent a letter to the Wet'suwet'en on July 31, 2008 enclosing maps of the proposed development area that included the Redtop. The identified areas were stated not to represent proposed cutblocks. He requested any input the Wet'suwet'en might have on cultural heritage or archaeological features in the area, as required under the FSP. John Ridsdale, Natural Resources Referral Coordinator of the Office of the Wet'suwet'en, responded on August 11, 2008, requesting digital data for the spatial location of the development, which Canfor provided the next day. On August 15, 2008, McCormack informed Richard Sam by letter of the proposed development and asked for information to assist field work to mitigate possible impact on the Crich family trapline. Throughout November 2008, Jakubec sent several emails to the Office of the Wet'suwet'en asking whether there were any questions or concerns about the proposed development. No response was received.

45 McCormack, Jakubec, and Richard Sam met again on November 18, 2008. Richard Sam indicated that he believed that MFR had no authority to issue cutting rights in the Redtop area. He told the Canfor representatives that there was to be no block or road development in the Redtop unless agreement was reached with Kelah or permission granted by the courts. This was consistent with Kelah's understanding of the 2001 agreement. He said that the Office of the Wet'suwet'en was not adequately representing his family's interests. The meeting concluded abruptly when Sam stated he was not interested in reviewing Canfor's maps.

46 Canfor advised MFR of its information sharing efforts with the Office of the Wet'suwet'en, but not of its efforts with Richard Sam as stakeholder because of the trapline. In late November 2008, MFR confirmed with Canfor that information sharing was complete for the planned developments as disclosed in the maps attached to the July 2008

letters.

47 By January 2009, Canfor had decided to proceed with harvest plans in the summer of 2009 and, knowing Kelah's position, notified MFR of its plans so that there would be no delay in the issuance of cutting permits. Canfor identified cutblocks VALL0006, VALL0008, and VALL0016 as "critical to [its] harvest plans", even though they represented only about 1.2% of the total planned cut for the winter in the Houston division area. Canfor was aware of the 2001 agreement by February 25, 2009. BC Timber Sales had provided Canfor with its assessment of the status of the Redtop controversy from 2004. McCormack and Jakubec knew that cutblocks in the Redtop were dropped from the FDP and that the Crich family was to be consulted on any proposed new cutblocks. Canfor also knew that, although access via the Red Top Road was blocked, an amendment to the FDP had never been put through. Canfor knew that any amendment of the FDP to specifically remove the restriction on use of the road would likely result in a blockade. Despite this information, Canfor decided that the 2001 agreement was not a matter involving Canfor and chose to ignore its implications.

48 In March 2009, the Wet'suwet'en joined in a petition against Canada to the Inter-American Commission on Human Rights of the Organization of American States claiming that domestic remedies had proven inadequate, ineffective and offered no meaningful recourse to the resolution of aboriginal rights in the circumstances of a legislative bar until 1951 to the bringing of claims to respect their rights, the failure of the treaty process since 1977, and the failure of a single Canadian court to confirm the existence of aboriginal title and rights in traditional territories after over thirteen years of litigation. This had all been at immense cost to the Wet'suwet'en while traditional lands were being used for resource development.

49 Canfor submitted its application for CP324 on April 28, 2009. CP324 was issued on August 7.

50 Canfor gave Kelah notice of issuance of CP324 on August 12, 2009, by standard letter setting out the cutblocks in the cutting permit, including number VALL0016. Richard Sam replied immediately, requesting identification of the location of the cutblocks, restating his position, expressing frustration over the lack of consultation, and requesting a meeting.

51 Canfor continued with its plans. To harvest VALL0016 in the winter of 2009, Canfor intended to construct a 650m spur road off of the Red Top Road, for which it was issued a road use permit on August 20, 2009.

52 On September 15, 2009, Richard Sam met with three Canfor representatives and two MFR representatives to specifically advise them of the Crich family opposition to the harvesting of the cutblocks in the Redtop area. He told the meeting that Canfor had obtained the operating area without consultation and demanded compensation. He requested deactivation of the Red Top Road and indicated that there would be a blockade of the area until the matter of compensation was resolved. Following the departure of Richard Sam, MFR and Canfor continued the meeting. Canfor decided to continue with its plans regardless of the threatened blockade, with the intention to "let the courts deal with it". On the same day, Canfor requested a copy of the 2001 agreement. On September 24, Canfor representatives met with Kelah's daughter, Angeline Vincent, and others, who identified certain archaeological interests in the area that had not been identified in previous archaeological studies known to Canfor. The Crich family declined to assist Canfor to identify these interests immediately.

53 Another meeting occurred on October 9, 2009, this time with attendance of representatives of Canfor, MFR, Office of the Wet'suwet'en, and the Crich family. David de Wit ("de Wit") from the Office of the Wet'suwet'en made it clear that the Wet'suwet'en supported the Crich family. It asserted aboriginal title to the Ilh K'il Bin territory and the right to determine use of the land pursuant to ***Delgamuukw***. de Wit summarized the importance of this last traditional territory to the exercise of aboriginal rights within the context of Ginehklaiyex territories being heavily impacted by resource development elsewhere. Canfor attempted to discuss modification of its site plans to accommodate the family, but the discussion went nowhere. When asked by Canfor, the Wet'suwet'en confirmed that a blockade would occur if Canfor went ahead with cutting plans in CP324, meaning the Redtop. Canfor committed to withhold plans and activities

in the area until the Ginehklaiyex had the opportunity to formally present their interest in the territory. This was followed up by a written letter from de Wit for the Office of the Wet'suwet'en summarizing the discussion at the meeting and asking Canfor for written confirmation that it would honour its commitment to withhold plans.

54 On October 16, 2009, Jakubec responded to the Wet'suwet'en and stated that it was Canfor's intent to minimize, to the extent possible, potential impact upon the Wet'suwet'en and the Crich family. Comments on this issue were requested within five days.

55 Consistent with Wet'suwet'en tradition, the Wet'suwet'en chiefs met together at an All Clans meeting on October 23-25. All of the chiefs decided to support Kelah and her family. The Wet'suwet'en then informed Canfor in writing on October 27 of their formal support.

The 2009 Blockade

56 Canfor decided to push forward with its plans to log the Redtop in November 2009. On November 9, 2009, Himech, a logging crew hired by Canfor, commenced logging activity at VALL0016, and worked throughout the day without incident. On November 10, 2009, the Himech logging crew again attended the site and continued logging activity, including construction of about 100m of the spur road.

57 Around 10:51 a.m. on November 10, Lorne Himech ("Mr. Himech"), part-owner of Himech, received a telephone call from a member of the Himech crew who was working at the site. Mr. Himech was told that some people from the Office of the Wet'suwet'en were at the site requesting them to stop work. Mr. Himech telephoned Michael Van Arem ("Van Arem"), the Operations Superintendent for Canfor's Houston Division. Two Canfor employees, Andrew Lavigne ("Lavigne"), Harvesting Supervisor for Canfor's Houston Division, and McCormack, were dispatched to the site to investigate. Mr. Himech arrived at the site around 11:20 a.m.

58 When Mr. Himech arrived at the junction of the Red Top road and the first spur road on the cutblock, he observed four individuals in addition to his logging crew. Those individuals were Julian Bowes ("Bowes"), Angela Vincent, Samantha Vincent, and de Wit. Mr. Himech deposed that their presence was no surprise to him, as Canfor had informed him that there would probably be a blockade of the site. Mr. Himech described the group as "very nice and friendly".

59 Lavigne also spoke with the individuals without the presence of Mr. Himech. Lavigne was told that de Wit was speaking on behalf of the Crich family. de Wit stated that the Crich family was asserting their aboriginal title over the area surrounding the site and setting up a blockade to prevent any further timber harvesting in the area. de Wit also advised that the Crich family did not intend to allow Canfor's contractors to return to work, stating that this was the last remaining area in the traditional territory of the Crich family that had not been extensively logged and the family was not seeking any economic benefit from the harvesting activities, but rather wanted no further timber harvesting in that area. At the same meeting, Bowes informed McCormack and Lavigne that the Crich family had not been notified that Canfor was going to harvest in the Redtop area and felt that the harvesting operations were commenced in "bad faith". McCormack then told the group that Canfor would be sending Himech back to work at the site the next day, and if they were not permitted to work, that Canfor would likely seek a court injunction to remove the blockade.

60 That same day, Mr. Himech asked the group of individuals whether they would like him to cease operations, to which they replied yes. Mr. Himech had his crew move equipment out of the cutblock away from the blockade, and the group of individuals told him that none of the equipment would be vandalized. After all of the equipment was moved out, the group strung a rope across the Red Top Road approximately 100 metres from the junction with the Granisle Highway, and placed a sign reading "Entering Laksilyu Wet'suwet'en Territory" in the middle of the road. The sign had a logo of the office of the Wet'suwet'en and writing on the bottom of the sign which read "for further information contact the Office of the Wet'suwet'en" and gave a phone number.

61 Mr. Himech returned to the site on November 11, 2009. When he stopped at the rope, he observed that a camp had been set up 50m past the rope. Richard Sam approached him and asked what he wanted. When Mr. Himech asked

whether the crew could work that day, Sam replied "no way" and said "you should get your equipment out of here".

62 Mr. Himech was again denied access to the cutblock on November 12 and 13. Mr. Himech removed some of the equipment from the site on November 13 to be used elsewhere, but the rest of the equipment was left at the site so work could immediately resume if the blockade came down.

63 Van Arem and Mr. Himech attended the site on Saturday, November 14. They left their vehicles at the rope and walked down to the camp. Mr. Himech asked if he could continue work, and was told "no". Mr. Himech attended the site again with representatives of Canfor on November 15-17. Each time they were told that the crew could not work. They also observed that the camp was being moved up the Red Top Road closer to the Granisle Highway.

64 On the afternoon of November 17, 2009, just before 5 p.m., Lavigne attended the blockade site to deliver to those present at the blockade a notice of legal proceedings. Richard Sam was the only person present at the blockade at that time, and when Lavigne tried to serve the notice, Richard Sam responded that he would not take it and that it should be given to the chiefs. Richard Sam told Lavigne that the notice could not be posted at the blockade, and that the logging contractors were not welcome there.

65 The Canfor action was commenced on November 20, 2009.

66 On November 27, 2009, both Canfor and MFR representatives were invited to a Wet'suwet'en feast. Consistent with tradition, they were fed with moose meat stew from the Ilh K'il Bin territory. At that feast, Kelah explained why this part of the Kelah territory had to be protected, as it was one of the last areas where they could hunt, trap, and earn their livelihood. The other chiefs stood up to support Kelah in the protection of the territory. The Wet'suwet'en viewed this as a very significant event. No response was received from either Canfor or the MFR to the event.

67 The Kelah family has continued to occupy the blockade in shifts. When Canfor returned on several occasions to ask those on site whether Canfor can go to work, the defendants reply no. When Canfor has asked what will happen if it tries to go to work, Canfor has been told that the situation could escalate. Canfor has also been told by Richard Sam that "Canfor will never be able to harvest here".

68 The Hagwilneghl action was commenced against Canfor on January 19, 2009.

69 In February 2010, after receiving the affidavit materials upon which the plaintiffs in the Hagwilneghl action rely, and after it became clear to Canfor that the hearing of its injunction application in the Canfor action would not occur until the late spring of 2010, Canfor gave notice that it would not engage in any timber harvesting, new road construction or other related activities within the boundaries of CP324 without giving seven days written notice, or such reasonable notice as circumstances would permit if seven days was not possible.

70 As a result of the blockade, Canfor's plans to harvest CP324 by March 2010 have been delayed. Canfor has incurred costs for development work done to date of about $50,000. It has adjusted its harvesting schedule in other blocks and purchased more wood from the market to maintain supply to its Houston mill. However, cutblocks VALL0016 and VALL0006 represent only 1.2% of the total planned winter cut in the Houston division. Canfor stands to lose the operational flexibility offered by the Redtop location, which is relatively close and accessible to the Houston mill.

Analysis

(a) General principles and overview

71 Interlocutory injunctions are sought on behalf of the plaintiffs in both actions. Each application must be considered independently based upon the test for the grant of an interlocutory injunction. The test in British Columbia is the two part test established in ***A.G. British Columbia v. Wale*** (1986), 9 B.C.L.R. (2d) 333 at 345 (C.A.) [***Wale***], aff'd

[1991] 1 S.C.R. 62, as confirmed in ***Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.***, 2005 BCCA 5 at paras. 54-55 [***Expert Travel***] as follows:

> **54** The test for the granting of an interlocutory injunction has been expressed as both a three-part test (see RJR-MacDonald Inc. v. Canada (Attorney-General), [1994] 1 S.C.R. 311 at [paragraph] 77) and a two-part test (see A.G. British Columbia v. Wale (1986), 9 B.C.L.R. (2d) 333 (C.A.) at 345, aff'd [1991] 1 S.C.R. 62). As Madam Justice Saunders said in Coburn v. Nagra (2001), 96 B.C.L.R. (3d) 327, 159 B.C.A.C. 299, 2001 BCCA 607:
>
> > [7] Whether the criteria for an injunction is two part or three may be a topic of debate for scholars. In British Columbia the common test for injunctions has been two-pronged since British Columbia (Attorney General) v. Wale (1986), 9 B.C.L.R. (2d) 333 (B.C.C.A.), with the issue of irreparable harm being subsumed into the discussion of balance of convenience (or inconvenience). As Madam Justice McLachlin (now C.J.C.) noted in Wale, the distinction is likely without practical effect. The question in most cases is the relative weight of the convenience and inconvenience of the order sought, always considering the paramount measure, the interests of justice.
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> **55** The test set out in A.G. British Columbia v. Wale, supra, was described in Canadian Broadcasting Corp. (CBC) v. CKPG Television Ltd. (1992), 64 B.C.L.R. (2d) 96 (C.A.) at p. 101:
>
> > The two-pronged test is this: "First, the applicant must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction."

72 Although the Kelah plaintiffs urged this Court to adopt the three part test based upon the commentary in ***International Forest Products Ltd. v. Kern***, 2000 BCSC 1141 at para. 29, that there is a material difference between the two and three part test, that is, if irreparable harm must be considered separately from the question of balance of convenience, failure on the part of the applicant to prove irreparable harm will preclude the grant of injunctive relief, I decline to embark upon this route because of the prevailing statements of the law in British Columbia from our Court of Appeal. However, a judge must always remember that she is not the prisoner of a formula and that the fundamental question in each case is whether the granting of an injunction is just and equitable in all of the circumstances (***Wale*** at 346). The onus is on the applicant.

73 The threshold for a serious question to be tried is relatively low and does not require the applicant to prove a strong *prima facie* case (***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 at para. 49 [***RJR-MacDonald***]). The requirement to establish that there is a serious question to be tried applies both to the asserted right and to the alleged breach (***Wale*** at 345). However, while generally a judge will not engage in an extensive review of the merits, if the interlocutory motion will in effect amount to a final determination of the action in the sense that the harm will have been already caused to the losing party by its grant, then the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction at trial is a factor to be brought into the balance when considering the injustice that may occur (***RJR-MacDonald*** at para. 51). If this situation arises, a more extensive review of the merits must be undertaken, a strong arguable case must be made out, and the anticipated result borne in mind in the balance of convenience (***RJR-MacDonald*** at para. 54; ***Relentless Energy Corporation v. Davis***, 2004 BCSC 1492 at paras. 13-14; ***F&G Delivery Ltd. v. MacKenzie***, 2010 BCSC 195 at para. 22).

74 Irreparable harm refers to the nature of the harm, rather than its magnitude, and is a harm that cannot be quantified

in monetary terms (***RJR-MacDonald*** at para. 59). Evidence of irreparable harm must be clear and not speculative (***Cimolai v. Children's and Women's Health Centre of British Columbia***, 2001 BCSC 1537 at para. 34). The harm anticipated must arise between now and the date of trial (***Lake Petitcodiac Preservation Assn. Inc. v. Canada (Minister of the Environment)***, [1998] F.C.J. No. 797 at para. 23).

75 Ultimately, the balance of convenience must favour the granting of the injunction. This question asks who will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a determination on the merits (***RJR-MacDonald*** at para. 62). In a case, as here, involving a request by a private party to grant an injunction with an enforcement clause which might have an adverse impact upon asserted aboriginal rights, a careful and sensitive balancing of many important interests should occur and terms carefully considered (***Frontenac Ventures Corp. v. Ardoch Algonquin First Nation***, 2008 ONCA 534 at para. 43 [***Frontenac Ventures***]). This is especially so here, where the Wet'suwet'en have pursued lengthy court proceedings to assert aboriginal rights over the territory in question, only to have the matter ordered for retrial because of a defect in pleadings and errors in the admissibility of evidence (***Delgamuukw***). Although a sentencing case, the words of MacPherson J.A. in ***Frontenac Ventures*** at paras. 46 and 48 are apropos because aboriginal protesters may face civil or criminal contempt proceedings if they violate an injunction that may be granted here:

> **46** Having regard to the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests. Such is the case even if the affected aboriginal communities choose not to fully participate in the injunction proceedings.
>
> ...
>
> **48** Where a requested injunction is intended to create "a protest-free zone" for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations: see Julia E. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998) 56 U.T. Fac. L. Rev. 101. The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it. Good faith on both sides is required in this process: *Haida Nation*, p. 532.

In inserting this statement, this Court is well aware that this is not a consultation case as understood in ***Haida***.

(b) Application of law on Injunctions

(1) Serious question to be tried: Canfor

76 Canfor alleges that the Sam defendants have harmed Canfor's property interests, committed economic torts against Canfor, and harmed public interests by committing trespass, nuisance, interference with economic relations, inducing breach of contract, conspiring to injure, intimidation, and unlawful blocking of a public road. Each of these causes of action should be considered.

i. Trespass based upon a *profit a prendre*

77 The claim in trespass is based upon Canfor's right to harvest timber under FL A16828, a volume based forest licence, which Canfor says constitutes an interest in land in the nature of a *profit a prendre* based upon the decisions in ***MacMillan Bloedel Ltd. v. Simpson*** (1993), 106 D.L.R. (4th) 556 at 559-562 (B.C.S.C.) [***MacMillan Bloedel BCSC***], aff'd (1994), 96 B.C.L.R. (2d) 201 at paras.9-10 (C.A.) [***MacMillan Bloedel BCCA***], aff'd [1996] 2 S.C.R. 1048 [

MacMillan Bloedel]; ***Tolko Industries Ltd. v. Okanagan Indian Band***, 2010 BCSC 24 at para. 35 [***Tolko***]; and ***Siska Indian Band v. British Columbia (Minister of Forests)***, [1999] B.C.J. No. 2354 at paras. 2 and 18 (S.C.) [***Siska***]. The Sam defendants argue that, with the exception of ***Siska***, these cases involve tree farm licences, not forest licences, and that the latter is not a registerable interest in land that gives rise to a *profit a prendre.* Although ***Siska*** did involve a forest licence, it had been agreed that a serious question was raised and whether the forest licence gave rise to a *profit a prendre* did not arise as a legal issue.

78 Tree farm licences are dealt with in s. 35 of the ***Forest Act***, R.S.B.C. 1996, c. 157, and provide the grantee with exclusive right to harvest Crown timber from a specifically described tree farm licence area. Forest licences are described in s. 14 of the ***Forest Act*** and provide for a non-exclusive, limited volume based usage of timber in a particular timber supply area. Both a tree farm licence and a forest licence are transferable under s. 54.1 of the ***Forest Act***.

79 The Supreme Court of Canada defined a *profit a prendre* in ***British Columbia v. Tener***, [1985] 1 S.C.R. 533 at 540-541 as follows:

> A profit à prendre is defined in Stroud's Judicial Dictionary (4th ed.), vol. 4, at p. 2141 as "a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil". In Black's Law Dictionary (5th ed.), it is defined as "a right to make some use of the soil of another, such as a right to mine metals, and it carries with it the right of entry and the right to remove and take from the land the designated products or profit and also includes the right to use such of the surface as is necessary and convenient for exercise of the profit".
>
> Wells J. elaborated on the nature of a profit à prendre in Cherry v. Petch, [1948] O.W.N. 378 where he said, at p. 380:
>
> > It has been said that a profit à prendre is a right to take something off the land of another person. It may be more fully defined as a right to enter on the land of another person and take some profit of the soil such as minerals, oil, stones, trees, turf, fish or game, for the use of the owner of the right. It is an incorporeal hereditament, and unlike an easement it is not necessarily appurtenant to a dominant tenement but may be held as a right in gross, and as such may be assigned and dealt with as a valuable interest according to the ordinary rules of property. [Emphasis added]
>
> It is important to note that it is the right of severance which results in the holder of the profit à prendre acquiring title to the thing severed. The holder of the profit does not own the minerals in situ. They form part of the fee. What he owns are mineral claims and the right to exploit them through the process of severance. This may be significant when attempting to answer the questions: what constitutes the expropriation of a profit à prendre? What constitutes injurious affection in the case of a profit à prendre?
>
> Profits à prendre may be held independently of the ownership of any land, i.e., they may be held in gross. In this they differ from easements. Alternatively, they may be appurtenant to land as easements are, i.e. they may be a privilege which is attached to the ownership of land and increases its beneficial enjoyment. In this case the respondents would appear to have a profit à prendre in gross since they do not own any land to which the profit is appurtenant.

80 As this definition suggests, a *profit a prendre* is an interest in land that allows entry upon land and removal from the land of designated profits. It need not convey an exclusive right of possession.

81 However, with respect to the right to harvest timber, the caselaw is not clear that the right to enter and remove timber will always be considered an interest in land, specifically where the right conveyed is not exclusive. Early cases required that the plaintiff show that he had an exclusive right to harvest timber in order to sustain a claim for an interest in land, rather than a mere licence. Subsequent cases have relied upon characterization of the right to harvest as a *profit a prendre* to find an interest in land. The question is whether subsequent cases have dispensed with the requirement of exclusivity and whether this has a bearing on the extent of remedies available in an action for trespass. To understand this issue, an overview of caselaw development on the characterization of the right to harvest timber will shed light on the nature of the *profit a prendre* as it relates to the scope of an action in trespass.

82 In ***Breckenridge v. Woolner*** (1856), 8 N.B.R. 303 (S.C.), the plaintiff was proceeding in an action for trespass against the defendant, who had cut and taken away a quantity of timber from the land within the bounds of the plaintiff's licence. The plaintiff held a licence, granted by the Crown, to cut and remove timber on Crown land. The plaintiff sought to rely on legislation, which stated that "If any timber, trees or logs are cut and carried away from any grounds held under lease or licence from the Crown, the lessee or licencee may recover damages therefor in an action of trespass or replevin, and such lessee or licencee, for the purpose of such action, shall be deemed and taken to be the owner of such property." The court held, however, at page 305 that the licence was not exclusive and did not confer an interest in the land:

> the licence in this case gives no interest in any land, but merely a right (and that not an exclusive one) to cut the trees and remove them when cut. A licence given by the owner of land to another, to enter and cut down and take away trees cut therefrom, gives no possessory estate in the land, though it is a grant of the trees when cut, and a licence to enter, cut, and carry away, which would protect such person from being dealt with as a trespasser.

As a result, the plaintiff could not maintain an action of trespass against the defendant.

83 In ***Sinnott v. Scoble*** (1884), 11 S.C.R. 571 [***Sinnott***], the plaintiffs sought an interim injunction to restrain the defendants from cutting timber on portions of their land, which they claimed to hold under a permit from the Crown Timber Agent. Ritchie C.J. held at 581 that a permit to cut a quantity of timber (a volume based permit), which did not grant exclusive possession, did not amount to an interest in the land:

> ... it did not give the licensee possession of the land covered by the permit, or any interest in all the trees standing on such land; nor did it prevent the Crown from giving a permit to cut on the same land subject to such permit.
>
> ... even ... if this license or permit had been issued under legal authority, it amounted to no more than a mere permission or right to enter on the land and cut the quantity of timber specified in the permit, and gave the licensee no interest in or possession of the land, or exclusive right to cut or property in the standing trees. This permit is entirely different from a license such as that contemplated by the 52nd section of the Dominion Lands Act, which covers all the timber oil the land, and gives the licensee the exclusive possession of the land ...
>
> Long ago it was held, by the Supreme Court of New Brunswick, that a license to cut timber and remove it from lands does not enure as a grant of the trees until cut under the license. Kerr v. Connell, Bert. R. 133; and again, that license conveys no interest in the land to, the grantee, nor any property in the standing trees. The N.B. & N.S. Land Co. v. Kirk, 1 Allen 443; Breckenridge

> v. Woolner, 3 Allen 303.

84 In ***Glenwood Lumber Co. v. Phillips***, [1904] A.C. 405, the Privy Council held that a licence to cut timber, granted under an Act, which gave the licencee a right to the exclusive possession of the lands on which the timber was growing, conferred an interest in land. Lord Davey stated at p. 408:

> If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.

85 Then, in ***Vaughan-Rys v. Clary*** (1910), 15 B.C.R. 9 (S.C.), Murphy J. considered the issue of whether an interest in timber licences issued under the ***Land Act*** was an interest in land. Without reference to ***Sinnott***, he relied on ***Race v. Ward*** (1855), 24 L.J.Q.B. 153, at 157, wherein Lord Campbell held that a right to take trees from the soil of another fell within the category of a *profit a prendre*. Justice Murphy thereby concluded at 10:

> I think the point of law should be determined in favour of the plaintiff. By virtue of section 59 of the Land Act, a timber licence is, I consider, at least a profit a prendre.

Based on this definition, the mere right to enter land and remove trees would seem to give rise to an interest in the land, regardless of whether that right is exclusive. This decision was followed in ***Anderson v. Rolandi Brothers Logging Co.*** (1955), 17 W.W.R. 119 (B.C.S.C.) where the court held that a timber sales contract issued by the provincial government amounted to a profit a prendre. Relying on the decisions of ***Race v. Ward*** and ***Vaughan-Rys***, the court noted that the right to cut timber is an incorporeal hereditament, a *profit a prendre*, which is an interest in land. The court further suggested at 122 that one should look at the nature of the right, rather than its description:

> It is true that the document issued is called a timber sale contract but the fact remains that it is a licence to cut and remove timber. I fail to see any justification for making the distinction.

86 In ***Cameron v. Silverglen Farms Ltd.*** (1982), 51 N.S.R. (2d) 64 (S.C.T.D.) (reversed on other grounds), the plaintiff sought a declaration that he was entitled to enter upon the lands of the defendant to remove wood, and for an injunction prohibiting the defendant from interfering with this right. The court questioned whether an agreement that sold and assigned "all trees and timber now standing, growing, lying and being in and upon" certain parcels of land amounted to a *profit a prendre*. The defendant had argued that this amounted to a mere licence. The court concluded that since the agreement conveyed the right to not only cut the trees but also to remove them from the property, the interest created by the agreement was a *profit à prendre* and not a mere licence.

87 In ***MacMillan Bloedel BCSC***, the trial judge considered whether a tree farm licence amounted to a *profit a prendre*. At 559, the court noted the statements of Justice Murphy in ***Vaughan-Rys***, to the effect that a timber licence was, at least, a *profit a prendre*. The court also noted the judgment of Justice Wood in ***Anderson v. Rolandi Brothers Logging Company***. The trial judge then made the following comments at 561:

> It appears to me that on the authorities cited, and having regard to the facts of this case, that the plaintiff here has a sufficient interest in the area and in the access roads leading to the logging areas to support the claims advanced. It appears to me that the right to harvest timber granted to the plaintiff herein is in the nature of an interest termed a profit à prendre, and that this interest could, if other facts were proved, establish a basis to afford the plaintiff the relief claimed in the amended statement of claim.

88 ***MacMillan Bloedel BCCA*** is the most authoritative case at this point on the question of whether a licence to harvest timber is an interest in land. After quoting from the learned trial judge, Macfarlane J.A. said at paras. 9-10:

> **9** [The trial judge] considered Vaughan-Rys v. Clary et al (1910), 15 B.C.L.R. 9 (Murphy J.) and

> Anderson v. Rolandi Brothers Logging Company (1955), 17 W.W.R. 119 (Wood J.) in which British Columbia courts had held a timber licence to be at least a profit a prendre and a timber sales contract an interest in land. He concluded, at p. 10:
>
> > It appears to me that on the authorities cited, and having regard to the facts of this case, that the plaintiff here has a sufficient interest in the area and in the access roads leading to the logging areas to support the claims advanced. It appears to me that the right to harvest timber granted to the plaintiff herein is in the nature of an interest termed a profit a prendre, and that this interest could, if other facts were proved, establish a basis to afford the plaintiff the relief claimed in the amended statement of claim.
>
> **10** That finding is not directly attacked, although it is asserted that the interest which the respondent seeks to protect is more in the nature of a business interest than a property interest. In my opinion Mr. Justice Hall was correct. What the respondent seeks to protect is an interest in private property.

89 It is worth noting, however, that in ***Pilon v. Bourdon***, 2003 BCSC 379 at para. 67, Meiklem J. questioned the conclusion formed in ***MacMillan Bloedel BCCA*** with respect to characterizing a right to harvest timber as an interest in land. Justice Meiklem suggested that this finding in ***MacMillan Bloedel BCCA*** was incidental to the main issue, such that this issue may not be fully resolved. The court held, however, that a woodlot licence was sufficiently unique to merit imposing a constructive trust, even if it were not an interest in land.

90 More recently, in ***Robillard v. Staaf Estate***, 2008 BCSC 1266, a stated case involving a question about the nature of the interest in an agreement for a half-interest in timber on certain property, Williams J. had no difficulty in concluding that the taking of timber is a *profit a prendre*. Based upon ***Vaughan-Rys v. Clary***, the Court said at para. 25:

> **25** On the basis of these authorities, I have no difficulty in concluding that a profit à prendre is a right which entitles the holder to enter upon the land of another and to take some "profit of the soil" for use of that holder, and that the taking of timber is included in the concept. I am satisfied also that it is an interest in land that is capable of registration. The grant of such a right must be in writing, although no particular incantation or wording is necessary to effect its creation. It cannot exist simply by custom.

91 Most recently, in ***Tolko***, the Court relied upon ***MacMillan Bloedel BCSC*** to hold at para. 35 that an area based, exclusive tree farm licence is equivalent to a *profit a prendre*. This was sufficient to raise a serious question to be tried within actions in nuisance, obstruction, conspiracy and intentional interference with contractual relations, although the Court did not embark upon an analysis of the requirements of each tort. With respect to trespass, it was agreed in that case that an aboriginal right to harvest trees upon lands in which aboriginal title was claimed is a *profit a prendre* which can found a trespass claim.

92 Accepting that the right to harvest trees generally gives right to a *profit a prendre*, the question then arises as to the extent of the right in trespass. In ***Perry v. Buck*** (1854), 12 U.C.R. 451, the court questioned the ability of a person who had acquired the right to cut and remove trees on a certain lot, but did not have exclusive possession to that lot, to proceed in trespass against the defendant who had entered the same lot to cut down trees. Because the plaintiff did not have exclusive possession but only a right to enter upon the lands, the court concluded that the defendant was not a trespasser because he may have lawful reasons for going there for purposes that did not interfere with the plaintiff's privilege. Subsequently, in ***Sinnott***, the Supreme Court of Canada held that the plaintiff, who did not possess an exclusive right to harvest timber, could not sustain an action in trespass generally, but solely an action on the case to prevent interference with his rights under the licence.

93 In ***Douglas Lake Cattle Co. v. British Columbia*** (1990), 44 L.C.R. 260 (B.C.C.A.), the court considered the kind of possession required to support an action in trespass. The plaintiff claimed damages in trespass when the Crown took licensed grazing lands for construction of a highway. In finding that it all depended upon the concise language of the grant and the relevant legislation, the court differentiated between a licence and the grant of an equitable interest in land in the nature of a *profit a prendre* as follows at 263-264:

> In Professor Flemming's The Law of Torts (4th) p. 41 that learned author states:
>
> > Thus, a plaintiff who had a concession from a canal company to the exclusive right of keeping pleasure-boats for hire, failed to recover from a stranger who interfered with his monopoly, because the action of trespass afforded no protection against infringement of a mere licence. On the other hand, the grantee of a legal or equitable interest in land in the nature of an easement or profit a prendre, like a fishery or right to cut timber, can sue in trespass for direct interference by strangers.
>
> In this case the plaintiff's right under its license is to graze for a specified number of unit months upon the lands of the license but it is not a right of occupation or possession. Even if it could be classified as a profit a prendre on which I express no opinion, it is an unusual one because the owner has reserved to itself by the Range Act and the permit and other statutes the right also to use parts of the license area. Although these cases always depend upon the concise language of the grant and the relevant legislation I conclude that the plaintiff could not prevent strangers from using the grazing lands for non-grazing purposes. I believe the plaintiff could by an action in trespass permit a stranger from interfering with the exercise of its grazing rights: Gagetown Lumber Co. Ltd. v. The Queen, [1957] S.C.R. 44 per Rand, J. at p. 28.

Ultimately, after carefully reviewing the terms of the grazing licence, the court found that the Crown had reserved for itself the right to use the lands for other purposes and there was ample lands left for grazing so that trespass could not be maintained.

94 In ***MacMillan Bloedel BCSC*** at 561, the court adopted the basic principle that a *profit a prendre* could be enforced through an action in trespass. However, the decision on this issue did not turn on the exclusivity of the tree farm licence because the plaintiff sought only to protect its right of access to the logging areas, rather than keep trespassers off the land.

95 In the recent decision in ***Tolko***, the court questioned whether exclusive possession was required to sustain the tort of trespass. With respect to the action in trespass of the Okanagan Indian Band on the basis of possession of the lands, the court suggested at para. 43 that exclusive possession was required to found such a claim. However, the Okanagan Indian Band had also claimed trespass on the basis of the aboriginal right to harvest timber, which was considered akin to a *profit a prendre*. On this basis, the band had established a fair question to be tried.

96 Canfor's claim is that the Sam defendants have directly interfered with its right to harvest timber by preventing access to the Red Top Road. This claim is within the extent of the caselaw on trespass as has been recognized and, as such, raises a serious question to be tried even though careful examination of the language of the licence and legislation may lead to a different result.

97 However, that is not the end of the matter. Kelah holds a registered trapline in the same area which is a prior *profit a prendre* (***Bolton v. Forest Pest Management Institute*** (1985), 66 B.C.L.R. 126 at 134). Generally, the first in time prevails (***Alexander v. Gesman*** (1912), 45 S.C.R. 551). The extent to which CP324 interferes with the trapline has not been clearly established. The 2001 agreement may also affect the extent to which the right to harvest timber includes

access via the Red Top Road. All of this goes to the strength of the plaintiff's case and may be factored into the balance of convenience if the grant of an injunction here will be determinative of ultimate harm.

ii. Nuisance

98 Canfor maintains that the Sam defendants have unreasonably interfered with its interest in the land in the form of its *profit a prendre* under the forest licence and that an action in nuisance lies to restrain unreasonable interference with the enjoyment of those rights. This is the import of ***MacMillan Bloedel BCSC*** where a claim in nuisance was recognized to restrain unreasonable interference with a tree farm licence. Although an easement case, the court in ***Terasen Gas Inc. v. Utzig Holdings (B.C.) Ltd.***, 2010 BCSC 90 at para. 370 [***Terasen Gas***] referred to interference with a *profit a prendre* as giving rise to an action in nuisance.

99 In my view, the significant question here is whether the conduct of the Sam defendants constitutes an unreasonable interference. The tort of nuisance is based upon the defendant's unreasonable interference with the plaintiff's use and enjoyment of its interest in the land (***Terasen Gas*** at para. 397). What is unreasonable depends upon consideration of all of the circumstances so that it is clear, according to concepts of the day, that the conduct is so substantial and serious as to be an actionable wrong. As stated by McIntyre J.A. (as he then was) in ***Royal Anne Hotel Co. Ltd. v. Ashcroft***, [1979] 2 W.W.R. 462 at 466-468, as adopted by Smith J. in ***Terasen Gas*** at para. 397:

> In reaching a conclusion, the court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration and many other factors which could be of significance in special circumstances. ... The conflicting interests must be weighed and considered against all the circumstances. The social utility of the conduct complained of must be weighed against the significance of the injury caused and the value of the interest sought to be protected. ...

100 While Canfor has raised a serious question to be tried on this issue, the existence of the 2001 agreement in the context of the defendants' conduct in maintaining the deactivation of the Red Top Road weighs in favour of the reasonableness of the interference here.

iii. Interference with economic interest/unlawful blocking of a public road

101 Canfor claims that the Sam defendants deliberately used unlawful means with the object and effect of causing damage to the plaintiff's economic interests. Canfor maintains that the Red Top Road is a forest service road for which Canfor had obtained a road use permit pursuant to CP324 and that the blockade by the defendants is unlawful because it blocks a public road, is contrary to s. 22.2 of the ***Forest and Range Practices Act***, S.B.C. 2002, c. 69, and is an offence under s. 423(1)(g) of the ***Criminal Code***, R.S.C. 1985, c. C-46.

102 The Sam defendants say that the Red Top Road is not a public road or highway, that the blockade is not contrary to the rule of law, and that the defendants have no intention of harming Canfor's economic interests.

103 It is not contested that the essential elements of the tort of interference with economic interest are an intention to injure the plaintiff's economic interests, an interference with those interests by illegal or unlawful means, and economic loss (***No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia***, 2000 BCCA 463 at para. 110). For purposes of establishing a serious question to be tried, if the defendants knew that their conduct in blockading the Red Top Road would prevent Canfor from proceeding with harvesting, then the necessary intention can be inferred (see ***Verchere v. Greenpeace Canada***, 2004 BCCA 242 at paras. 29 and 41; ***Daishowa Inc. v. Friends of the Lubicon*** (1996), 27 O.R. (3d) 215 (C.A.)). The motive to act, being the protection of interests under the 2001 agreement, and the fact that the harm to Canfor's overall economic interest may be slight, are irrelevant. The real question here is whether the blockade was illegal.

104 It should be noted that the defendants have not been charged criminally with blocking a highway contrary to s. 423(1)(g) of the ***Criminal Code.*** It should also be noted that the reconciliation of aboriginal title with common law land use entitlements does not give rise to blockade as a legitimate self-help remedy in criminal or common law (***R. v. Manuel***, 2008 BCCA 143 at para. 62). However, this is beside the point of whether the Red Top Road is a public road, whether the defendants have restricted the plaintiff's access, and what is the effect of the 2001 agreement.

105 All parties agree that the Red Top Road is a forest service road that has never been designated as a public highway. The MFR is the tenure holder for all forest service roads. The District Manager for the Nadina Forest District issued Canfor a road use permit for industrial use of the Red Top Road on August 20, 2009. Use of a forest service road is governed by the ***Forest and Range Practices Act***, particularly s. 22.2 which provides that only the District Manager or holder of a road permit acting with the Minister's consent may close or restrict use of a forest service road. Canfor says that the Sam defendants, as members of the public, had no right to close the road. However, this ignores the effect of the 2001 agreement wherein the District Manager agreed with the Crich family, of which the Sam defendants are members, to effectively close the road by restricting access to the road by amendment to the FDP and by erecting blocks across the road to prevent access. If the amendment had taken place, as promised, then the road would not have been available for permit. Further, the access control measures contemplated in the 2001 agreement were clearly intended to prevent access for the very purpose that Canfor asserts, to harvest timber in the Redtop. This circumstance raises a significant issue as to whether the blockade can be considered unlawful and seriously undermines the strength of the plaintiff's claim, notwithstanding that Canfor maintains that the 2001 agreement is a matter between the Crown and the Crich family.

iv. Interference with contractual relations, conspiracy to injure and intimidation

106 Canfor candidly acknowledged that it does not rely extensively on these causes of action. Furthermore, the cause of action in intimidation relates only to the defendants Richard Sam and Julian Bowes. Further, with respect to the tort of conspiracy, I agree with the defendants that it is merged in the other tort claims in the circumstances here, even though success has not been determined, and adds nothing in itself (***Bank of Montreal v. Tortora***, 2010 BCCA 139 at para. 53).

(2) Serious question to be tried: the Kelah plaintiffs

107 In this application, the Kelah plaintiffs have claimed against Canfor for an interlocutory injunction to prevent harvesting within CP324. The plaintiffs do not seek a broader injunction to prevent Canfor from harvesting in all areas subject to the claim of aboriginal title in the broader Wet'suwet'en traditional territory. Therefore, it is not necessary to consider Canfor's argument that the broader application seeks *quia timet* injunctive relief. The Crown takes no position on this application. The claim against Canfor relates to a declaration that the 2001 agreement renders CP324 unlawful, trespass, obstruction, intimidation and wrongful conversion of property by removal and sale of timber from aboriginal lands, and interference with contractual and economic relations.

i. Preliminary issue: circumvention of *Haida*

108 As a preliminary matter, Canfor has argued that the Kelah plaintiffs seek to circumvent the consultative process established in ***Haida*** and are effectively seeking a veto over timber harvesting in an area over which they have yet to prove aboriginal title. The plaintiffs have not sought judicial review of the decision to grant CP324; instead, they have brought a direct application for injunctive relief. Canfor argues that this circumvents the process in ***Haida*** and is an impermissible attempt to exercise a veto over licensee activity in asserted traditional territories that should not be sanctioned. At the least, Canfor says that this should be considered within the balance of convenience.

109 The Kelah plaintiffs claim that regardless of the consultation process, nothing prevents them from challenging the validity of authorizations such as CP324 through actions aimed at proving aboriginal title, unjustified infringement, or breach of the 2001 agreement. The Kelah plaintiffs maintain that they may obtain an interlocutory injunction to

enjoin a third party from proceeding as a licensee, whether or not the Crown has consulted prior to infringing aboriginal title, as the adequacy of consultation is only one factor to consider in the determination of whether Crown infringement is constitutionally justifiable.

110 The statement at para. 48 in ***Haida***, that the consultation process with the Crown does not give aboriginal groups a veto over what can be done with land pending final proof of title claim, does not mean that injunctive relief cannot be sought against Crown authorized third party activity in connection with an underlying action directed first against the Crown for unjustified infringement of s. 35 constitutional rights and then against the third party who proceeds on the basis of Crown authorization, especially in the context here of the 2001 agreement. An application for injunctive relief outside of the consultation process is not equivalent to a veto within the consultation/accommodation/negotiation context. It was expressly recognized in ***Haida*** at para. 56 that third parties could be liable to aboriginal peoples. Also, Lambert J. specifically concluded in ***Haida Nation v. British Columbia (Minister of Forests)***, 2002 BCCA 462 at paras. 75-76, that an aboriginal claim in trespass may be founded on a good prima facie case for aboriginal title against anyone who violates the title once conceded or proven. In any event, the Supreme Court of Canada stated at para. 13 in ***Haida*** that it was open for plaintiffs like Haida to seek an interlocutory injunction as a remedy apart from the obligation to consult or accommodate.

111 There are numerous cases in which injunctive relief has been successfully sought by aboriginal groups against third parties holding a licence to harvest timber from the Crown (for example, ***MacMillan Bloedel Ltd. v. Mullin***, [1985] 3 W.W.R. 577 (B.C.C.A.) [***Meares Island***]; ***Hunt v. Halcan Log Services Ltd.***, [1987] 4 C.N.L.R. 63 (B.C.S.C.); ***Westar Timber Ltd. v. Gitksan Wet'suwet'en Tribal Council*** (1989), 60 D.L.R. (4th) 453 (B.C.C.A.) [***Westar***]). In ***Westar***, the court specifically acknowledged that notwithstanding powerful considerations that may mitigate against granting interlocutory relief to those claiming aboriginal rights, such relief may be granted in respect of particular sites which have unique qualities even if the apparent effect may be to suspend or exempt certain persons from the operation of legislation. Each case must be dealt with on a case by case basis.

112 This matter was addressed in ***Tolko***, a post-***Haida*** case, in which the Court made clear at paras. 50-51 that aboriginal claimants are not confined to a particular remedy and that there are various remedies that an aboriginal group may pursue, including an injunction or consultation and accommodation. The recent decision of the Supreme Court of Canada in ***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council***, [2010] 2 S.C.R. 650, does not alter this conclusion. Rather, the court at paras. 33-34 expressed the need for meaningful consultation in light of the expense and lack of success faced by many aboriginal groups when seeking injunctive relief. The recognition at para. 37 that breach of the duty to consult may give rise to injunctive relief against threatening activity as a remedy for the breach, does not preclude an aboriginal group from directly pursuing that remedy, as here. Injunctive relief is available to the Kelah plaintiffs separate from any claim that they may make as to the adequacy of the consultation process.

ii. Aboriginal rights and title to the Redtop area and Kelah territory

113 The Kelah plaintiffs have claimed rights and title to the Redtop area and to the whole of the Kelah territory following from the decision ordering a new trial in ***Delgamuukw***. This action has the full support of the Wet'suwet'en. There is a serious question to be tried that may potentially give rise to a cause of action against Canfor as a third party in trespass.

iii. Effect of the 2001 agreement/interference with contractual relations

114 The Kelah plaintiffs claim that the 2001 agreement bound the Crown to remove cutblocks from the Redtop area and to implement access control over the Red Top Road purposefully to prevent the harvesting of timber in this limited area of Kelah's traditional territory. There was no term to the agreement. Canfor knew about the agreement and that removal of the restricted access to Red Top Road would result in a blockade to protect aboriginal rights generally and the 2001 agreement in particular. Kelah claims that the honour of the Crown requires concrete action to respect its promise such that CP324 should be declared null and void. In reply, Canfor says that it is not liable at all under the

agreement because it was not privy to it and that its proper interpretation does not give rise to a prohibition on logging in the Redtop.

115 In my view, the effect of the 2001 agreement upon the Crown and upon the ability to grant third party rights in apparent contravention of that agreement raises a serious question to be tried. This is so within the context of the honour of the Crown requiring avoidance of even the appearance of sharp dealing in the process of treaty negotiation, which could be extended to agreements in advance of treaty negotiation such as the 2001 agreement (***Haida*** at para. 19). With this comes the expectation that the Crown will fulfill its promises. Within this issue, the proper interpretation of the 2001 agreement may arise. But, at this point, the Kelah plaintiffs have raised a serious issue that will have to be determined as to the nature of that agreement and its effect upon Canfor.

(3) The Balance of Convenience

116 Both Canfor and the Kelah plaintiffs have established serious questions to be tried in each action. The question remains: who will suffer the greater harm from the grant or refusal of an interlocutory injunction pending a determination on the merits? This depends upon a number of factors including whether a party will suffer irreparable harm.

i. Irreparable Harm

117 Both sides in these competing interlocutory injunctions claim that the other will not suffer irreparable harm. The law is not contested.

118 Because an interlocutory injunction is an extraordinary intervention, the question is whether the plaintiff will suffer irreparable injury if the defendant is not restrained (***American Cyanamid v. Ethicon Ltd.***, [1975] A.C. 396; ***Aetna Financial Services Ltd. v. Feigelman***, [1985] 1 S.C.R. 2 at para.7; ***RJR-MacDonald*** at para. 58). The type of harm contemplated must be suffered by the applicant alone (***RJR-MacDonald***). It either cannot be quantified in monetary terms or cannot be cured, usually because the applicant cannot collect damages from the other (***RJR-MacDonald*** at para. 59). Examples of harm that cannot be quantified in monetary terms were given in ***RJR-MacDonald*** at para. 59 to include where one party will be put out of business by the court's decision, where one party will suffer permanent market loss, or where a permanent loss of natural resources will result if a challenged activity is not enjoined. The injury must be material in the sense that the parties could not be placed in the position in which they formerly stood (***Meares Island*** at para. 67).

119 Canfor claims that it has suffered irreparable harm because of the interference with its business as an ongoing concern, because of the interference with its property rights, because the inability to harvest threatens the value of timber given the pine beetle infestation, because of deferral of its harvesting activities in CP324 which also affects its other harvesting activities and the maintenance of a timber supply to its mill in Houston, because of the costs thrown away to date of $50,000 maximum, and because of loss of operational flexibility given the proximity of CP324 to the mill and highways. The Sam defendants say that irreparable harm is not established with just any interference with business as an ongoing concern and that the cut from CP324 is a small percentage of the overall cut for Canfor which has not been shown to affect continuing operation of the mill. Canfor has not shown that it will lose market position or be forced to close business if it cannot cut from CP324. Further, adjustment of cutting schedule and loss of operational flexibility is not irreparable harm. Finally, the Kelah defendants say that Canfor is the author of its own misfortune in pushing ahead with CP324 knowing of the 2001 agreement, the claim for aboriginal title, and the likelihood of a blockade of the Red Top Road.

120 In ***Zeo-Tech Enviro Corp. v. Maynard***, 2005 BCCA 392 at paras. 40-45, the court considered irreparable harm within the context of interference with an ongoing business and clarified that it is the nature of the harm that is important. It is not just any interference: there must be business closure or loss of market position, for example. Canfor is not in the situation of ***Tlowitisis-Mumtagila Band v. MacMillan Bloedel Ltd.*** (1990), 53 B.C.L.R. (2d) 69 (C.A.),

where evidence disclosed that many jobs would be lost and no alternate logging sites were available to supply its mill. Nor is it akin to the situation of ***West Fraser Mills Ltd. v. Lax Kw'Alaams Indian Band***, 2004 BCSC 815, where a recently re-opened mill's ongoing economic security and that of the logging contractor and involved employees would be significantly jeopardized without an injunction. While ***Tolko*** has some similarity as it pertains to the loss of value of timber because of pine beetle infestation, that case involved an area based tree farm licence and there was no basis upon which it could be concluded that damages could be recovered if awarded.

121 Canfor's licence is volume based and historically has been shown to have been adjusted to grant volume in different areas at different times based upon changing government policies. Neither Canfor nor the Crown suggested that there could not be a re-adjustment of the volume based area if Canfor is not granted an injunction. Further, there has been an undertaking to pay damages if awarded. In the circumstances here, with CP324 representing only 1.2% of Canfor's winter operations in the area, with no employees having been shown to be significantly affected by the closure, with no long term business losses of a significant nature arising, and within the background of Canfor's knowledge of the 2001 agreement, it cannot be concluded that Canfor will suffer irreparable harm to its ongoing business if it is not granted an injunction.

122 The interference with property rights, in this case the competing and secondary *profit a prendre*, also does not give rise to irreparable harm. Canfor cited ***Frontenac Ventures Corp.*** for the principle that interference with property rights by blockade gives rise to irreparable harm by its very nature because it is akin to expropriation without legislative sanction. In that case, the mining company had secured leases over private lands and held valid mining claims. When it began exploration activity in the area, an occupation by the defendants, who did not participate in the motion, started. The court recognized irreparable harm, although based upon the property right, because the ability to explore that property was the sole asset of the mining company and without it, the company would be entirely unable to compete for investor funds. It would be out of business. This is not the case here.

123 Canfor has not established that it will suffer irreparable harm if the injunction is not granted.

124 The Kelah plaintiffs claim that they will suffer irreparable harm because of the permanent loss of natural resources and the loss of the original condition of the Redtop within the Ilh Ki'l Bin. This is the last untouched area in Kelah's traditional territory and logging in that area will destroy the ability of the Wet'suwet'en to continue their traditional relationship to the land. The Kelah plaintiffs' traditional way of life is a cultural heritage resource. This claim is made within the context of the renewed claim of the Wet'suwet'en in ***Delgamuukw*** and the 2001 agreement. Canfor says that this claim is unfounded. Canfor has a plan to preserve culturally modified trees and the trapline trail, has complied with accommodation and information sharing, will conduct its operations according to legislative requirements, and the interference with an area within the ***Delgamuukw*** claim is modest. Canfor is only authorized to remove 32,000 m3 under CP324 and these trees are already dead or dying from pine beetle infestation. There is nothing unique about the Redtop area and the plaintiffs' concerns are based upon fear and speculation.

125 Assessing the degree of uniqueness of the land as significant to the aboriginal claimants has been a repeated theme in injunction applications of this sort. The preservation of pristine forest areas for traditional aboriginal uses clashes frequently with economic interests related to logging and other industrial use. In ***Siska***, Sigurdson J. acknowledged two of these cases, ***Kitkatla Band v. British Columbia (Minister of Forests)***, [1999] 4 W.W.R. 274 (B.C.C.A.), and ***Wiigyet v. Kispiox Forest District*** (1990), 51 B.C.L.R. (2d) 73 (S.C.), as demonstrative of the balance favouring industrial use when the significance to the aboriginal group is spiritual and cultural in the face of threatened economic viability. In ***Siska***, the Band did not have the obvious support of the nation, had not seriously pursued an aboriginal title claim, and had sat still while substantial logging took place before asserting the uniqueness of the lands as essential to traditional culture. The comparison of potential harm favoured the small family run logging company which would be devastated if the logging was not allowed.

126 The unique nature of the lands in relation to traditional culture as an irreplaceable resource was recognized in ***Meares Island*** at paras. 71 and 73 as follows:

> **71** If logging proceeds and it turns out that the Indians have the right to the area with the trees standing, it will no longer be possible to give them that right. The area will have been logged. The courts will not be able to do justice in the circumstances. That is the sort of result that the courts have attempted to prevent by granting injunctions.
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> ...
>
> **73** I have emphasized the material and symbolic importance of Meares Island to the Indians, but its cultural importance should not be disregarded. I adopt the words of Muirhead, J., speaking of the protection of aboriginal secrets by interlocutory injunction in Foster v. Mountford and Rigby Ltd. (1976), 14 A.L.R. 71, at p. 75; [1978] F.S.R. 582 at p. 586:
>
> > These people have come to the law for relief and protection and they have, in my view, established a strong prima facie case. They have set up a cause of action and raised issues, which require, of course, careful examination and consideration. As I have emphasised, monetary damages cannot alleviate any wrong to the plaintiffs that may be established and perhaps, there can be no greater threat to any of us than a threat to one's family and social structure.

127 In ***Westar***, Esson J.A. acknowledged at 474 that preservation of the Shedin Watershed was not required for purposes of evidence at trial and the area did not have the specific attributes as had ***Meares Island*** to make it specifically unique. However, he went on to say at 474-475:

> But there are other aspects of the Shedin Watershed which support the view that it is special. If the Gitksan succeed in establishing that they have unextinguished aboriginal rights in respect of the land within the claim area, any declaration of existing rights in 1990 or later will have to take into account what has happened in the last century and more since the white man came to those lands. What the Indians ask for is to be put back into the same relationship which they had with the land before the coming of the white man. What makes the Shedin area different from the area south of the Babine, and even more clearly different from Hazelton and other communities within the land claim area, is that, after all this time, it remains pristine in that has not been changed by white settlement. It is an area, small in relation to the whole of the land claim area, where it is feasible to contemplate the Gitksan continuing in the same relationship to the land which they enjoyed before the coming of the whites. In that respect, it has some similarity to the features of Meares Island referred to by Seaton J.A. at p. 156:
>
> > The Indians have pressed their land claims in various ways for generations. The claims have not been dealt with and found invalid. They have not been dealt with at all. Meanwhile, the logger continues his steady march and the Indians see themselves retreating into a smaller and smaller area. They, too, have drawn the line at Meares Island. The island has become a symbol of their claim to rights in the land.
>
> I do not overlook the consideration that the Gitksan land claim is made in respect of a vast area which, by comparison with most of the rest of the province, is largely untouched and uninhabited. I do not know how many other areas there are within the land claim which have characteristics generally similar to the Shedin Watershed -- I will assume there are others. If that is so, that

> effects the relative significance of the special qualities of the Shedin but does not deprive it of special significance on that basis.

128 The Kelah plaintiffs have demonstrated the cultural depth of the Redtop as the last remaining tract of land to preserve the traditional identity of the Ginehklaiyex within Wet'suwet'en society and government. Kelah and her family have fought legally and otherwise for decades to preserve these lands and the traditional way of life which they still practice in this very area. They have the full support of the Wet'suwet'en. They established a special contractual relationship with the MFR in 2001 to preserve their lands from logging. While the full interpretation of this agreement remains to be established at trial, within the background of ***Delgamuukw*** and in the circumstances here, a liberal interpretation should be contemplated. This relatively small area of land in relation to the land claim falls within the uniqueness of ***Westar*** and ***Meares Island***.

129 The Kelah plaintiffs have established that they will suffer irreparable harm if an injunction to prevent logging within CP324 is not granted.

ii. Other considerations

130 The comparison of relative harms comes within the weighing of various factors to be taken into account in determining where the balance of convenience lies. As famously stated by McLachlin J.A. in ***Wale*** at 346 "[t]he fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case". The ultimate question was stated by Seaton J.A. in ***Meares Island*** at para. 79, as paraphrased, to be: If the Kelah plaintiffs wished to do something that had the effect of making the Redtop unusable by Canfor, would we let them, or would we preserve the forest in its present state until trial?

131 If Canfor proceeds, it will have completed its logging of the Redtop within four months. A trial would then be of little consequence as the harm will have been caused. If Canfor cannot proceed, it will carry on business as relatively usual without grave economic effect.

132 For the Kelah plaintiffs, the logging will be a final blow to its long fought struggle to preserve the last remaining intact tract of traditional territory, not just the culturally modified trees and trapline trail, in the face of the 2001 agreement which was seen by all involved as a test of the accord reached between the Wet'suwet'en and the province. The adequacy of the consultation or accommodation that took place after the 2001 agreement, to the issuance of CP324 on August 7, 2009, and then to the grant of the road use permit on August 20, 2009, is not specifically before me.

133 However, in respect of the admonition at para. 48 of ***Frontenac Ventures*** (see para. 75 herein) and the issues of whether the Crown has fully and faithfully discharged its duty to consult and whether every effort has been exhausted to obtain a negotiated solution, it is notable that the Crown has chosen to take a 'sit back and wait' attitude here rather than actively encourage meaningful negotiation of competing rights and interests within this relatively small territory. MFR did not inform Kelah of the negotiations underway with Canfor in 2005 for transfer of the Redtop operating area. Thereafter, the Crown took a back seat to any consultation process, but actively assisted Canfor in January 2009 by providing Canfor with its 2004 assessment of the controversy and informing Canfor of the 2001 agreement. The same information was not given to Kelah. The Crown also did not inform Kelah of Canfor's plans for new cutblocks in the Redtop when it was advised of them in January 2009. The Crown remained uninvolved after the road use permit was issued in August 2009 and the blockade ensured.

134 If all factors are equal, the status quo should be maintained. Here, however, it is not simple. While maintenance of the status quo pending trial may have negative consequences because of the pine beetle infestation, there is evidence before me that the forest biodiversity persists with changing specie in the face of this threat. This complex issue cannot be resolved on an application of this nature. Further, the status quo was initially defined by the 2001 agreement: the Red Top Road allowing access to the Redtop for logging or any other purpose was to be closed. It has been refined by the grant of CP324.

135 The balance of convenience is not weighted equally here. The balance favours the Kelah plaintiffs in all of the circumstances.

(4) Conclusion

136 Canfor's application for an interim injunction against the Sam defendants in action no. S098601 is dismissed. Costs will be in the cause of that action generally.

137 The Kelah plaintiffs' application for an interim injunction in action no. S100409 to restrain Canfor from engaging in timber harvesting within CP324 is allowed. Costs will be in the cause of that action generally.

J.R. DILLON J.

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