Citation: Council of the Haida Nation etal v Minister of Forests etal 2000 BCSC 1280

Date: 20001121
Docket: SC3394
Registry: Prince Rupert

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

COUNCIL OF THE HAIDA NATION and GUUJAAW, on their own behalf and on behalf of all members of the Haida Nation

PETITIONERS

AND:

THE MINISTER OF FORESTS and THE ATTORNEY GENERAL OF BRITISH COLUMBIA ON BEHALF OF HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, and WEYERHAEUSER COMPANY LIMITED

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE D.A. HALFYARD

Counsel for the Petitioners	T.L. Williams-Davidson L. Mandell, Q.C. D. Paterson C. Sharvit
Counsel for the Respondents The Minister of Forests and The Attorney General of B.C.	P.J. Pearlman, Q.C. J. Penner
Counsel for the Respondent Weyerhaeuser Company Ltd.	J.J.L. Hunter, Q.C. S.P. Pike
Date and Place of Hearing/Trial:	July 31, August 1, 2, 3 and 4, 2000 Masset, BC

[1] This is an application for judicial review of several decisions of the Minister of Forests, and is made pursuant to s. 2 of the *Judicial Review Procedure Act*. The petitioners allege that the Minister of Forests made decisions in 1981, 1995, and 2000, to replace Tree Farm Licence 39 ("T.F.L. 39"), and to approve a transfer of T.F.L. 39 from MacMillan Bloedel Ltd. to Weyerhaeuser Company Limited, and that in doing so, the Minister acted without jurisdiction or in excess of his jurisdiction. The Petitioners seek a declaration that the three replacements of T.F.L. 39, or such part of T.F.L. 39 as relates to Block 6, are invalid. In the alternative, they seek orders in the nature of *certiorari*, quashing and setting aside the replacements of T.F.L. 39 in 1995 and 2000.

[2] The petitioner, the Council of the Haida Nation, is the governing body of the Haida Nation pursuant to its constitution. The people of the Haida Nation include all Aboriginal people of Haida ancestry whose traditional territory is Haida Gwaii, also known as the Queen Charlotte Islands, and surrounding waters.

[3] The petitioner, Guujaaw, is the president of the Council of the Haida Nation. I shall hereafter refer to the petitioners as "the Haida", "the Haida people", or "the Haida Nation."

[4] The respondent, the Minister of Forests (“the Minister”), is the Minister responsible for, among other things, the management, protection, and conservation of the forest and range resources of the Crown, in the Province of British Columbia, pursuant to the *Ministry of Forests Act*.

[5] The respondent, Weyerhaeuser Company Limited (“Weyerhaeuser”), is a company engaged in the forest industry of the province of British Columbia, which became the licence holder of T.F.L. 39 on November 1, 1999, as a result of acquiring that part of the assets of MacMillan Bloedel Limited.

[6] The undisputed facts that give rise to this lawsuit may be summarized as follows:

(a) The area within T.F.L. 39 known as Block 6 is made up of several areas, all of which are located on the islands of Haida Gwaii, and contains old growth forests and second growth forests, including spruce, cedar, and hemlock timber (as well as other species), portions of which have been logged off.

(b) For more than 100 years, the Haida people have claimed title to all the lands and surrounding waters of the Queen Charlotte Islands.

(c) MacMillan Bloedel Limited (“M&B”) was engaged in logging timber on the Queen Charlotte Islands since about the time of World War I, acquired T.F.L. 39 in 1961, and conducted logging operations pursuant to T.F.L. 39 until the transfer of its rights under T.F.L. 39 to Weyerhaeuser in November 1999.

(d) T.F.L. 39 granted to M&B the exclusive right to harvest quantities of timber on the Queen Charlotte Islands within the areas collectively known as Block 6.

(e) In 1981 and 1995, the Minister offered to replace, and upon acceptance of the offer by M&B, did replace T.F.L. 39 pursuant to the procedure authorized by the *Forest Act*.

(f) In February 1995, the Haida Nation filed a petition challenging the validity of the replacement of T.F.L. 39 that became effective March 1, 1995. On November 7, 1997, the Court of Appeal held that the Aboriginal title claimed by the Haida Nation, if it exists, would constitute an encumbrance on the Crown’s title to timber, within the meaning of s. 28 of the *Forest Act* (now s. 35). That litigation was never formally concluded.

(g) On September 1, 1999, the Minister sent to M&B an offer to replace T.F.L. 39, with the knowledge that Weyerhaeuser would likely become the successor to M&B, and on February 10, 2000, the Minister issued the replacement to Weyerhaeuser effective March 1, 2000.

(h) The three decisions of the Minister to replace T.F.L. 39, which are complained of, were all made without the consent of the Haida Nation, and the decisions in 1995 and 2000 were made against the objections of the Haida. The Haida also objected to the transfer of T.F.L. 39 from M&B to Weyerhaeuser.

(i) This lawsuit was commenced on January 13, 2000.

[7] It is also undisputed that, in making the decisions that are being challenged in this proceeding, the Minister was acting in reliance on the powers conferred on him by the *Forest Act*, the relevant parts of which statute presently read as follows:

> 12 Subject to this Act and the regulations, the *Forest Practices Code of British Columbia Act* and the regulations made under that Act, a district manager, a regional manager or the minister, on behalf of the government, may enter into an agreement granting rights to harvest Crown timber in the form of a
> (d) tree farm licence...

35(1) A tree farm licence entered into under this Act must:
(a) Subject to s. 36(3)(a), be for a term of 25 years.
(b) Subject to s. 33, 34 and 39, describe a tree farm licence area composed of:
(i) An area of Crown land, the timber on which is not otherwise encumbered, determined by the minister...
(e) Subject to the provisions of this Act, grant to its holder the exclusive right to harvest from the tree farm licence area during the term of the tree farm licence...
(f) Provide for cutting permits to be issued by the district manager..., within the limits provided in the tree farm licence and subject to this Act and the *Forest Practices Code of British Columbia Act*, to authorize its holder to harvest the portion of the allowable annual cut available to its holder from specified areas of land within the tree farm licence area...

36(1) Unless a tree farm licence provides that a replacement for the licence must not be offered, the minister must offer the holder of an existing licence a replacement for the licence and the offer must be made during the six month period following:
(a) The fourth anniversary of the tree farm licence if its term commences on or after July 1, 1993...
(3) A tree farm licence offered under this section must
(a) be for a term equal to
(i) 25 years...
(b) have a term commencing
(i) On the fifth anniversary of the existing tree farm licence if its term commences on or after July 1, 1993...

(6) If an offer made under this section is accepted:
(a) an agreement in the form of a tree farm licence containing the terms and conditions set out in the offer, including amendments, must be entered into by the minister and the holder of the tree farm licence, and

> (b) The existing tree farm licence expires on the commencement of the replacement licence...

[8] In s. 1 of the *Forest Act*, the following definitions appear:

> "Crown land" has the same meaning as in the *Land Act*, but does not include land owned by an agent of the government;
>
> "Crown timber" means timber on Crown land, or timber reserved to the government;

Crown land is defined in the *Land Act*, as follows:

> "Crown land" means land, whether or not it is covered by water, or an interest in land, vested in the government.

[9] It is common ground that, in making the decisions complained of, the Minister was exercising the statutory power of decision conferred on him by the provisions of the *Forest Act*, or was acting in the exercise, or the purported exercise, of a statutory power. In any event, the challenged decisions and actions of the Minister are of a kind that is subject to judicial review pursuant to ss. 2, 3, and 7 of the *Judicial Review Procedure Act*.

[10] The grounds of this application were articulated on the hearing somewhat differently than stated in the petition, and were also stated in several different ways. I would summarize the grounds as follows:

(a) As a matter of law, the lands within Block 6 were subject to the asserted claim of the Haida Nation to Aboriginal title, which claim constitutes an encumbrance on the provincial Crown's title to the timber, within the meaning of s. 35 of *the Forest Act.* That legal encumbrance prohibited the Minister from replacing T.F.L. 39 to M&B and Weyerhaeuser. In doing so, the Minister acted without statutory authorization, and thereby exceeded his jurisdiction under ss. 35 and 36 of the *Forest Act*.

(b) In the alternative, if the asserted Aboriginal title of the Haida Nation does not constitute a legal encumbrance on the timber on Block 6, then the Haida claim to Aboriginal title constitutes an equitable encumbrance on the timber by reason of the fiduciary relationship existing between the Crown and all Aboriginal peoples. This claim imposed a fiduciary duty on the provincial Crown to treat the timber on Block 6 as being legally encumbered by the Haida title, unless and until the Crown established that it was not so encumbered. In replacing T.F.L. 39 in 1981, 1995, and 2000, without disproving the Haida claim, and without incorporating conditions in

T.F.L. 39 that would adequately accommodate and protect the asserted Aboriginal title of the Haida Nation in relation to the timber on Block 6, the Minister acted in breach of the Crown's fiduciary duty, and without jurisdiction.

(c) In the further alternative, if there was no legal or equitable encumbrance on the timber within Block 6, then in 1995 and 2000, the Minister acted in breach of a fiduciary duty owed by the provincial Crown to the Haida Nation, not to replace T.F.L. 39 without first consulting with the Haida Nation in good faith, and with the intention of substantially addressing their concerns with respect to their asserted Aboriginal title to the lands comprising Block 6. In replacing T.F.L. 39 in 1995 and 2000, without first consulting with the Haida Nation in good faith, the Minister acted unlawfully and in violation of the Crown's fiduciary obligation.

[11] In order to invoke the aid of *the Judicial Review Procedure Act*, the petitioners must allege and prove that the Minister committed an error going to his jurisdiction to replace T.F.L. 39, or made an error of law on the face of the record. Section 35(1)(b)(i) appears to give the Minister the

power to decide whether the timber on Crown land being considered for a tree farm licence, is encumbered by any interest other than the Crown interest. In my opinion, if the timber is encumbered by such other interest, but the Minister determines that it is not so encumbered, then he gives himself jurisdiction to issue or replace a tree farm licence by means of a wrong decision on a question of law. Since an inferior tribunal cannot be permitted to decide the extent of its own jurisdiction, except in limited circumstances which do not exist here, the Minister will have acted without jurisdiction if he errs in deciding that question. Accordingly, if the petitioners succeed in establishing the first or second grounds of their petition, then the Minister's decisions may be set aside for jurisdictional error, subject to the courts discretion to refuse to grant the remedy sought. As to ground three, if it were made out, I do not think that the failure to consult would deprive the Minister of jurisdiction to do what he did, although his actions might be the subject of a declaration.

[12] With respect to all three grounds, the petitioners rely on the assertion, as opposed to proof, of their Aboriginal title in relation to Block 6. The questions of whether their asserted right does in fact exist, and if so, whether there

has been unjustified infringement of their right, have been referred to the trial list and they are outside the scope of this application.

[13] Ground 1 involves questions of law which do not require a review of the evidence. In my view, having regard to the undisputed facts recited in paragraph 6, a sufficient factual foundation for this ground will be established if the Crown (i.e., the provincial Crown) was aware of the general nature and scope of the Aboriginal rights claimed by the Haida, and if those alleged rights are not obviously false or baseless. I am satisfied that the proper factual foundation exists and, moreover, I understood that these two facts were not in issue.

[14] The argument in support of the first ground in summary form, as I understand it, is as follows:

(a) The effect of s. 109 of the *Constitution Act 1867* was that the federal government gave the lands of British Columbia to the province "... subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same," which "other interest" included the title of the Aboriginal peoples of the province in the lands, that pre-existed the transfer of the lands to British Columbia.

(b) The Aboriginal title claimed by the Haida has never been surrendered by treaty or otherwise, and has not been extinguished by federal legislation.

(c) Where an Aboriginal people assert their Aboriginal title to Crown lands of British Columbia, such interest is presumed to exist in law, and if the Province claims unencumbered title to the Crown lands in question, the onus shifts onto the Province to prove that the asserted Aboriginal rights do not exist.

(d) Here, the Haida have asserted Aboriginal title to all the lands of Haida Gwaii, and have alleged that their claimed interest in the lands comprising Block 6 constitutes an encumbrance on the timber on those lands, within the meaning of s. 35 of the *Forest Act*.

(e) Therefore, in order to validate the replacements of T.F.L. 39, the Province must prove that the alleged Aboriginal title of the Haida in respect of Block 6 does not exist.

(f) The Province has not disproved the asserted Aboriginal title of the Haida Nation to Block 6, and

so the legal presumption is not rebutted, and must prevail.

(g) In the result, the asserted Aboriginal title of the Haida constitutes an encumbrance on the timber located on Block 6, and the Minister committed jurisdictional error in deciding that the timber on Block 6 was not so encumbered.

[15] The petitioners contend that this conclusion must follow from an analysis of the *Constitution Act 1867*, the judgment of the Privy Council in ***St. Catharines's Milling and Lumber Co. v. The Queen*** (1889) 14 A.C. 46, and from statements made by the British Columbia Court of Appeal and the Supreme Court of Canada in cases which include:

(a) ***Calder v. Attorney General of British Columbia*** [1973] S.C.R. 313 (per Hall, J. particularly at pp. 375-380.)

(b) ***Guerin v. The Queen*** [1984] 2 S.C.R. 35 (per Dickson, C.J.C. at pp. 379-382.)

(c) ***Delgamuukw v. British Columbia*** (1993) 104 D.L.R. (4d) 470 (B.C.C.A.) (per Macfarlane, J.A. at pp. 529-531.)

(d) ***Regina v. Van der Peet*** [1996] 4 C.N.L.R. 177 (per Lamer, C.J.C. at para. 28)

(e) ***Delgamuukw v. British Columbia*** [1997] 3 S.C.R. 1010 (per Lamer, C.J.C. at paras. 114, 133-134 and 175.)

[16] In answer to the petitioners' argument on ground one, the respondents submit that the mere assertion of Aboriginal rights has no legal effect unless, and until, the claimed Aboriginal rights are proved, and the onus of proof is always on the Aboriginal people who claim such rights. The respondents further state that the kind and extent of the proof required is enunciated in ***R. v. Van der Peet*** [1996] 2 S.C.R. 507 (at par.'s 46, 55, and 69), and ***Delgamuukw v. British Columbia*** [1997] 3 S.C.R. 1010 (at par. 143). Finally, the respondents contend that there can be no shifting of the onus of proof onto the Province, unless and until the Haida first prove the existence of their asserted Aboriginal rights, and a *prima facie* infringement of such rights, at which point the Province would have the burden of proving that the infringement was justified. The respondents also rely on the judgment of Sigurdson, J. dated August 2, 2000, in ***Westbank v. British Columbia and Wenger*** [2000] B.C.S.C. 1139.

[17] In my opinion, what the authorities establish is that Aboriginal rights which existed in 1846, and that were not

surrendered under a treaty nor extinguished by specific federal legislation before 1982, were given constitutional status and protection by s. 35(1) of *the Constitution Act 1982*, and such rights cannot now be infringed by the Crown (federal or provincial) without justification. But in my view, the law does not presume the existence of Aboriginal rights, merely from proof that such rights have been asserted, and that there has been no surrender or extinguishment of the rights. Aboriginal rights are site-specific and group-specific, and proof of Aboriginal title requires proof of exclusive occupation of the lands in question as at 1846.

[18] In deciding ground 1, I found support for my conclusion in the judgment of Sigurdson, J. in the ***Westbank Nation*** case, supra. In that case, the Westbank First Nation attacked a decision by the District Manager of Forests to grant a timber cutting and hauling contract to a particular logging company. The petitioners alleged that the decision of the District Manager was unauthorized and invalid on three grounds: first, because the contract was awarded to a company which was neither an employee nor an agent of the government; second, because the timber on the land was encumbered by the asserted Aboriginal title of the petitioners; and third, because the decision made by the District Manager was in breach of the

fiduciary duty of the provincial Crown to consult with the Westbank First Nation in good faith, in connection with their asserted Aboriginal title.

[19] Sigurdson, J. quashed the decision of the District Manager on the first ground. However, in his reasons for judgment, Sigurdson J. gave extensive consideration to the second and third grounds advanced by the Westbank Nation. Those grounds were the same as the first and third grounds put forward on the present application. With respect to ground 1 in the case at bar, the arguments made to Sigurdson, J. on that ground, both for and against, were similar to the arguments made in the present case, and based on similar authorities. Sigurdson, J. set out his reasons for rejecting the “legal encumbrance” argument at paragraphs 56 to 63 of his judgement, and I agree with his reasoning. The argument of the respondents is persuasive, and the petitioners’ first ground must fail.

[20] With respect to ground 2, the petitioners maintain that the alleged fiduciary duty of the Province to accommodate their asserted Aboriginal title to the lands comprising Block 6, arises as an aspect of the fiduciary relationship which exists between the Crown and all Aboriginal peoples. It was argued that the existence of this fiduciary relationship has

been firmly established by judgments of the Supreme Court of Canada and this court, including:

(a) ***Regina v. Sparrow*** [1990] 1 S.C.R. 1075 at p. 1108.

(b) ***Regina v. Van der Peet*** supra, at paras. 24 and 25.

(c) ***Delgamuukw v. British Columbia*** supra, at paras. 162 and 168.

(d) ***Gitanyow First Nation v. Canada and British Columbia*** [1999] 3 C.N.L.R. 89 (B.C.S.C.) at paras. 29 and 47.

[21] The respondents contend that no fiduciary obligation to protect the alleged Aboriginal title of the Haida to the lands and timber of Block 6 can be fixed on the Province, before those Aboriginal rights have been proved.

[22] Many authorities were cited in argument, in addition to those already mentioned, including:

(a) ***Halfway River First Nation v. British Columbia (Minister of Forests)*** [1998] 1 C.N.L.R. 98 (B.C.C.A.)

(b) ***Cheslatta Carrier Nation v. British Columbia*** [1998] 3 C.N.L.R. 1 (Williams, C.J.S.C.)

(c) ***Taku River Tlingit v. Ringstad*** [2000] B.C.S.C. 1001 (Kirkpatrick, J.)

(d) ***Kitkatla Band v. British Columbia (Small Business, etc.)*** [2000] B.C.C.A. 42

(e) ***Westbank v. British Columbia (Minister of Forests) and Wenger*** [2000] B.C.S.C. 1139 (Sigurdson, J.)

[23] I have concluded that the authorities do establish, as a matter of law, that the federal Crown stands in a fiduciary relationship with all Aboriginal peoples of Canada, and the provincial Crown stands in a similar relationship to the Aboriginal peoples of British Columbia. In ***Regina v. Sparrow*** supra, at p. 1108, Dickson, C.J.C. said that, by reason of s. 35(1) of the *Constitution Act 1982*,

> ...the government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the government and Aboriginals is trust-like, rather than adversarial...

In ***Regina v. Van der Peet*** supra, at para. 24, Lamer, C.J.C. said:

> The Crown has a fiduciary obligation to Aboriginal peoples with the result that in dealings between the government and Aboriginals, the honour of the Crown is at stake.

In ***Delgamuukw*** supra, at para. 162, Lamer, C.J.C. spoke of

> ...the special fiduciary relationship between the Crown and Aboriginal peoples.

In ***Gitanyow First Nation*** supra, Williamson, J. stated as follows at para. 47:

> In 1867, the powers, duties and responsibilities of the Crown pre-Confederation were enumerated and assigned to either the Crown in Right of Canada or the Crown in Right of the Provinces. But, as can be seen above, the fiduciary obligation of the Crown which characterized its relationship with Aboriginal peoples continued after 1867 as before. As a result, in its dealings with Native peoples within its jurisdictional powers, the Crown in Right of British Columbia must act in light of that duty even as its predecessor, the Crown of colonial times should have done.

[24] The next issue under ground 2, is whether the fiduciary obligation of the Crown included the duty to accommodate the asserted, but as yet unproved, Aboriginal title of the Haida, before replacing T.F.L. 39. A review of some of the evidence is required, because the petitioners submit that their claim to Aboriginal title to Block 6 is strong on its face, and that the Crown should have recognized this, and taken steps to accommodate their title.

[25] The evidence presented on this application was voluminous, and of necessity, my comments on the evidence will be general in nature. I find the following conclusions to be inescapable:

(a) The Haida people have inhabited the Queen Charlotte Islands continuously from at least 1774 to the present time.

(b) At the time of the assertion of British sovereignty in 1846, and likely for many years before then, the Haida were the only Aboriginal people who lived on the Queen Charlotte Islands.

(c) From 1846 to the present time, the Haida have been the only Aboriginal people living on the Queen Charlotte Islands.

(d) The Haida have never been conquered, they have never surrendered their Aboriginal rights by treaty, and their Aboriginal rights have not been extinguished by federal legislation.

(e) For more than 100 years, the Haida have claimed to possess Aboriginal title to all of the lands comprising the Queen Charlotte Islands.

(f) From a time which is uncertain, but which pre-dates 1846, up to the present time, the Haida have used large red cedar trees from the old-growth forests of the Queen Charlotte Islands for the construction of canoes, houses, and totem poles, and have also used

red cedar for carving masks, boxes, and other objects of art, ceremony, and utility.

(g) Since before 1846, the Haida have utilized red cedar trees obtained from old growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39.

(h) Red cedar has long been, and still is, an integral part of the Haida culture.

(i) Old growth red cedar timber has been, and will in the future continue to be harvested from Block 6, pursuant to T.F.L. 39.

(j) For a number of years, the Haida have expressed their objections to the Crown, to the rate at which the old-growth forests of Haida Gwaii are being logged off, the methods of logging being used, and the environmental effects of the logging on the land, watersheds, fish, and wildlife.

(k) Since the decision of the Court of Appeal in ***Delgamuukw*** on June 25, 1993, the Province has known that there was no blanket extinguishment of Aboriginal rights in British Columbia.

(l) Since at least 1994, the Province has known that the Haida objected to T.F.L. 39 being replaced without their consent and without the reconciliation of their title with Crown title.

(m) Since 1994, and probably much earlier, there has been available to the Province a significant body of evidence that indicates the Haida people exclusively occupied and used both coastal and inland areas of the Queen Charlotte Islands, including some of the coastal and inland areas of Block 6, since before the assertion of sovereignty in 1846, and evidence that indicates the importance of red cedar in the Haida culture.

(n) Since the Court of Appeal's decision on November 7, 1997, in ***Haida Nation v. British Columbia Minister of Forests*** [1998] 1 C.N.L.R. 98, the Province has known that, if the Haida proved their claim of Aboriginal title, their title would constitute an encumbrance on the timber on Block 6.

[26] The petitioners argue that the Province, having possession of all of this knowledge, or the means to obtain it, was fixed with a duty to inquire into the nature and extent of the Aboriginal rights claimed by the Haida people,

and to assess the strength of these claims in relation to the lands comprising Block 6. It is submitted that the Province failed to take reasonable steps to make such an inquiry, until in or about February 2000, when it retained the services of Shauna McRanor to conduct research. Finally, the petitioners submit that, until such time as the Province could establish by such inquiry that the Haida had no valid claim to Aboriginal title to the lands of Block 6, it was obligated to treat those lands as if they were encumbered by Haida title.

[27] I see fundamental weaknesses in the petitioners' argument. First, it purports to cast an onus on the Crown to disprove the asserted Aboriginal title of the Haida to all of the lands of Block 6. If the Crown has not done this, so the argument goes, the existence of Haida title to Block 6 must be presumed. But more than that, the argument requires that Haida title be presumed to exist, to the extent claimed by the Haida. Only if that presumption is made, can the argument proceed to the next step, namely, the contention that Haida title must be given "priority". This would permit the petitioners to argue that the Crown had the duty to "accommodate" Haida title. But I have concluded that there is no such presumption, in law.

[28] The petitioners are saying, in effect, that the Crown has the burden of proving "justification" for infringing rights that have not yet been proved, in kind or in extent. In my opinion, the issue of whether there has been infringement of an Aboriginal right cannot be decided until both the kind of right, and its extent, have been established. I think the fatal flaw is that the petitioners want results that could only be achieved at a trial, and only after the Haida proved their Aboriginal title, and its infringement.

[29] My opinion is that the scope of the Crown's fiduciary duty to the Haida cannot be determined without a trial. Whether the duty requires that priority be given to Aboriginal title, and if so, whether the measures taken by the Crown are consistent with the principle of priority, are issues that depend on the nature and extent of the Aboriginal right or title at issue. In my view, the judgment of Lamer, C.J.C. in ***Delgamuukw*** at paragraphs 162 to 167 indicates that these questions are matters for trial. I reject ground 2.

[30] I move to consider the first issue arising from ground 3, namely: Did the Crown have a legal obligation to consult with the Haida in good faith, before replacing T.F.L. 39?

[31] Among other authorities, the petitioners relied on the judgment of Williamson, J. in ***Gitanyow First Nation*** supra. In

that case, Williamson, J. held that the Crown (federal and provincial) was "...subject to a legal obligation to negotiate in good faith" with the Gitanyow, where the parties were engaged in treaty negotiations at stage 4. His reasoning was that this duty was "...founded upon the fiduciary relationship between Aboriginal people and the Crown..." (see paragraphs 40 and 53). He also granted the remedy of a declaration, to that effect. As here, the Gitanyow had only asserted their Aboriginal rights, but had not proved them. In his reasons, Williamson, J. pointed out that, before commencing the B.C. treaty process with the Aboriginal peoples of this province, the Crown agreed to a number of principles that govern the treaty negotiations.

[32] The Crown's acceptance of those principles, in my view, could reasonably give rise to a duty to conduct treaty negotiations in good faith. But in my opinion, it does not logically follow from this conclusion, that the Minister of Forests, who has no statutory or contractual obligation to negotiate with Aboriginal peoples concerning their claims before replacing tree farm licences in their traditional territories, should have a fiduciary obligation to consult with them in good faith, merely because he knows about the Aboriginal claim, and has not disproved it. Accordingly, I

conclude that the ***Gitanyow*** decision does not advance the petitioners' argument on ground 3.

[33] The respondents submitted that I should adopt the reasoning of Sigurdson, J. in ***Westbank First Nation*** supra. In that case, in dealing with the same issue, and similar arguments based on the same authorities, Sigurdson, J. held, in effect, that the fiduciary relationship between the Crown and Aboriginal peoples does not give rise to a duty on the Crown to consult, before the alleged Aboriginal title or right was proved to exist. He allowed for an exception, where the Crown and Aboriginal people were engaged in treaty negotiations, as occurred in the ***Gitanyow First Nation*** case. Sigurdson, J. concluded that the District Manager was not in a fiduciary relationship with the Westbank Nation, in connection with his decision to grant the logging contract that was being challenged.

[34] I have decided that the same reasoning that led me to reject ground 2, also applies with respect to ground 3. In ***Delgamuukw*** at paragraph 168, Lamer, C.J.C. discussed the Crown's duty to consult as a factor relevant to the issue of whether an infringement of Aboriginal title is justified. He states: "There is always a duty of consultation." But Lamer, C.J.C. thereafter states: "The nature and scope of the duty

of consultation will vary with the circumstances," and goes on to describe the possible minimum and maximum extent of the duty to consult. In my opinion, these statements imply that the scope of the duty to consult is an issue that must be determined at a trial. This issue, like the issue of infringement, also depends on the nature and extent of the Aboriginal title or other right that must first be established. I consider my decision to be consistent with the judgment of Sigurdson, J. in the ***Westbank*** case.

[35] I understand the ***Gitanyow*** case is under appeal, and perhaps the Court of Appeal will settle at least some of the uncertainty and apparent inconsistencies in this evolving area of the law.

[36] In the event that I have erred in deciding ground 2 or ground 3, and in fairness to the parties, I will consider the alternative arguments made by the respondents.

[37] First, the respondents submitted that, even if the Crown had a fiduciary duty to consult with the Haida in good faith in connection with their asserted Aboriginal title to Block 6, that duty has been satisfied.

[38] The Crown (and Weyerhaeuser) says that there has been consultation with the Haida on matters relating to T.F.L. 39,

and some accommodation of their claims to Block 6, in connection with the following matters:

(a) The protection of culturally modified trees located on Block 6.

(b) The supplying of large cedar logs to the Haida for cultural and other uses, under Weyerhaeuser's "cedar policy" and permits issued by the Ministry of Forests.

(c) The protection of cedar seedlings from damage or destruction by deer browsing.

(d) The voluntary deferring of applications for cutting permits in the six "Haida Protected Areas" on Block 6.

(e) The institution of "variable retention" logging methods, which reduces environmental damage and promotes natural reforestation.

(f) The inclusion of provisions in paragraphs 8 and 10 of T.F.L. 39, which allow for consultation with the Haida at the stage where cutting permits are applied for by Weyerhaeuser, and which give notice to

Weyerhaeuser of the possibility of amendments to T.F.L. 39.

[39] The Haida recognize and accept the foregoing measures as being steps in the right direction. But they say these measures fall far short of accommodation of their title, or consultation in good faith. The Haida point out that the cedar logs supplied by Weyerhaeuser under its cedar policy amounts to only a tiny fraction of the allowable annual cut. Also, they say that there is no guarantee that Weyerhaeuser will not eventually apply for, and be granted, cutting permits for timber in the Haida Protected Areas. Finally, the Haida argue that the consultation that may occur at the operational stage when cutting permits are applied for is far too late.

[40] The only terms of T.F.L. 39 that relate to the Haida claim are contained in the replacement licence dated March 1, 2000, in paragraphs 8.07, 8.08, 8.09, and 10.01. Those provisions read as follows:

> 8.07 The District Manager may consult aboriginal people who claim to have an aboriginal interest that may be affected by activities or operations under or associated with a cutting permit.
>
> 8.08 The District Manager may impose conditions in a cutting permit to address an aboriginal interest.

> 8.09 The District Manager may refuse to issue a cutting permit if, in the opinion of the District Manager, issuance of the cutting permit would result in an unjustifiable infringement of an aboriginal interest.
>
> 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 and/or title,
> (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 and/or title,
>
> the Regional Manager or District Manager, in a notice given to the Licencee, may vary or suspend, in whole or in part, or refuse to issue a cutting permit, road permit or special use permit, or a free use permit issued to the Licensee so as to be consistent with the court determination.

[41] It is apparent that the provisions in paragraph 8 give the District Manager discretion to consult with the Haida concerning applications for cutting permits, and to impose conditions in a cutting permit or refuse to issue a cutting permit, if he thinks fit to do so. Paragraph 10.01 merely gives notice to the licence holder that, if the Haida obtain an interlocutory or permanent injunction, or prove an unjustifiable infringement of their Aboriginal rights or title in court, then the Regional Manager or District Manager may

make certain changes so as to conform with the court's judgment. These terms of T.F.L. 39, and the other measures listed in paragraph 38, do not, in my opinion, amount to protection or accommodation of the Haida's claimed Aboriginal title from possible infringement by the logging and other related activities of Weyerhaeuser on Block 6.

[42] Furthermore, on the evidence presented, it is apparent that the Minister refused to consult with the Haida about replacing T.F.L. 39 in 1995 and 2000, on the grounds that he was not required by law to consult, and that such consultation could not affect his statutory duty to replace T.F.L. 39. Accordingly, if (contrary to my decision) the Crown had a legal obligation to consult with the Haida, and if that duty extended to the Minister's decisions to replace T.F.L. 39, then it would follow that the duty had been breached.

[43] The respondents also made an alternative submission as to what remedy, if any, should be granted, in the event that the application was allowed. it was forcefully argued by the respondent Weyerhaeuser that the court's discretion should be exercised against granting the remedy being sought, for the following reasons:

(a) An order setting aside the Minister's decisions to replace T.F.L. 39 would have a devastating financial

effect on Weyerhaeuser, its employees, contractors and suppliers, and on the communities that are dependent on Weyerhaeuser's forest operations, all of whom are innocent third parties.

(b) If the Crown's only legal error was a past failure to adequately consult with the Haida before replacing T.F.L. 39, no useful purpose would be served by a declaration to that effect.

(c) There has been excessive delay in bringing this application, particularly in respect of the replacements of T.F.L. 39 in 1981 and 1995.

[44] I find the delay argument persuasive as to the replacement decisions in 1981 and 1995. In my opinion, regardless of whether or not the Minister had jurisdiction, no relief should be granted in connection with those two replacements. Too many people have acted in reliance on those decisions, for too long.

[45] As to the replacement of T.F.L. 39 in 2000, I would not have acceded to the arguments of delay, or prejudice to innocent third parties who have acted in reliance on the Minister's decision. The Haida claim of Aboriginal title to all of Haida Gwaii (including Block 6), and their objections

to the replacement and transfer of T.F.L. 39 without an accommodation of their rights, was widely known. Those who acted in reliance on this decision of the Minister, particularly Weyerhaeuser, did so with knowledge of the risk of the potential consequences of the Haida claim.

[46] There was much discussion about the Crown's alleged moral duty to negotiate with the Haida concerning their claims, and the petitioners insisted that the honour of the Crown is called into question by its failure to consult with the Haida in good faith in connection with the decisions to replace T.F.L. 39 in 1994-95 and 1999-2000. As I understood it, the argument was based to a considerable extent on the alleged strength of the Haida claim to Aboriginal title. Since I think there is some merit in this argument, I will comment on it, beginning with some general observation on the evidence that points to the existence of Aboriginal title.

[47] In my opinion, there is a reasonable probability that the Haida will be able to establish Aboriginal title to at least some parts of the coastal and inland areas of Haida Gwaii, and that these areas will include coastal areas of Block 6. As to inland areas of Block 6, I would describe the Haida's chance of success at this stage, as being a reasonable possibility. Moreover, in my view, there is a substantial probability that

the Haida will be able to establish the Aboriginal right to harvest red cedar trees from various old-growth forest areas of Haida Gwaii, including both coastal and inland areas of Block 6, regardless of whether Aboriginal title to those forest areas is proven.

[48] I am also of the opinion that a reasonable probability exists that the Haida would be able to show a *prima facie* case of infringement of this last-mentioned right, by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply. I find myself unable to predict what likelihood there is that the Haida would be able to establish infringement of other aspects of their rights in relation to the lands and timber of Block 6.

[49] In making these statements, I am mindful of the essential elements that must be proved to establish a claim of Aboriginal title or other Aboriginal right, as defined and described in ***Regina v. Van der Peet*** [1996] 4 C.N.L.R. 177 (S.C.C.) at par.'s 46 to 74, and ***Delgamuukw v. British Columbia*** [1997] 3 S.C.R. 1010; [1998] 1 C.N.L.R. 14, at par.'s 140 to 159.

[50] I recognize that there are legitimate issues with respect to the Haida claim of Aboriginal title to the lands of Block 6, and particularly as to those lands that are more than one

kilometre inland from shore. It seems clear that most of Block 6 is “inland”. There is also an understandable dispute concerning the issue of infringement, and the extent of infringement (if any), by Crown-authorized activities on Block 6. The Crown cannot be faulted for raising these fact issues, and it appears that a great deal of further evidence will have to be presented and assessed, before these questions can be resolved. But I think it is fair to say that the Haida claim goes far beyond the mere “assertion” of Aboriginal title.

[51] In my judgment, the provincial Crown should have been able to make a similar assessment of the apparent strength of the Haida claims, long before September 1, 1999, when the Minister offered to replace T.F.L. 39. I think this factor favours the creation of a moral duty to consult in relation to the decision to replace T.F.L. 39.

[52] There are other circumstances, which I think tend to strengthen this moral duty, and to bring the decision to replace T.F.L. 39 within its purview. First, the evidence showed that the Crown and the Haida have been involved, to some degree, in treaty negotiations since 1992, but are still only at stage two of the six-stage process. I understood from the evidence that the Crown has refused to discuss the replacement of T.F.L. 39 as part of any “Interim Measures”

negotiations, which appear to be collateral to the treaty negotiations. But the evidence also shows that all parties accepted the Report of the British Columbia Claims Task Force dated June 28, 1991, which included the following as Recommendation No. 16:

> No. 16 The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.

[53] The parties accepted the Task Force Report by way of a Protocol agreement dated August 20, 1993. Section 4.2 of the Protocol agreement reads in part as follows:

> 4.2 Interim measures negotiations may deal with the following matters:
>
> (a) The jurisdiction and authority of First Nations over the protection, management, use, allocation and development of their lands, waters and resources within their traditional territories...

[54] But having accepted the task force report, and having entered into the Protocol agreement, I find it difficult to understand why the Province has apparently refused to consider the replacement of T.F.L. 39 as a subject for Interim Measures negotiations.

[55] The evidence establishes that in September 1998, the Province published updated "British Columbia Consultation Guidelines" governing consultation with Aboriginal peoples concerning their Aboriginal rights and title, for all provincial ministries. Although the guidelines state that "...staff must not explicitly or implicitly confirm the existence of Aboriginal title when consulting with First Nations," at page 8 of those guidelines the following statements are included:

> While the nature and scope of consultation may vary depending on specific circumstances, the fundamental principles of consultation are the same for both Aboriginal rights and Aboriginal title. Consultation efforts must be made in good faith with the intention of substantially addressing a First Nation's concerns relating to infringement... (Emphasis added)
>
> The province must assess the likelihood of Aboriginal rights and title prior to land or resource decisions concerning Crown land activities...
>
> Consultation is the responsibility of the Crown...

[56] In addition to these general Crown guidelines, the Province published *Ministry of Forests Policy 15.1 – Aboriginal Rights and Title* on June 2, 1999. At page 1 of that document, under the heading "Policy", these statements appear:

> Aboriginal rights, including Aboriginal title, are recognized and affirmed in s. 35 of the *Constitution*

> *Act 1982*. The effect of this recognition is that existing Aboriginal rights must not be unjustifiably infringed by the resource development activities of the Crown or its licencees. It is the policy of the Ministry of Forests to meet its constitutional obligations with respect to those rights while maintaining a timely approval process for forest activities. The Ministry of Forests also has the objective of building and maintaining co-operative relationships with Aboriginal groups.

At pages 2 and 3 under the heading of “Aboriginal Title”,

these paragraphs appear:

> Since the onus to prove Aboriginal title lies with First Nations, the Crown does not assume the existence of Aboriginal title where its existence has not been legally proven. Negotiations with First Nations were identified by the Supreme Court of Canada as a desirable way to resolve issues associated with Aboriginal title...
>
> In the absence of legal confirmation of existence of Aboriginal title over particular lands, the Ministry of Forests carries out consultation to gather information regarding specific Aboriginal interests. Levels of appropriate consultation will vary with the contemplated use of the land, and the degree of the potential for Aboriginal title to exist in the area in question. Through consultation, the Ministry of Forests will identify whether considerations of Aboriginal title issues may be appropriate for operational decisions, and will apply subsequent consultation processes appropriately (described in the Ministry Forests’ consultation guidelines).

And at page 3, under “Additional Considerations”, the policy states:

> The Ministry of Forests strives, where possible, to build and maintain working relationships with First Nations based on trust and respect. Involvement in aspects of strategic or long-term planning processes can provide Aboriginal groups with greater

> understanding of subsequent operational planning stages. This involvement can increase the effectiveness of M.O.F. planning processes.

[57] In the “Consultation Guidelines” themselves, although they are expressly limited to “addressing Aboriginal interests in operational planning processes”, statements are made at pages 7 and 8 that I consider to be important. For example, at page 7:

> ...in the absence of court rulings of the scope and location of particular rights or title, or a treaty, circumstances require Ministry staff to take reasonable steps to obtain relevant information, and to use that information to determine:
>
> 1. Whether the potential for Aboriginal rights exists in the proposed forest management area and, if so,
> 2. The nature, location and extent of those potential rights.

And at page 8 of the Guidelines:

> If the Aboriginal interest as of 1846 was <u>exclusive</u> occupation of land, there will be a potential for Aboriginal title in that area...

[58] Having regard to these two sets of guidelines, and the evidence pointing to Aboriginal title, I think it is arguable that the Crown has failed to comply with its own guidelines, in refusing to consult with the Haida on the replacement of T.F.L. 39.

[59] Finally, there was other evidence that, in my view, indicates that the decision of the Minister to replace T.F.L. 39 should be subject to the moral duty to consult with the Haida. I summarize that evidence as follows:

(a) The evidence indicated that T.F.L. 39 has an area of about 241,000 hectares, and that the licence area constitutes almost one-quarter of the total land area of Haida Gwaii (which is about 5,800 square kilometres).

(b) It was unclear from the evidence as to how much of the total area of Block 6 has been logged off. But from the one-hour helicopter view of the Graham Island portion of Block 6 that I took after court on August 3, 2000 (along with representatives of the petitioners and respondents), it was apparent that large areas of Block 6 have been logged off.

(c) Although I could not discern from the evidence how much of the old-growth forests of Haida Gwaii or Block 6 have been logged off, and how much remains, such forests are obviously limited in quantity, and I find it understandable that the Haida would want to reduce the rate at which logging is being

conducted in old-growth forests on Block 6. They say these forests take 500 years or more to grow.

(d) Consultation at the operational level does not permit the Haida to influence the quantity of the annual allowable cut on Block 6.

[60] In my opinion, once the decision to replace T.F.L. 39 is made (followed by the required offer and acceptance procedure) it is inevitable that logging and road building activities will be authorized and carried out on Block 6, pursuant to T.F.L. 39. I conclude that the decision to replace T.F.L. 39 has high potential to affect Haida title, if it is established. Consultation at the replacement stage would enable the Haida to seek the inclusion of terms and conditions in T.F.L. 39 that would address their major concerns, on a long-term basis.

[61] In the circumstances, I conclude that the Crown does have a moral duty to consult with the Haida concerning their Aboriginal claims, in connection with the decision to replace T.F.L. 39. In ***Delgamuukw*** supra, in the context of encouraging the parties to settle their dispute by negotiation, Lamer, C.J.C. said this at paragraph 186: “Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct

those negotiations in good faith." I think that statement also applies to this case.

[62] Of course, agreement is a voluntary thing. No one can force any two persons (let alone, two or more groups of persons) to agree about anything that is a subject of dispute between them. Nor should this court attempt to influence or supervise any negotiations the parties choose to engage in. But the Court should, and does, encourage negotiations.

[63] On the evidence, there were Interim Measures Negotiations between the parties beginning in 1994 and continuing up to the time the Haida commenced the previous lawsuit in May 1995. In the spring or summer of 1999, Interim Measures Negotiations were again instituted between the Haida, the province and Canada, with a view to concluding a forest agreement for all of Haida Gwaii. These negotiations were terminated by the Province after this petition was filed. So, in addition to the matters on which consultation occurred, and the steps that have been taken to address Haida concerns, which I have previously mentioned, the Province has engaged in relevant negotiations with the Haida. I also noticed there was some evidence indicating that the Haida had been invited to participate in a process designed to review and set the future annual allowable cut for Block 6 and perhaps other areas of

Haida Gwaii. But the frustration of the Haida with the slowness of the process is also understandable, because they believe that the forests of Haida Gwaii, which are a crucial subject of negotiations, are being unnecessarily depleted without benefit to them, while the treaty process drags on.

[64] Although the Haida say the negotiations are unsatisfactory because the Province will not recognize the existence of Haida title, it must be remembered that the Crown has the heavy responsibility of representing non-Aboriginal interests, in its negotiations with the Haida. The Crown has the onerous task of trying to reconcile these often-conflicting interests, and it is not surprising that progress has been slow. And although I have expressed the opinion that the Crown has a moral duty to consult with the Haida concerning the Minister's decision to replace T.F.L. 39, I am not satisfied that the honour of the Crown has been diminished by the past failure to fulfil such moral duty. But I think the honour of the Crown will be called into question if this failure continues.

[65] Counsel did not address the issue of costs, and I will make no order as to costs until counsel have had the opportunity to make submissions.

"D.A. Halfyard, J."
The Honourable Mr. Justice D.A. Halfyard

December 5, 2000 -- Memorandum to the Legal Publishers advising the Style of Cause.