COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hagwilneghl v. Canadian Forest Products Ltd.,*
2011 BCCA 478

Date: 20111125
Nos: CA039139 and CA039140

Docket. CA039139

Between:

Hagwilneghl, also known as Ron Mitchell and Kelah, also known as Mable Crich, on behalf of themselves and on behalf of All The Members Of The House Of Ginehklaiyex

Respondents
(Plaintiffs)

And

Her Majesty the Queen in Right of the Province of British Columbia

Respondent
(Defendant)

And

Canadian Forest Products Ltd.

Appellant
(Defendant)

- and -

Docket: CA039140

Between:

Canadian Forest Products Ltd.

Appellant
(Plaintiff)

And

Richard Sam, Angeline Vincent, Samantha Vincent, Julian Bowes, Ken Sam, John Doe, Jane Doe and persons unknown

Respondents
(Defendants)

And

Her Majesty the Queen in Right of the Province of British Columbia

Respondent
(Defendant by Counterclaim)

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Before: The Honourable Mr. Justice Hinkson
(In Chambers)

On appeal from: Supreme Court of British Columbia, May 25, 2011,
(*Canadian Forest Products Inc. v. Sam*, 2011 BCSC 676, Vancouver Nos. S098601 and S100409)

Counsel for the Appellant:	M.S. Oulton and J.D. Hughes
Counsel for the Respondents, R. Mitchell, M. Crich and R. Sam:	P.R. Grant and Michael Lee Ross
Counsel for the Respondent, Attorney General of British Columbia:	K.J. Phillips
Place and Date of Hearing:	Vancouver, British Columbia October 24, 2011
Place and Date of Judgment:	Vancouver, British Columbia November 25, 2011

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Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[1] The applicant, Canadian Forest Products Ltd., seeks leave to appeal two orders of Madam Justice Dillon, sitting in Chambers. The first order dismisses its application for injunctive relief in British Columbia Supreme Court Action No. S098601. The second order grants injunctive relief against it to those referred to by the Chambers Judge as the Kelah plaintiffs (and whom I will refer to as the Kelah respondents), in British Columbia Supreme Court Action No. S100409.

[2] The reasons for judgment of the Chambers Judge are indexed as 2011 BCSC 676 and address the claims for injunctive relief in both actions. She made no order with respect to the counterclaim for interlocutory injunctive relief by what she referred to as the Sam defendants (and who I will refer to as the Sam respondents) in British Columbia Supreme Court Action No. S098601. That aspect of the matter is not before me. I propose to deal with the applications that are before me in both actions in these reasons for judgment.

Background

[3] The applicant is an integrated forest products company and major 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.

[4] The respondents in both actions were described in the following terms by the Chambers Judge at paras. 6-9 of her reasons for judgment:

> [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*].

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> [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.

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[5] The Chambers Judge described the applications in the two actions at paras. 1-3 of her reasons:

> [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.

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[6] The TSA covers approximately 1.5 million hectares. It is within the traditional territories of eight First Nation groups, including the Wet'suwet'en, and includes an area called the Redtop which is also within Kelah territory. 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 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"), a program operated by MFR.

[7] The applicant submitted its application for Cutting Permit 324 (“CP-324”) on April 28, 2009. CP-324 was issued on August 7 of that year. The CP-324 cutting area is completely within the Kelah registered trap line area. It purports to entitle the applicant to harvest timber from three cutblocks: VALL0016, VALL0006 and VALL0008, within the operating area that includes the Redtop. 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 access to VALL0006 and VALL0008 is by the Granisle Highway.

[8] The Kelah respondents' claim is based upon the 2001 agreement and the aboriginal title of the Wet'suwet'en. They maintain that 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 by entering into an agreement with the Crown in 2001. They say that they filed their claim in 1977, went through the court process, and have re-entered treaty negotiations. They say that the 2001 agreement was intended to protect the Redtop through deactivation of the Red Top Road and the right to be consulted.

[9] Kelah maintains that she 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 respondents assert that they were not informed of CP-324 until after it was issued. Further, that Canfor failed to engage the traditional holders of the rights to the Redtop, contrary to known and established Wet'suwet'en custom. Kelah contends that the *status quo ante* requires that the 2001 agreement be respected. Further, the Kelah respondents say that survival of the Wet'suwet'en relationship to their territory, their *yintah*, is at stake.

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[10] The applicant contends that prior to 2005, the Redtop was in an operating area held and administered by the BC Timber Sales program, or its predecessor. Under that program it says that it was ineligible to obtain timber sales licences and could not harvest in the Redtop until 2005 when the Redtop was reallocated to it by the then Ministry of Forests.

[11] At para. 20 of her reasons, the Chambers Judge found:

> ... 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.

[12] At paras. 47-48 of her reasons, the Chambers Judge found that :

> [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.

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[13] The applicants began to build a road in the area in dispute to facilitate its logging operations on November 9, 2009, and were met with a blockade by the Sam respondents the following day. This blockade has since prevented Canfor and its contractors from accessing the Redtop through Red Top Road. The applicant commenced proceedings for an injunction to remove the blockade on November 20, 2009. On January 19, 2010, the Kelah respondents commenced their proceedings for injunctive relief against the applicants.

[14] As a result of the blockade, Canfor asserts that its plans to harvest CP-324 by March 2010 have been delayed. It also asserts that it has incurred costs for development work done to date of about $50,000. It maintains that 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 contended before the Chambers Judge that it stood to lose the operational flexibility offered by the Redtop location, which is relatively close and accessible to the Houston mill.

[15] The Chambers Judge concluded at para. 116 of her reasons that:

> 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.

[16] The Chambers Judge concluded at para. 123 that the applicant had not established that it would suffer irreparable harm if the injunction that it sought was not granted, but at paras. 128-129 found:

> [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.

[17] The Chambers Judge considered the balance of convenience between the parties, concluding at paras. 131-132 that:

> [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.

[18] Finally, at para. 135 the Chambers Judge concluded:

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

[19] In the result, the Chambers Judge ordered that the applicant's application for an interim injunction against the Sam respondents in Action No. S098601 was dismissed, and that the Kelah respondents' application for an interim injunction in

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action no. S100409 to restrain Canfor from engaging in timber harvesting within CP - 324 was allowed.

Issues in the Proposed Appeal

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[20] The applicant contends that the Chambers Judge erred by misapprehending the evidence before her in reaching three conclusions, and in failing to address a further and necessary issue. The three errors alleged respecting her conclusions are:

a) that the Chambers Judge erred by failing to conclude that the injunctive relief sought by the respondents was an impermissible collateral attack on the cutting permit in an attempt to circumvent the procedures required by the decision in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511;

b) that the Chambers Judge erred in finding that the applicant had failed to establish that it would suffer irreparable harm if it were not permitted to continue to harvest under CP-324; and

c) that the Chambers Judge erred in identifying the area in issue, resulting in an erroneous finding that the balance of convenience favoured the Kelah respondents.

[21] The issue that the Chambers Judge is alleged not to have addressed is whether the injunction sought and obtained constituted a *de facto* or a *de jure* stay or injunction against the Crown, contrary to the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 11.

Discussion

[22] The criteria to be considered on an application for leave to appeal are well known. Subject always to the overarching concern of the interests of justice, they are, as summarized by Madam Justice Saunders (in Chambers) in *Goldman Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 as follows:

> The criteria for leave to appeal are well known. As stated in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp*. (1988), 19 C.P.C. (3d) 396 (C.A.) they include:
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> > (1) whether the point on appeal is of significance to the practice;
> >
> > (2) whether the point raised is of significance to the action itself;
> >
> > (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
> >
> > (4) whether the appeal will unduly hinder the progress of the action.
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> See also *Chavez v. Sundance Cruises Corp*. (1993), 77 B.C.L.R. (2d) 328 (C.A.).

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[23] There does not appear to be any real issue that the proposed appeal will unduly hinder the progress of the actions in the Supreme Court. In that none of the parties have taken any steps in their respective actions in the Supreme Court, and no trial date has been set in either action, I see no potential that the progress of the actions will be hindered if leave to appeal the orders of the Chambers Judge were granted.

[24] Thus the fourth criterion is met. The first three criteria must be examined with respect to each proposed ground of appeal.

a) Collateral Attack

[25] The Kelah respondents did not bring any application for judicial review with respect to the issuance of CP-324.

[26] The applicant contends that its proposed appeal on this ground is of general significance for two reasons. First, it will deal with the appropriate procedure to be used by First Nations who seek to challenge Crown decisions respecting natural resource management and development, and second because it will deal with what the applicant asserts is an apparent conflict in the law as to the nature and extent of interference with ongoing business operations necessary to constitute irreparable harm.

[27] I consider that this matter is one of importance to both the general practice of law, and to the litigation between the parties.

[28] With respect to appropriate procedure, the applicant relies on the decision of this Court in *Moulton Contracting Ltd. v. Behn*, 2011 BCCA 311. In that case, a logging company obtained two Timber Sale Licences and a Road Permit from the defendant Crown for a specific Timber Supply Area. The company alleged that certain persons blockaded the only access road to the permitted logging area, as an intentional interference with its business relations. Those persons pleaded that the plaintiff's licences and road permit were invalid because they were issued in breach of the Crown's duty to consult and infringed their Treaty right to hunt and trap.

[29] This Court held that the blockading individuals had no standing to advance those defences, as they did not possess the authorization by the collective in whom the treaty and constitutional rights inured. This Court further held that the presumption of the validity of the instruments applied until the instrument is found invalid in proceedings engaging the principles of the law of judicial review, and thus to raise that issue in the defence of a claim by the logging company was an impermissible collateral attack on those instruments.

[30] The applicant also contends that by granting the injunction that she did in this case, the Chambers Judge erred in law by effectively condoning an impermissible collateral attack on CP-324, and allowing the Kelah respondents to circumvent the procedure for consultation and if necessary, accommodation of the First Nation interests mandated by the decision of the Supreme Court of Canada in *Haida Nation*.

[31] Whether or not to grant or refuse injunctive relief is a matter of discretion. Where an application for leave to appeal relates to a discretionary order, the applicable test on the merits is whether there is an arguable case that the Chambers Judge erred in principle, made an order that is not supported by the evidence, or whether the order appealed will result in an injustice.

[32] The applicant contends that because the respondents have not challenged the issuance of CP-324 or the transfer of the Redtop operating area to it by judicial

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review, it is at least arguable that the injunction is an impermissible attack on those documents, and should not be permitted to stand.

[33] At paras. 13-14 in *Haida Nation*, Chief Justice McLachlin, for a unanimous Court held:

> [13] It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.
>
> [14] Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "*Advancing Aboriginal Title Claims after Delgamuukw: The Role of the Injunction*" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

[34] Despite these comments, given the reasoning of this Court in *Moulton*, I consider that the applicant at least meets the test of merit on its first proposed ground of appeal.

[35] I would therefore grant leave to appeal on this ground.

b) Irreparable Harm

[36] The second proposed ground of appeal that is raised by the applicants is what they contend to be an apparent conflict in the law as to the nature and extent of

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the interference with ongoing business operations that is necessary to constitute irreparable harm. The assertion of such a conflict is contrary to the applicant's own submission that there is a "long standing principle" that irreparable harm refers to the nature, and not the magnitude of the interference; a principle established in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 at para. 59.

[37] I do not consider that this second proposed ground of appeal meets the first criteria set out in *Goldman Sachs*.

[38] While the second proposed ground of appeal is doubtless of significance to the applicant, the injunction sought was an interim injunction only. I am unable to conclude that its refusal or the injunction that the Chambers Judge did issue can be said to meet the second of the *Goldman Sachs* criteria.

[39] The applicant contends that the weight of the jurisprudence in a blockade context has been that any interference with ongoing operations that cannot be quantified in damages is irreparable harm. The Chambers Judge referred to a number of the authorities relied upon by the applicant on this issue, and concluded at paras. 119-123 that:

> [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

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> 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.

[40] The finding that the applicant would not suffer irreparable harm if the injunction it sought did not issue was a finding of fact by the Chambers Judge. The finding was made after a consideration of many of the authorities that the applicant relies upon, and certainly after a consideration of the argument that the applicant relies upon. The applicant has not demonstrated any error in principle, lack of evidentiary support or injustice concerning the finding of the Chambers Judge. I am

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unable to conclude that the proposed appeal from this finding of fact meets the third of the *Goldman Sachs* criteria.

[41] I would not grant leave to appeal on this proposed ground.

c) Balance of Convenience

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[42] The applicant contends that the Chambers Judge's conclusion that that the Kelah respondents would suffer irreparable harm is based upon a misapprehension of the evidence before her. They refer to paras. 20 and 132 which I have set out above. I see no merit in this contention.

[43] The applicant points first to the evidence that the Red Top is dissected by the Granisle Highway. This was known to the Chambers Judge as she referred at para. 10 of her reasons to the only access to cutblock VALL0016 in the Redtop being via the Red Top Road, a forest service road that intersects with the Granisle Highway and that was the subject of the 2001 agreement.

[44] The applicant secondly contends that the Chambers Judge failed to consider the other harvesting and disturbances in and around the cutblocks comprising CP-324, but has not persuaded me that there is relevance to this other harvesting and these other disturbances. In any event, the other harvesting and disturbances do not detract from the conclusion of the Chambers Judge that what remains is "the last remaining untouched area within the Ilh Ki'l Bin" and "the last remaining intact tract of traditional territory, not just the culturally modified trees and trapline trail."

[45] The third example of evidence that the applicant says was disregarded by the Chambers Judge was its twenty year harvesting plan that included other road access to the cutblock areas. It is unclear to me how the applicant's future plans should have been factored into the Chambers Judge's considerations of the *status quo*.

[46] I do not consider that the third issue of the weighing of the balance of convenience between the applicant and the Kelah respondents meets the first criteria in *Goldman Sachs*. It is an issue that pertains only to those parties and is fact specific by its very nature.

[47] In terms of the significance of the appeal to the action itself, the applicant contends that the main issue in the proceedings in both actions is injunctive relief, and that by alternately refusing and granting the interim injunctive relief that she did, the Chambers Judge effectively determined the issue. The applicant contends that a refusal to grant leave would effectively determine the matter, as by the time the matter could proceed to trial, the timber in CP-324 will no longer be commercially viable, due to the infestation of pine beetles in the area in question.

[48] With respect, this is simply another way of framing the third issue of the balance of convenience by giving priority to the interests of the applicant over those of the respondents, and is no basis for granting leave to appeal.

[49] As I have already explained, I am not persuaded that the applicant has shown any merit on the issue of irreparable harm to it. The Chambers Judge made a finding on this issue, and the applicant has not demonstrated any error in principle, or lack of evidentiary support or injustice concerning that finding. It therefore follows that I see no merit on the issue of the balance of convenience for that reason, and further, as I have not been persuaded that the Chambers Judge misapprehended the evidence before her.

d) *De Facto* or *De Jure* Injunction against the Crown

[50] The applicant's fourth issue on the proposed appeal is that the injunction granted to the Kelah respondents is effectively an injunction against the Crown. Accepting, for the sake of this argument, that such an injunction is unavailable leaves then the question of whether that precludes injunctive relief against the holder of a Crown license or other permit. A conclusion that it does not would appear to be contrary to the reasoning of the Supreme Court of Canada in *Haida Nation.* I would therefore not grant leave to appeal on this ground.

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Conclusion

[51] I would grant leave to appeal the orders of the Chambers Judge, limited to the issue of whether by granting and refusing to grant the injunctions that she did, the Chambers Judge erred in law by permitting an impermissible collateral attack on CP-324, and allowing the Kelah respondents to circumvent the procedure for consultation and if necessary, accommodation of the First Nation interests as mandated by the decision of the Supreme Court of Canada in *Haida Nation*.

“The Honourable Mr. Justice Hinkson”