# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ehattesaht First Nation v. British Columbia (Forests, Lands and Natural Resource Operations),* 2014 BCSC 849

Date: 20140514
Docket: S135318
Registry: Vancouver

Between:

**Ehattesaht First Nation and Chief Rose Ann Billy in her capacity as Chief of the Ehattesaht First Nation on behalf of all members of the Ehattesaht First Nation**

Petitioners

And

**Her Majesty the Queen in Right of British Columbia, as represented by Minister of Forests, Lands and Natural Resource Operations and Western Forest Products Inc.**

Respondents

Before: The Honourable Mr. Justice Ehrcke

## Reasons for Judgment

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|---|---|
| Counsel for the Petitioners: | F.M. Kirchner<br>A.G. Murphy |
| Counsel for the Respondent Her Majesty the Queen as represented by Minister of Forests, Lands and Natural Resource Operations: | K.J. Phillips<br>A.C. Peacock |
| Counsel for the Respondent Western Forest Products Inc.: | G. Plant, Q.C. |
| Place and Date of Hearing: | Vancouver, B.C.<br>February 24-26, 2014 |
| Place and Date of Judgment: | Vancouver, B.C.<br>May 14, 2014 |

## INTRODUCTION

[1] The issue before me in this case is whether there has been a failure by the Crown of its Constitutional duty to consult with the Ehattesaht First Nation over certain matters relating to a Tree Farm Licence.

[2] Under the *Forest Act*, R.S.B.C. 1996, c. 157 (the "*Act*"), the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), manages forest lands in British Columbia through Tree Farm Licences ("TFLs") and Timber Supply Areas ("TSAs").

[3] The Ehattesaht First Nation ("Ehattesaht") asserts aboriginal rights within and aboriginal title to an area on the west coast of Vancouver Island, a significant portion of which falls within TFL 19, which is presently held by the respondent Western Forest Products Inc. ("Western").

[4] By letter dated April 18, 2013, the Deputy Minister issued a decision (the "Decision") with respect to the 1,381,036 cubic metres of unharvested timber volume that accumulated in TFL 19 over the 2007-2011 cut control period (the "TFL 19 Undercut"). The Decision was to retain 25% of the TFL 19 Undercut for potential disposition to third parties to meet government objectives, including First Nations' interest in gaining access to the unharvested volume, and to return the remaining 75% of the TFL 19 Undercut to the inventory of TFL 19.

[5] Prior to making the Decision, there had been consultation between the Ministry and Western, but there was no consultation between the Ministry and Ehattesaht. Indeed, the Ministry did not even notify Ehattesaht that the matter was under consideration, and Ehattesaht submits that it was therefore denied any opportunity to provide comments or make submissions.

[6] Ehattesaht submits that in accordance with the principles set out by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 [*Haida*], the Ministry had a constitutional obligation to consult with

them before making the Decision. Accordingly, Ehattesaht brings this petition seeking a declaration to that effect and an order quashing the Decision pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

## BACKGROUND

[7] The Ehattesaht are part of the Nuu-chah-nulth cultural and linguistic group that have lived on the west coast of Vancouver Island for centuries. Ehattesaht is a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5.

[8] The Province has knowledge of the aboriginal title claims of Ehattesaht, including the portion that is within TFL 19.

[9] In November 2005 the Province and Ehattesaht entered into the Ehattesaht First Nation Forest Agreement and the Interim Measures Agreement (collectively, the "Forestry Accommodation Agreements"), which provided Ehattesaht with the opportunity to harvest up to 188,945 cubic metres of timber over a five-year period within TFL 19 and the Strathcona Timber Supply Area (the "Strathcona TSA").

[10] Ehattesaht took advantage of these opportunities to harvest the volume through its wholly-owned and operated forest company, Aat'uu Forestry Limited Partnership ("Aat'uu").

[11] Aat'uu also holds Forest Licence No. A139326 in the Strathcona TSA, which has an allowable annual cut of 55,000 cubic metres (a total of 275,000 cubic metres over the five-year licence period).

[12] The five-year term of the Forestry Accommodation Agreements expired in November 2010, and the licences issued pursuant to them began to expire in December 2012.

[13] Effective March 14, 2012, Ehattesaht and the Province entered into the Ehattesaht First Nation Forest & Range Consultation and Revenue Sharing Agreement, but while this provided for revenue sharing and a consultation process in

respect of administrative and operational forestry decisions, it did not provide Ehattesaht with timber-harvesting opportunities and did not address the expiring forest licences issued under the Forestry Accommodation Agreements. Those opportunities were to be the subject of another agreement, referred to as a "Forest Tenure Opportunity Agreement" ("FTOA"), but no agreement has yet been reached on an FTOA.

[14] Negotiations for an FTOA began in December 2012. At meetings with officials from the Ministry over the following three months, Ehattesaht asserted its desire to obtain timber harvesting opportunities through both the TFL 19 Undercut and undercuts within the TSA.

[15] In this way, Ehattesaht submits that since December 2012, it has consistently advocated that the Province should provide interim accommodation of its aboriginal rights and title through the reallocation of undercut to Ehattesaht.

## THE STATUTORY SCHEME UNDER THE *FOREST ACT*

[16] The *Act* governs the harvesting of Crown timber in British Columbia. Under s. 12(1), a district manager, regional manager or the Minister may enter into a tenure agreement granting rights to harvest Crown timber.

[17] A TFL is a form of tenure agreement pursuant to s. 12(2), which provides the holder with rights to carry out forest management on a specific area of Crown land. The right is geographically specific and provides an exclusive right to manage and harvest timber in the TFL area. Pursuant to s. 8 of the *Act*, the allowable annual cut for each TFL is determined by the Chief Forester at least once every ten years.

[18] While the holder of a TFL has the exclusive right to harvest timber in the TFL area, subject to certain exceptions, the holder must still obtain further authorizations to undertake harvesting activities within the TFL area.

[19] Cut control periods are governed by Division 3.1, Part 4 of the *Act*. For major licences, the cut control period is determined in accordance with s. 75.4, and pursuant to s. 75.41, the harvest in a cut control period must not exceed 110% of the aggregate of the allowable annual cuts.

[20] Section 75.8(1) of the *Act* provides that where the volume of timber harvested during a cut control period is less than the sum of the allowable annual cuts available to the licensee for the cut control period, the licensee must not harvest that unharvested volume (the "undercut") in a subsequent cut control period. Under s-s 75.8(2), the undercut may be disposed of to a person other than the licensee by way of a forestry licence to cut (ss. 47.4 to 47.7 and 47.3), a timber sales licence (ss. 20 and 22), or a non-replaceable forest licence (ss. 13 to 19 and 47.3).

[21] Pursuant to s. 47.3 of the *Act* the Minister may award certain types of tenures, such as a forestry licence to cut and forest licence, directly to a First Nation "to implement or further an agreement between the first nation and government respecting treaty-related measures".

## THE DECISION ON THE TFL 19 UNDERCUT

[22] TFL 19 was issued to Western on January 1, 2001. It has a 25-year term.

[23] When the five year cut control period for TFL 19 ended on December 31, 2011, Western had harvested 65.6% of their allowable annual cut, leaving the TFL 19 Undercut of 1,381,036 cubic metres of unharvested volume.

[24] By operation of s. 75.8(1) of the *Act*, any undercut at the end of a cut control period returns to the Crown and cannot be harvested by the licensee in any subsequent cut control period. The undercut may be disposed of by way of certain types of tenure agreement specified in s. 75.8(2).

[25] Government policy at the time was contained in a January 31, 2012 memorandum of the Deputy Minister entitled "Guidance on Unused Volume Tracking

and Disposition", which provided that undercut may be disposed of in whole or in part by a tenure agreement with third parties, or may be "reconciled", in whole or in part, after considering various factors, including:

> a. where the unused volume originated from, such as "a specific partition, geographic area, species profile or otherwise definable location or harvesting opportunity";
>
> b. whether "the possible disposition of unused volumes can be used to offset any forest management concerns or issues";
>
> c. impacts to the existing license holder's operations; and
>
> d. the district or region's ability to find suitable operating areas for First Nations' commitments.

[26] In accordance with s. 75.8 of the *Act*, the original licensee has no entitlement to any of this volume, whether disposed of or reconciled.

[27] Western indicated to the Ministry that most of the timber in the TFL 19 Undercut was "challenged" in the sense that it was in mature stands with low economic value, or was in geographically challenging areas with high harvest costs, such as high elevations or locations that could only be accessed by helicopter.

[28] Since 2010, Western had been expressing its concerns to the Province regarding unharvested volume in its TFLs, including TFL 19, and the possibility that the Province would dispose of volume by way of the third party tenures pursuant to s. 75.8(2) of the *Act*.

[29] On April 18, 2013, the Deputy Minister issued the Decision that 25% of the TFL 19 Undercut would be retained for potential disposition to third parties to meet government objectives, including First Nations' interest in gaining access to the unharvested volume, and to the remaining 75% of the TFL 19 Undercut, which amounts to 1,035,777 cubic metres (the "Reconciled Volume") would be returned to the inventory of TFL 19.

## THE CONSEQUENCES OF THE DECISION

[30] The Ministry submits the Decision on the TFL 19 Undercut did not result in a reservation of the Reconciled Volume for Western, as undercut may not be cut by the original licensee in any subsequent cut control period, but Ehattesaht submits that the 75% of the TFL 19 Undercut that was returned to the inventory of TFL 19 will affect future allowable annual cut determinations for Western and is thus a benefit to Western.

[31] It is not strictly speaking necessary to decide on this petition whether the Decision was beneficial to Western, as Ehattesaht's argument is based, rather, on the proposition that the Decision was detrimental to Ehattesaht. The detrimental effect on Ehattesaht does not necessarily depend on the existence of a benefit to Western.

[32] Nevertheless, I agree with Ehattesaht that the Decision was beneficial to Western, and indeed, that is why Western was eager to consult with the Ministry and put its position forward before the Decision was made.

[33] The detriment to Ehattesaht is apparent from paragraph 12 of the affidavit of Sharon L. Hadaway, Regional Executive Director, West Coast Region of the Ministry:

> 12. With respect to the 1,035,777 cubic meters (75%) of unharvested volume from the 2007-2011 cut control period that was removed from unused volume tracking and returned to the inventory of TFL 19, no further decisions respecting this volume will be made. It remains, in its entirety, in the inventory of TFL 19. Western Forest Products, as holder of TFL 19 can only harvest their current AAC and cannot access the reconciled unharvested volume.

[34] As explained at paragraph 62 of the petitioners' written argument:

> As a result of the Decision, the Reconciled Volume of 1,035,777 $m^3$ remains in the inventory of TFL 19 and will be considered in the calculation of the AAC for future cut-control periods. As the holder of the TFL, Western will have the exclusive right to harvest the timber pursuant to these future AAC determinations. No further decisions will be made regarding the Reconciled

> Volume. Consequently, the opportunity for Ehattesaht to be allocated this volume, or a portion of it, in the foreseeable future has been lost.

[35] Thus, as a consequence of the Decision, it is now impossible for Ehattesaht to be allocated anything more than 25% of the TFL 19 Undercut. Were it not for the Decision, there would not have been that "cap" on the portion of the TFL 19 Undercut that might have been allocated to it. The Decision foreclosed the opportunity for Ehattesaht to be allocated any portion of the 1,035,777 cubic metres (75%) of unharvested volume that now, as a result of the Decision, has been returned to the inventory of TFL 19.

## ISSUES

[36] The respondents raise two bases on which they submit the present petition should be dismissed: First, that the relief sought by the petitioners is not available under the *Judicial Review Procedure Act*; and Second, that the Minister had no duty to consult with Ehattesaht prior to making the Decision.

## AVAILABILITY OF JUDICIAL REVIEW

[37] The respondents submit that the relief sought by the petitioners is not available under the *Judicial Review Procedure Act* because "there has been no decision for which judicial review is available -- that is -- the statutory decision, the disposition of the TFL Undercut -- has not been made and the application is premature."

[38] The petitioners reply that the decision in question is the Decision to return 75% of the TFL Undercut to the inventory of TFL 19 leaving only 25% for possible apportionment, and that this Decision involved the exercise of a statutory power of decision with respect to which declaratory and injunctive relief is available under the *Judicial Review Procedure Act*.

[39] I agree with the petitioners that the Decision in question is reviewable under the *Judicial Review Procedure Act*.

[40] In *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.,* 2005 BCSC 697 the Court held at para. 104:

> [104] In conclusion, declaratory relief has been granted by this court in several cases involving First Nations disputes concerning the duty to consult. In regards to forestry decisions, declaratory relief stems from the initial decisions to issue timber licences. In this case, the FRA initiative is a creature of statute, the *Forestry Revitalization Act* and the *Forest Act*, which enable the province to make specific agreements with First Nations regarding forest tenure. The FRA is the vehicle that the Ministry chose to deliver those specific agreements. The concept of 'decision' should not be strictly applied when there is legislative enablement for a government initiative that directly affects the constitutional rights of First Nations. This approach has been approved by the Supreme Court of Canada in *Haida* when it spoke of review of governmental action affecting the duty to consult. The petitioners are entitled to seek the declaratory relief under the *JRPA* that the FRA policy does not meet the Crown's constitutional obligation to consult the HFN. [Emphasis added.]

[41] In the present case, The Minister derived his power to make the Decision either from the power to allocate undercut under s. 75.8 or the general power to administer the *Forest Act*.

[42] The relief sought by the petitioners with respect to the Decision is relief that is available under the *Judicial Review Procedure Act*.

## STANDARD OF REVIEW

[43] There is no dispute in this case that the Province did not, in fact, consult with Ehattesaht regarding the Decision. The issue in this case is not whether the form or extent of consultation was adequate. There was in this case no consultation at all.

[44] Thus, the issue to be decided on this judicial review is whether the Province had a duty to consult in respect of the Decision.

[45] The existence of the duty to consult is an issue of law that is reviewable on a standard of correctness: *Haida* at paras. 61-63.

## THE DUTY TO CONSULT

[46] *Haida* is the leading authority from the Supreme Court of Canada on the Crown's duty to consult with First Nations over decisions where Aboriginal interests may be affected.

[47] In that case, the Court explained that the duty to consult is grounded in the honour of the Crown and must be understood generously: *Haida* paras. 16-17.

[48] Consultation may be required in respect of potential interests that are presently unproven (*Haida* para. 27):

> 27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable. [Emphasis added.]

[49] The content of the duty to consult and accommodate varies with the circumstances, but at a minimum, it includes the duty to discuss important decisions: *Haida* para. 24.

[50] In the present case, the issue is whether the duty to consult was triggered by the contemplated Decision. In *Haida* at para. 35, the Court said that the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."

[51] In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 the Court identified three conditions for the existence of a duty to consult:

> 31 The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. [Emphasis in original.]

## DISCUSSION

[52] With respect to the first condition, the Crown does not dispute that it had knowledge of Ehattesaht's claims of Aboriginal right and title to the affected lands within TFL 19: see paragraph 51 of the Written Argument of the Minister.

[53] More specifically, the Province had knowledge of Ehattesaht's interest in the TFL 19 Undercut, because prior to the Decision, the Province was engaged in negotiations over the FTOA to provide Ehattesaht with timber volume as an accommodation measure in relation to Ehattesaht's asserted aboriginal rights and title, and Ehattesaht specifically indicated to the Province that it sought to obtain volume from the TFL 19 Undercut.

[54] As to the second condition, the lead up to the Decision clearly constituted "contemplated Crown conduct". Indeed, the Ministry engaged in a fairly extensive consultation process with Western in the period preceding the announcement of the Decision in order to give Western the opportunity of providing their input. During this period, no opportunity for consultation was provided to Ehattesaht.

[55] As to the third requirement, the Decision had the potential to adversely affect Ehattesaht's interest in the TFL 19 Undercut because it capped at maximum of 25% the portion of the TFL 19 Undercut that might be allocated to it. The Decision renders it impossible for Ehattesaht to be allocated any portion of the 1,035,777 cubic metres (75%) of unharvested volume that has now been returned to the inventory of TFL 19.

[56] Nevertheless, the respondents maintain that the Crown had no duty to consult with Ehattesaht prior to the Decision because, in their submission, the right or interest that was affected by the Decision is an economic interest as opposed to an Aboriginal right.

[57] In the respondents' submission, the petitioner's objective in this petition is to gain an advantage in their negotiations with the Province over the FTOA. As the argument is expressed at paragraph 80 of the Written Argument of the Minister:

> 80 The Respondent urges the Court not to recognize a duty to consult in such circumstances. The Province must be able to determine what Crown resources are allocated for negotiation purposes, having regard for policy factors and the balancing of societal and other interests. Discussion about the sufficiency of the Crown's offer ought to occur at the negotiating table. The negotiation process ought not to be fragmented by requiring the Crown engage in consultations on internal policy decisions on the basis that it may affect an offer made to the First Nation (i.e., affect the Province's negotiating mandate).

[58] I do not agree with the respondents' position. The issue here is not about the adequacy of accommodation or even about the sufficiency of the consultation. Here, there was no consultation whatsoever. The only issue before me is whether there was some duty to consult. I fail to see how the recognition of some duty to consult could be said to distort the negotiation process.

[59] In *Rio Tinto Alcan*, the Court recognized at para. 44 that the duty to consult may be triggered by contemplated Crown conduct that involves "strategic, higher level decisions" that may have an impact on aboriginal claims and rights, and conduct that sets the stage for further decisions that will have a direct adverse impact on the lands attract the duty to consult:

> [44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41, (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the

> establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd, 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.

[60] Moreover, the Court in *Rio Tinto Alcan* observed at para. 47 that the adverse impact triggering a duty to consult is not restricted to physical effects:

> [47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on the lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73. [Emphasis in original.]

[61] In *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Environment)*, 2011 BCSC 620, the Court recognized that a duty to consult may extend to cases in which the proposed Government action may have a potential adverse impact on a First Nation's economic interests. Thus, at para. 139 Fisher J. wrote:

> [139] I accept that in some circumstances, decisions preserving lands or the *status quo* may not have an adverse impact on aboriginal claims. *Tsuu T'ina* is an example of this. However, I do not interpret *Haida Nation* as establishing a duty to consult only for the purpose of preserving land from development. I agree with Mr. Elwood's submission that there was an economic component to the Haida's claim to the lands and forests of their traditional territory, and another aspect of the Crown's conduct in issue was the exclusion of the Haida from the benefits of the forest resource. Proposed conservation measures could have an adverse effect on claimed aboriginal rights and title, as they may limit future uses of land. The LRMP process and the government-to-government consultations regarding the Upper Klinaklini

> area clearly demonstrate this. In my opinion, limiting the duty to consult in the manner suggested by the government is inconsistent with the "generous, purposive approach" to this element of the duty to consult as described in *Rio Tinto* and inconsistent with the goal of achieving reconciliation.

[62] Thus, I do not accept the respondents' submission that there was no duty to consult in the present case because the right or interest of Ehattesaht that was affected by the Decision was merely an economic interest as opposed to an Aboriginal right.

## CONCLUSION

[63] I am satisfied that the Crown had a duty to consult Ehattesaht prior to making the Decision to return 75% of the TFL 19 Undercut to the inventory of TFL 19. As the Minister did not consult Ehattesaht, the Decision is quashed.

[64] The petitioner is entitled to its costs on scale B.

The Honourable Mr. Justice W.F. Ehrcke