IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *D.N.T. Contracting Ltd. v. Abraham,*
2016 BCSC 1917

Date: 20161019
Docket: S168846
Registry: Vancouver

Between:

D.N.T. Contracting Ltd.

Plaintiff

And

Dolly Abraham, Catherine Abraham, Clarence Abraham, Peter Abraham, Irene Johnny, James Teegee, John Doe, Jane Doe and Persons Unknown

Defendants

Before: The Honourable Madam Justice Duncan

Reasons for Judgment

Counsel for the Plaintiff:	M.S. Oulton A.A. Caron
Counsel for the Defendants:	M. Faille
Place and Date of Hearing:	Vancouver, B.C. October 11, 2016
Place and Date of Judgment:	Vancouver, B.C. October 19, 2016

Introduction

[1] On October 12, 2016, I granted the plaintiff an injunction against the defendants, with reasons to follow. These are my reasons.

[2] The plaintiff, D.N.T. Contracting Ltd., is a logging company. Dolly Abraham and the other named defendants are members of the Takla Lake First Nation. The plaintiff filed its Notice of Civil Claim on September 23, 2016 against the defendants, seeking injunctive relief or, in the alternative, damages arising from a blockade the defendants placed on a forest service road, preventing the plaintiff from harvesting timber. The blockaded area is about two and one half hours from Fort St. James by passenger vehicle.

[3] The plaintiff applies for an interim injunction restraining the defendants and any other person from blocking, physically impeding or delaying access to the harvesting sites located within the boundaries of Timber Sale License A91256 (the "Licence"). The defendants have yet to file a response, but in opposing the injunction maintain that the Licence, and the extension of the Licence on September 9, 2016, were granted to the plaintiff by the Crown without properly consulting the Takla Lake First Nation, in violation of the principles in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73. It is a fair inference that this will also be a defence to the action.

[4] The Takla First Nation applied to be added as a defendant in this litigation on September 30th. I understand Mr. Justice Bowden dismissed the application on the basis that the personal defendants had standing to raise issues of aboriginal rights and title and lack of consultation.

[5] The Province of British Columbia, which issued the Licence through the Timber Sales Manager, is not a party to this action; however, on October 11, the day of the plaintiff's injunction application, the defendants filed an application for judicial review of the grant of the Licence, naming the Province and the plaintiff as parties.

The Licence

[6] The Licence is a written agreement dated January 12, 2015 between the Province of British Columbia, through the Timber Sales Manager, and the plaintiff. The plaintiff was the successful bidder for the Licence, which granted the right to harvest Crown timber from designated areas, known as cut blocks, within the Prince George Timber Supply Area. There are related rights for the plaintiff to use portions of certain Forest Service Roads in connection with its operations.

[7] The Licence includes four cut blocks. The total size of the four cut blocks is 357 hectares. The value of the stumpage is approximately over $1.4 million. The plaintiff has to pay stumpage for the timber, whether it is harvested or not. The Licence was time-limited and as I will discuss later, the plaintiff had to renew it in September of this year, incurring an extension fee of $67,227.

[8] The harvesting of timber from the cut blocks is governed by harvest and silviculture plans which prescribe how much timber can be taken and what areas it can be taken from. The plans in this case stipulate that the cut blocks are in an area of high archeological interest to the local First Nations people. Studies were done prior to the granting of the Licence to identify specific archeological and culturally significant features in the survey area, such as culturally modified trees, but the plans note that some may have been missed. If any are discovered during activities in the blocks, work in the area must cease and the timber sales manager immediately notified.

[9] Other aspects of the plan stipulate that timber is not to be harvested, nor roads built, near areas where enumerated species exist. There are also provisions for riparian management strategies.

[10] The Licence contains the following provision:

> **10.00 ABORIGINAL RIGHTS, ABORIGINAL TITLE, TREATY RIGHTS**
>
> 10.01 Notwithstanding any other provision of this Licence, if a court of competent jurisdiction

> (a) determines that activities or operations under or associated with this Licence will unjustifiably infringe an aboriginal right or title, or a treaty right,
>
> (b) grants an injunction further to a determination referred to in subparagraph (a), or
>
> (c) grants an injunction pending a determination of whether activities or operations under or associated with this Licence will unjustifiably infringe an aboriginal right or title, or a treaty right,
>
> the Timber Sales Manager, in a notice given to the Licensee, may vary or suspend this Licence, in whole or in part, or refuse to issue a Road Permit or other permit given to the Licensee, to be consistent with the court determination.

[11] This licensee does not have an analogous right to suspend operations without economic consequences where operations are disrupted by activities related to aboriginal rights. The licences are not granted in perpetuity and even if the timber is not harvested, the licence holder has to pay stumpage.

[12] The Licence was granted in January 2015 but the plaintiff and BC Timber Sales were notified there was a pending burial ceremony in the vicinity of the Licence area. The plaintiff deferred work on the Licence until June, when its employees conducted a pre-work inspection. Harvesting of timber began in July.

[13] On July 22, 2015, the plaintiff's employees encountered a blockade in the middle of the road near the junction of Driftwood and Fall-Tsayta Forest Services Roads. The individuals told the plaintiff to cease all operations within a 50 km radius around a burial site on Fall-Tsayta FSR. The plaintiff complied with the request.

[14] On July 24, representatives of the plaintiff, BC Timber Sales and the Takla First Nation met to discuss the blockade. One of the individuals involved in the blockade, Dolly Abraham, was asserting a family trap line in the area as well as a burial site. The plaintiff chose to respect the mourning period and moved its equipment out of the area at the end of July. At that point, the plaintiff had felled and bunched 18,600 cubic metres of timber. Approximately 4,600 cubic metres had been hauled out and delivered to a customer, leaving 14,000 cubic metres on the ground and a further 45,730 cubic metres standing in the four cut blocks.

[15] The plaintiff tried to discuss resuming operations in March and April 2016 with Chief John French of the Takla First Nation, but did not meet with success.

[16] The Licence was set to expire on September 11, 2016. Dave Neufeld, the principal of the plaintiff company, submitted an application to extend the Licence. The extension was granted and the plaintiff paid nearly $70,000 in associated fees.

[17] The plaintiff recommenced operations on the cut blocks on September 7, 2016. Two days later, the defendants reinstated a blockade at the same location as before. The blockade consists of a large log, a wire obstruction and signs stating “no trespassing”. While the entire width of the road is not blocked, the remaining portion is not sufficient to safely drive logging trucks or other timber harvesting equipment through.

[18] On September 12, representatives of the plaintiff attended the road block. Dolly Abraham told them the defendants objected to any further logging in the area but they would probably negotiate if a revenue sharing could be reached.
Ms. Abraham refused to allow the plaintiff to return to work the next day. She alleged the plaintiff’s operations were occurring on reserve land but could not or would not produce a map to prove her allegation. Ms. Abraham said she would do so the next time they met.

[19] Personnel from the plaintiff’s company went back on September 14, 15, 16, 19 and 22. On each occasion, Ms. Abraham or another individual at the blockade told them they could not return to work. Ms. Abraham also voiced complaints about BC Timber Sales and suggested there may be a cabin located somewhere in the logging block.

[20] On September 19, representatives of the plaintiff provided Dolly Abraham, Catherine Abraham, Peter Abraham and Irene Johnny a copy of a written notice that it intended to commence legal proceedings to obtain an injunction.

[21] The RCMP made intermittent appearances at the blockade to ensure matters remained peaceful.

[22] To date, approximately 17,000 cubic metres of timber remain on the ground in the cut blocks and 42,700 cubic metres of standing timber remain to be harvested from the Licence area. The defendants continue to refuse access. No maps have been produced by the defendants to illustrate that burial sites are within the cut block boundaries. The plaintiff's personnel who walked the cut block located no cabin.

[23] The defendants tendered the affidavits of Chief John French and Dolly Abraham. Chief French was elected as Chief of the Takla First Nation in May 2015. He explained the importance of the Takla's traditional territory and his involvement with the matters in and around the Takla community through his life. There are about 800 registered members of the Takla First Nation. About 200 of those live in or close to the reserves, including the general area of the cut blocks, called k'eyukh.

[24] Chief French has worked in the forest industry. He is not opposed to logging but feels his people's lands have been the subject of too much resource harvesting in too short a time. His people's territory measures over 27,000 square kilometres. The Takla Nation has never entered into a treaty with the Crown but has attempted to work with the province in good faith on matters relating to the land. The Takla Nation and six others entered into a collaboration agreement with the provincial government.

[25] Because of the perception that too much timber harvesting has been happening too quickly, Takla and the six other nations have prioritized the negotiation of a comprehensive forestry agreement with the province. They hope to do so before significant resources are harvested, most particularly old growth trees. Chief French estimates 50% of the trees in the Licence area that would be harvested by the plaintiff are old growth trees. They have spiritual and economic importance to the Takla.

[26] Chief French deposes that the Takla receives hundreds of requests and proposals to be consulted, consistent with the Crown's duty to consult, but that such requests and proposals can be difficult to manage for a small reserve. The Takla was also subject to an audit in 2011-2012 which disclosed significant financial

management issues of previous Takla administrations. This, in turn, triggered the imposition of the Management Action Plan which had an impact on the Takla's ability to be meaningfully consulted about potential impacts on title and rights, particularly between 2012 and 2015 when much of the groundwork for the Licence at issue in this case was done.

[27] Chief French says his community has repeatedly expressed concerns to provincial officials that there be no logging under the Licence at issue until there is a meeting of the minds. BC Timber Sales, he says, has not taken any steps to address the Takla's concerns. BC Timber Sales maintains it cannot go backwards on the Licence and did not meet with Takla members before issuing the Licence. Chief French also says the Takla were not consulted when the Licence extension was granted in September of this year.

[28] Chief French say he has continued to try to engage with the plaintiff to reach a negotiated or mediated solution, whereas Dave Neufeld for the plaintiff deposes that efforts to contact Chief French have not met with success. Chief French characterizes an injunction at this stage as something that would inflame matters and be an impediment to trust and dialogue between the protesters and the plaintiff. He seeks an adjournment or deferral of the injunction until further discussions can be had.

[29] Dolly Abraham deposes that her family k'eyukh, or hereditary landholding, is in the area of the cut blocks. She confirms there are several burial sites in the area contemplated to be logged. Her family hunts and traps for sustenance in the immediately vicinity and directly within the Licence area and would be impacted by tree harvesting. Sacred sites in the area might be impacted or depleted of their spiritual powers. There are old growth trees which have been carved or modified by members of her k'eyukh.

[30] Ms. Abraham says that to her knowledge, neither her family nor the Takla were meaningfully consulted about the issuance of the Licence. She, too, is prepared to engage in good faith negotiations with the plaintiff and the province to

resolve their concerns about the Licence and supports Chief French's efforts to bring the parties together to attempt to reach a mutually agreeable solution.

The Law

[31] The test applied in British Columbia on an application for an interlocutory injunction stems from *A.G.(B.C.) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.) and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. *Wale* sets out a two-part test (fair question to be tried and balance of convenience), while *RJR-MacDonald* adds the requirement of irreparable harm as a separate consideration from the balance of convenience. The parties proceeded on the basis of the three-part test.

Fair Question to be Tried

[32] The defendants do not dispute that there is a fair question to be tried, or to put it more accurately, that there are several fair questions to be tried: whether the blockade preventing the plaintiff from harvesting timber pursuant to its licence is in violation of the law and tortious as well as contrary to ss. 423(1)(g) and 430(1)(c) of the *Criminal Code*. In light of that, I will turn to the second issue, irreparable harm.

Irreparable Harm

[33] The plaintiff's primary position is that it need not demonstrate irreparable harm where there is unlawful conduct, based on *T.N.T. Canada Inc. v. General Truck Drivers and Helpers Union,* 1990 CanLII 1637 BCSC, which cited *Pacific Western Airlines v. UAW* 1986 ABCA 38. But the plaintiff maintains the requirement for proof of irreparable harm has been met.

[34] The plaintiff relies on the affidavit evidence of David Neufeld. Mr. Neufeld deposes that his crews are down, he is losing revenue and some of his equipment is behind the blockade. He had to pay to extend the Licence, which would have expired in early September. Much of the available timber in the Licence area is beetle kill and 44% of the pine is already dead, in his estimation. Harvesting it before

it becomes worthless is a matter of economic significance to the plaintiff. There is also timber on the ground that is degrading and becoming less valuable as a result.

[35] If the plaintiff cannot harvest the remaining timber it will still be required to pay the full stumpage owing on the Licence, approximately $1,450,000, despite having sold only a small fraction of the total standing timber. The plaintiff would also be responsible for road deactivation, pile burning and other ancillary duties pursuant to the Licence and may forfeit its original deposit of $77,403.43.

[36] Counsel for the defendant maintains that interference with an ongoing business does not prove irreparable harm and, in any event, the evidence of harm in this case is thin and vague. There is no evidence a delay in work will actually harm the plaintiff and some of the losses adverted to by David Neufeld are past losses. The plaintiff will only lose revenue if it is permanently prevented from harvesting, not if it is temporarily prevented by the blockade. Counsel argues that to the contrary, irreparable harm will be caused if the contract is carried out without further discussions between the interested parties and the outcome of the very recently filed application for judicial review. The trees will still be there to be harvested at the end of the litigation if the injunction is not granted. Counsel likened an injunction in this case as akin to summary judgment against the defendants.

[37] Counsel for the plaintiff relied on a number of cases from this Court to illustrate that business loss can constitute irreparable harm. Recently, in *A.J.B. Investments Ltd. v. Elphinstone Logging Focus*, 2016 BCSC 734, Mr. Justice Greyell granted an injunction to a logging company attempting to harvest timber on its private managed forest lands in the face of a blockade of individuals with environmental concerns. The applicant alleged irreparable harm if relief was not granted in the form of loss of income, delay from replanting and future losses along with the lost value of timber which had been harvested but remained on the ground on the cut block. The defendants offered compromise to allow the plaintiff to access the cut timber in return for certain promises and meaningful discussions. The offer was refused and the plaintiff sought an injunction.

[38] Greyell J. said:

> [31] I am of the view the plaintiff has established that it has and will suffer irreparable harm should the injunction not be issued. There are many decisions of this court which stand for the proposition that interference with a business as an ongoing concern has been regarded as irreparable harm within the context of the test for an injunction: *West Fraser Mills v. Members of Lax Kw'Alaams*, 2004 BCSC 815 at paras. 21-22; *International Forest Products Ltd. v. Kern*, [2000] B.C.J. No. 1533 (S.C.); *MacMillan Bloedel Ltd. v. Simpson*, [1993] B.C.J. No. 1798 (S.C.), affirmed (1993), 96 B.C.L.R. (2d) 201 (C.A.); *Tlowitsis-Mumtagila Band v. MacMillan Bloedel Ltd.* (1990), 53 B.C.L.R. (2d) 69 (C.A.) at p. 78; and *McLeod Lake Indian Band v. British Columbia*, [1988] B.C.J. No. 2058 (S.C.) at p. 4.
>
> [32] In *Trans Mountain Pipeline ULC v. Gold*, 2014 BCSC 2133 at para. 118 the court stated:
>
> > As to the question of irreparable harm, I am satisfied that the failure to grant the injunction would cause the plaintiff irreparable harm. The plaintiff has advanced essentially uncontradicted evidence that the delays occasioned by the activities at issue have and will continue to cause the substantial costs and potential losses of revenues which are not recoverable. The harm although primarily economic, is thus, nonetheless, irreparable.
>
> [33] In *Red Chris* the court stated at para. 68:
>
> > As well, irreparable harm may be caused when a blockade forces a company to downsize, as a result of unemployment which affects workers, their families, and their communities. The emotional and psychological effects of long-term unemployment are harms that cannot be compensated through damages: *Snuneymuxw First Nation et al v. HMTQ et al*, 2004 BCSC 205, at para 35.

The Balance of Convenience

[39] Some of the considerations under this branch of the test are an examination of the *status quo*; the strength of the plaintiff's case; the relative magnitude of the harm; and whether the public interest is engaged, per Butler J. in *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355 at para. 69.

[40] Counsel for the defendants submits the *status quo* would be preserved by refusing the injunction and effectively sanctioning the blockade. Counsel for the plaintiff maintains the *status quo* should permit the plaintiff to act on a presumptively valid licence granted pursuant to a statutory process. The defendants' assertion of a

breach of the Crown's duty to consult is not a defence to the action before me. Their actions against the plaintiff constitute an abuse of process, as was the case in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26.

[41] The circumstances in *Behn* are similar to the ones before me. The Crown granted licences to a logging company to harvest timber. Members of the local First Nation blocked the company's access to the logging sites. The logging company brought an action in tort against the defendants, the Behns, who defended their actions on the basis that they had been issued in breach of their constitutional right to be consulted and in violation of their treaty rights. The defendants had not challenged the licences when they were issued, by way of judicial review or other legal avenues. The Chambers judge struck out the portions of the pleadings relating to the validity of the licences as an abuse of process under Rule 19(24) of the Supreme Court Rules. The British Columbia Court of Appeal upheld the Chambers judge: 2011 BCCA 311.

[42] In dismissing the Behns' further appeal, Mr. Justice LeBel for the Court said:

> [37] The key issue in this appeal is whether the Behns' acts constitute an abuse of process. In my opinion, in the circumstances of this case, raising a breach of the duty to consult and of treaty rights as a defence was an abuse of process. If the Behns were of the view that they had standing, themselves or through the FNFN, they should have raised the issue at the appropriate time. Neither the Behns nor the FNFN had made any attempt to legally challenge the Authorizations when the British Columbia government granted them. It is common ground that the Behns did not apply for judicial review, ask for an injunction or seek any other form of judicial relief against the province or against Moulton. Nor did the FNFN make any such move.
>
> [38] Had the Behns acted when the Authorizations were granted, clause 9.00 of the timber sale agreements provided that the Timber Sales Manager had the power to suspend the Authorizations until the legal issues were resolved: trial judgment, at para. 16. Moulton would not then have been led to believe that it was free to plan and start its logging operations. Moreover, legal issues like standing could have been addressed at the proper time and in the appropriate context.

[43] LeBel J. concluded:

> [42] In my opinion, the Behns' acts amount to an abuse of process. The Behns clearly objected to the validity of the Authorizations on the grounds

> that the Authorizations infringed their treaty rights and that the Crown had breached its duty to consult. On the face of the record, whereas they now claim to have standing to raise these issues, the Behns did not seek to resolve the issue of standing, nor did they contest the validity of the Authorizations by legal means when they were issued. They did not raise their concerns with Moulton after the Authorizations were issued. Instead, without any warning, they set up a camp that blocked access to the logging sites assigned to Moulton. By doing so, the Behns put Moulton in the position of having either to go to court or to forgo harvesting timber pursuant to the Authorizations it had received after having incurred substantial costs to start its operations. To allow the Behns to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights and of the duty to consult as a defence.

[44] Counsel for the defendants distinguishes *Behn* on the basis that the defendants have not been idle and their objection to logging was not a surprise to the plaintiff. Chief French deposed his efforts to speak with BC Timber Sales about the Takla's concerns with the lack of consultation over the issuance of the Licence. The Takla First Nation, of which the defendants are members, has filed an application for judicial review of the issuance and extension of the Licence. As I understand counsel for the defendants, this fortifies their position by legitimizing the nature of their opposition, which is rooted in the Crown's failure to consult. The delay in pursuing judicial review is due in large part to Chief French's hope or belief that dialogue would solve the problem.

[45] The legitimacy of the process by which the Licence was granted to the plaintiff is the subject of the Takla First Nation's application for judicial review. It is not before me. I am not satisfied it should have any effect on my consideration of the order sought by the plaintiff.

[46] In *British Columbia Hydro and Power Authority v. Boon*, Butler J. was faced with similar arguments about the effect other litigation can or should have on an assessment of the *status quo*. Butler J. said:

> 73] While I initially had some concern with regard to the outstanding appeals and the judicial review challenge to the Licences, I have concluded that the status quo would be preserved by granting the injunction. As Hydro argues, the protestors have no right to prevent Hydro from proceeding with the Project. To allow them to achieve that result by declining to issue the injunction would permit the protestors to collaterally attack the various orders and ministerial decisions which are in place and have survived challenges in the trial courts.
>
> [74] The comments of Cullen A.C.J. in *Trans Mountain Pipeline ULC v. Gold*, 2014 BCSC 2133 at para. 76 are applicable to the situation before me:
>
> > [76] This Court is faced with the state of affairs as they exist today, not as they may become in the future. What the defendants are in effect asking this Court to do is to assess the merits of the appeals before the Federal Court of Appeal and the British Columbia Court of Appeal and decide whether a stay should be issued in one or another of those Courts if one were sought by Burnaby. I am in no position to make that assessment.

[47] To accede to the defendants' position and either dismiss or adjourn the plaintiff's application for an injunction would condone the pursuit of self-help remedies for litigants rather than requiring that applications for relief be brought and assessed in the proper forum between the proper parties.

The Enforcement Clause

[48] The plaintiff seeks an enforcement clause, authorizing the RCMP to use its authority and discretion in enforcing the order. In circumstances such as the ones before me, where the location of the protest is remote, the number of participants vary from day to day and the police have been monitoring the situation but taking no steps to exercise their authority under the trespass or mischief sections of the *Criminal Code* to curtail the behaviour of the protesters, I am satisfied that an enforcement clause should be granted.

"Duncan J."

_____

The Honourable Madam Justice Duncan