IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tolko Industries Ltd. v. Okanagan Indian Band,* 2010 BCSC 24

Date: 20100111
Docket: S097906
Registry: Vancouver

Between:

Tolko Industries Ltd.

Plaintiff

And

Okanagan Indian Band, Chief Timothy Manuel, Chief Fabian Alexis, Grand Chief Stewart Phillip, Colleen Marchand and Persons Unknown

Defendants

AND

Docket: S098138
Vancouver Registry

Between:

The Okanagan Nation Alliance and Grand Chief Stewart Phillip, on his own behalf and on behalf of all members of the Okanagan Nation

Plaintiff

And

Tolko Industries Ltd.

Defendant

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for Tolko Industries Ltd.:	D. Bennett M. Lang
Counsel for the Okanagan Indian Band et al and the Okanagan Nation Alliance et al:	L. Mandell, Q.C. A. Walkem C. Sharvit
Place and Date of Hearing:	Vancouver, B.C. November 18 – 20, December 18, 2009
Place and Date of Judgment:	Vancouver, B.C. January 11, 2010

[1] These actions concern rights to harvest timber in the Brown's Creek watershed area (I will refer to the area generally as "Brown's Creek") near the Okanagan Indian Reservation in British Columbia.

[2] In Action No. S097906, Tolko seeks damages for nuisance, obstruction, conspiracy, and intentional interference with contractual relations as well as an interlocutory and permanent injunction restraining the defendants from interfering with Tolko's road construction and timber harvesting operations in Tree Farm Licence #49 (TFL 49).

[3] In Action No. S098138, the Okanagan Nation Alliance (ONA) seeks damages for trespass and for interference with the aboriginal rights in Brown's Creek , special damages, and an interlocutory and permanent injunction restraining Tolko from carrying out logging activities, including cutting, destroying, skidding, stacking, decking, and moving or transporting of timber and the building or preparation of roads in Brown's Creek. The ONA is a registered society, whose members are members of seven bands: the Okanagan Indian Band; the Lower Similkameen Indian Band; the Penticton Indian Band; the Upper Similkameen Indian Band; the Lower Nicola Indian Band; the Westbank First Nation and the Osoyoos Indian Band; collectively, the Okanagan.

[4] In the applications before me, each of the parties seeks an interim interlocutory injunction restraining the other. Tolko seeks an injunction restraining everyone having notice of the order from impeding road construction, maintenance or timber harvesting operations in eight specified cut-blocks within TFL 49; from physically obstructing or impeding road maintenance and hauling or driving by Tolko or its employees on specified roads; and from being within 100 metres of any of the cut-blocks when Tolko's employees or contractors are conducting any timber harvesting operations within that cut-block. The ONA seeks an order restraining Tolko from any logging activities in Brown's Creek until trial of the matter and from interfering with the Okanagan's possession of the watershed.

BACKGROUND

[5] The Okanagan say that they have never relinquished Aboriginal title to Brown's Creek and that they have Aboriginal title and Aboriginal rights to that land. They say that they have been asserting these rights for at least 150 years. There has been extensive litigation of this issue, which is ongoing. In 1999, the Okanagan started logging in Brown's Creek. In doing so, the Okanagan were asserting their Aboriginal rights by cutting timber in their traditional use area: see *British Columbia* (*Minister of Forest) v. Adams Lake Band,* 2000 BCCA 315. The Crown, acting through the Ministry of Forest, issued a Stop Work Order. The Stop Work Order was not complied with, so the Crown commenced proceedings, seeking an injunctive order requiring compliance. The petition for an injunction came before Mr. Justice Sigurdson in Action 23911(the Wilson litigation). The Okanagan raised the issue of Aboriginal title and Aboriginal rights in their defence, arguing, *inter alia*, that they had the right to log in the area. The litigation progressed, with appeals to the Court of Appeal and Supreme Court of Canada.

[6] In 2007, the Province admitted that the respondents in the Wilson litigation "and all other persons engaged in the cutting, damaging or destroying of Crown timber at Timber Sale License A57614 had an Aboriginal right to harvest wood within the traditional territory of the Okanagan Indian Band, and that such territory extends to the 1999 cut block site from which the respondents harvested the timber at issue in this case." The Crown sought severance of the issue of the Aboriginal right to harvest timber from the issue of Aboriginal title. Mr. Justice Sigurdson granted the Crown's application. He said:

> There is a concern that evidence will be lost with respect to establishing Aboriginal title as a defence to the petition if the streamlined case goes ahead and the defence of Aboriginal title is deferred. I acknowledge Mr. Tyler's concession that the Crown agrees that the advanced costs order would apply to ensure that any such evidence is not lost.

[7] The Okanagan have continued to accumulate evidence in support of the Aboriginal title claim. This process is not complete.

[8] Turning now to Tolko's circumstances, Tolko holds TFL 49 on the west side of Okanagan Lake. TFL 49 is an area-based tenure. Tolko has the exclusive right to harvest a certain volume of timber within a designated area. Brown's Creek makes up 27,000 hectares of TFL 49. On February 27, 2007 the district manager of the Okanagan Shuswap Forest District ("OSFD") issued cutting permits authorizing Tolko to harvest the eight specific cut blocks at issue in this hearing.

[9] These cut blocks have been infested by the mountain pine beetle. Mountain pine beetles attack lodge pole pine, which is the most common tree species in TFL 49. In 2005, the Ministry of Forest and Range (MFR) provided its mountain pine beetle action plan to Tolko. The MFR predicts that the epidemic will kill 80% of the mature lodge pole pine inventory in British Columbia by 2013. As described by Tolko, the OSFD's objectives are to aggressively manage the mountain pine beetle (MPB) to reduce the spread of impact in suppression areas, to maximize fibre recovery, to minimize revenue losses to the Crown, and to minimize the impacts to all other resources within the OSFD. As the MPB epidemic began to move south-eastward into TFL 49, Tolko adjusted its operations to salvage pine-leading stands. Starting in 2000, Tolko applied for regular amendments to identify and add new MPB attacked cut-blocks and related access roads to its FDP. Between 2003 and 2006, about 75% of Tolko's harvesting in TFL 49 focussed on MPB attacked stands and other salvage operations. Since 2006, 100% of harvesting has been directed to MPB affected stands.

[10] In 2007, Tolko agreed with the Okanagan to defer harvesting in Brown's Creek until Tolko and the Okanagan had an opportunity to address concerns. In November 2008, Tolko informed the Okanagan that it intended to log in Brown's Creek.

[11] In January 2009, the Okanagan Indian Band (OKIB) filed a third party notice and a notice of motion in the Wilson litigation seeking an interlocutory injunction enjoining Tolko from harvesting. In March 2009, Mr. Justice Sigurdson directed that

the OKIB's injunction application should be heard in a separate proceeding. The Okanagan commenced proceeding S098138, now before me.

[12] On October 7, 2009, Tolko advised Chief Alexis that it planned to start harvesting in October 2009. In October 2009, Grand Chief Steward Phillip sent a letter to Tolko advising that the ONA would take all steps necessary to oppose any proposed logging by Tolko within the subject cut blocks. Tolko has attempted to enter the area to start logging and has been prevented from doing so by vehicles parked across access roads.

POSITIONS OF THE PARTIES

[13] Tolko says that it has held TFL 49 since 1951 (through its predecessor companies) and expects to hold the licence for the foreseeable future. It says that if it is precluded from harvesting in the MPB epidemic, it will lose a significant portion of the value of TFL 49 permanently.

[14] Tolko says that if this area is not harvested in a short time frame, more trees will degrade and will not be economically viable. Tolko will lose flexibility to provide economic timber to its four manufacturing facilities in the Okanagan. It cannot recover this volume from tenures outside of TFL 49. Tolko says the MPB infested pine has a 2–5 year shelf life, and the amount of infestation in Brown's Creek has increased significantly from 2007 to 2009. There has been relatively little harvesting in Brown's Creek despite the MPB epidemic. Tolko says that about 27% of the area was logged historically and it proposes to log a further 3%, leaving approximately 70% of the forested area unlogged after the 2009/2010 season. Tolko says that because it has focussed its harvesting in other areas outside of Brown's Creek, Brown's Creek now accounts for approximately 27.8% of TFL 49's mature timber volume. Tolko says that because of the MPB epidemic, if it is further delayed in harvesting the proposed areas of Brown's Creek, it will lose a significant portion of the value of TFL 49. Failure to harvest attacked stands can delay the establishment of new stands by 20–25 years and therefore affect the development of a long-term timber supply.

[15] Tolko says that it has spent approximately $900,000 in planning and preparation, a portion of which is attributable to the cut-blocks in question. If harvesting doesn't proceed, these costs will be lost. The economic margins of these cut-blocks are higher than those under other cutting permits held by Tolko. Tolko says that if it is not able to harvest the cut-blocks, it will have to close its Armstrong mill early in the new year and that it would be better positioned to keep the mill in Armstrong open if it were to harvest the subject wood.

[16] Tolko argues that it has a lawful right to harvest in TFL 49, in particular, the eight cut-blocks that are in issue. Tolko says that the Okanagan are clearly interfering with its rights and that there is a fair question to be tried with respect to its claims of nuisance, obstruction, conspiracy and intentional interference with economic relations.

[17] Tolko argues that the balance of convenience favours granting its injunction: damages will not provide an adequate remedy and there is little or no likelihood of damages being paid. Given the pine beetle infestation, there is no other way of preserving the contested property, and by impeding access, it is the Okanagan who have altered the status quo. Tolko says that interfering with its business in these circumstances constitutes irreparable harm and that its ability to harvest the timber before it becomes worthless has been jeopardized. This will have irreparable impact on Tolko in the short, mid and long-term. Tolko says that it obtained the necessary approvals after an extended approval process and after lengthy discussions with the OKIB in an effort to mitigate any impact on the OKIB.

[18] The Okanagan dispute that Tolko will suffer irreparable harm if it is precluded from cutting these eight specific cut-blocks. They say that the $900,000 which Tolko has spent on planning was not specifically spent on these cut-blocks and that any money was spent with full knowledge of the Wilson litigation. The Okanagan say there is nothing special about these cut-blocks from a market perspective and they are a very small portion of Tolko's annual logging on TFL 49. There is no real explanation for how the failure to harvest these eight cut-blocks would cause

irreparable harm to Tolko, particularly given that they are a very small portion of Tolko's annual allowable cuts: 380,000 cubic metres, of which the eight cut-blocks are expected to yield 50,000 cubic metres. There is no guarantee in current economic conditions that the Armstrong mill would stay open in any event: Tolko's plans are constantly changing. The Okanagan argue that the timber in the cut-blocks has already lost much of its economic value and the undergrowth now in place would be available many years earlier than newly planted trees if the area is logged now. The Okanagan say that they have proposed alternate harvesting options whereby Tolko could harvest the infested trees.

[19] The Okanagan say that the balance of convenience favours them. If Tolko is permitted to harvest, they will suffer irreparable harm by interference with their assertion of Aboriginal title and rights; interference with and potentially permanent damage to their mapping and evidence collecting which is necessary to establish their claims to Aboriginal title and rights; interference with the Okanagan's cultural and heritage practices, education of the young, hunting, fishing, use of vegetation; ecological impacts such as the hydrological impacts from de-forestation; and the loss of timber over which the Okanagan assert harvesting rights.

[20] Turning now to the Okanagan application, the Okanagan argue that the injunction they seek is grounded in the tort of trespass. They argue that the Okanagan have been and are in actual possession of Brown's Creek today. They say that this possession is sufficient to support the claim of trespass against Tolko.

[21] The Okanagan say that there is a serious issue to be tried: to establish a claim of trespass the plaintiff must prove possession, rather than title or ownership of the land. The Okanagan say that they have the right to possession based on the admitted Aboriginal right to harvest trees for domestic purposes as well as the preservation order. They also rely on evidence of possession through their practices of hunting, fishing and gathering plants in accordance with Okanagan laws.

[22] The Okanagan rely on *Douglas Lake Cattle Co. v. British Columbia,* [1990] B.C.J. No. 2307, 44 L.C.R. 260 (C.A.), to the following effect:

> ... the grantee of a legal or equitable interest in land in the nature of an easement or profit a prendre, like a fishery or right to cut timber, can sue in trespass for direct interference by strangers. [citing Professor Flemming's The Law of Torts (4th) p. 41]

[23] The Okanagan say that these rights and possession by the Okanagan of Brown's Creek are sufficient possessory interests in land to support a cause of action in trespass.

[24] With respect to the balance of convenience, the Okanagan say they will suffer irreparable harm if the logging proceeds. It will:

1. Interfere with the ability of the Okanagan to use, manage and conserve the forests, use the trees for domestic purposes and sustain Okanagan culture;
2. Impact significantly their ability to protect and gather evidence about as yet undocumented archaeological sites and trails;
3. Expose soils, resulting in further erosion and potential pollution, affecting water quality for drinking and for fish;
4. Increase populations of invasive weeds, and impact on native vegetation including species of cultural and economic importance to the Okanagan;
5. Destroy cultural heritage.

[25] In response to the Okanagan's application for an injunction, Tolko says, that to establish tort of trespass, the plaintiff must have exclusive possession. Tolko says that the ONA does not have a statutory right of use of Brown's Creek and until the ONA can prove exclusive possession sufficient to ground a title claim, Brown's Creek *prima facie* remains Crown land. Tolko says that it has a full defence to the allegation of trespass because it can show that it acts under the authority of the Crown. Tolko argues that the Okanagan have not established a fair question to be tried.

[26] Tolko argues that the Crown has a duty to consult, and where appropriate, provide accommodation. If the Crown has failed to properly consult and accommodate the Okanagan in the face of their claim to title and Aboriginal rights, then the appropriate course of action is for the Okanagan to make a claim against the Crown for lack of consultation.

[27] Tolko points to the Forest and Range Opportunities Agreement (FRA) of September 22, 2008 between the Crown and OKIB, pursuant to which the OKIB receive nearly $830,000 a year as accommodation for forest and range activities. Tolko suggests that this amount is accommodation for Tolko's activities in the subject lands.

[28] Tolko says that there is no "preservation order", rather the Crown has agreed that the advanced costs order applies in order to fund the collection of evidence regarding Aboriginal title. After the issue of Aboriginal title and Aboriginal rights were severed, Mr. Justice Sigurdson further directed that the advanced costs order could be used to fund reasonable steps taken to map and record trails. Tolko says there is no order to the effect that trails are to be indefinitely preserved pending an Aboriginal title claim.

[29] In summary, Tolko says:

1. The OKIB's defence of Aboriginal title has been severed from the Wilson litigation;

2. The ONA has filed a writ claiming Aboriginal title over extensive areas that include Brown's Creek, but the writ is being held in abeyance;

3. The Crown has admitted that the OKIB has an Aboriginal right to harvest timber for domestic use within its traditional territory;

4. The issue of whether the admitted Aboriginal right has been unjustifiably infringed is currently before the Supreme Court; and

5. The advanced costs order obtained by the OKIB may be used to fund reasonable steps taken to map and record trails.

[30] Tolko argues that none of these asserted rights and procedural rulings provide proof of the ONA's actual possession of the Brown's Creek litigation area and cannot be relied on to ground a claim in trespass.

[31] Tolko says that it has undertaken extensive planning to conduct harvesting in a manner that protects and preserves non-timber resources and this planning has been approved by the MFR. There is a lack of any evidence to show how the proposed harvesting interferes with hunting, fishing, gathering or other uses. Accordingly, the ONA has not shown that the manner in which Tolko harvests or proposes to harvest causes irreparable harm to its use and possession of Brown's Creek.

[32] Turning to the cultural heritage, Tolko says that there is no evidence that there is any cultural heritage resource that Tolko has destroyed or interfered with. Further, it says that although it sought input from the Okanagan, they did not advise Tolko of the existence of any archaeological sites, trails, culturally modified trees, traditional use areas or other cultural heritage resources. Tolko has obtained its own archaeological report which indicates that the cut-blocks have low archaeological potential. With respect to the argument that Tolko's harvesting will destroy trails that have not been mapped and that this will harm the OKIB's title claim, Tolko argues that this is not relevant to this action.

[33] Tolko says that any harm suffered by the Okanagan will be compensable in damages. Tolko says that if there is a later declaration of rights or title, and the rights are infringed as a result of government action, those persons whose rights or title have been compromised will have their remedy in damages. Tolko says that the status quo is maintenance of the current statutory regime for managing, protecting, conserving and planning the use of forest resources, which permits Tolko to harvest logs. Tolko says that no undertaking has been offered and in any event, would be ineffective as there is no ability to pay damages.

DISCUSSION

[34] The principles which apply to these applications for an interlocutory injunction are summarized in *Belron Canada Inc. v. TCG International Inc.,* 2009 BCSC 596:

> It may be trite to observe that an interlocutory injunction is an extraordinary remedy, however, the importance of bearing that principle in mind cannot be overstated.
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> [30] In *British Columbia (A.G.) v. Wale* (1986), 9 B.C.L.R. (2d) 333, [1987] 2 W.W.R. 331 (C.A.) [Wale] the Court of Appeal endorsed a two-part test for granting an interlocutory injunction at 345:
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> The traditional test for the granting of an interim injunction in British Columbia is two-pronged. First, the applicant must satisfy the Court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction.
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> [31] Some years later, the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 [RJR-MacDonald], ratified the line of authority that had adopted the three-part approach laid down by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 which asks:
>
> 1. Is there a serious question to be tried?
> 2. Has the applicant demonstrated that it will suffer irreparable harm if the injunction is not granted?
> 3. Does the balance of convenience favour granting the injunction?
>
> [32] The key difference between the framework applied in *Wale* and the three-prong test followed in *RJR-MacDonald* is that the former encompasses consideration of the vital concept of irreparable harm in its overall assessment of the balance of convenience. There is no difference of substance in the two approaches: *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd*., 2005 BCCA 5, 249 D.L.R. (4th) 367 per Smith J.A. at para. 54, citing *Coburn v. Nagra*, 2001 BCCA 607, 96 B.C.L.R. (3d) 327.
>
> [33] Using either model, the first branch of the test asks whether there is a fair question to be tried as to the existence of the legal right alleged by the applicant and a breach of that right. It is a low threshold, requiring the applicant to merely satisfy the court that its claim is neither frivolous nor vexatious: *RJR-MacDonald* at 337.
>
> [34] In *RJR-MacDonald*, the Court stated that the low threshold of the initial inquiry meant that an extensive examination of the merits of the applicant's claim was "neither necessary nor desirable" in the early days of the litigation (338).

[35] Turning first to Tolko's application, I am satisfied that Tolko has raised a fair question to be tried. Tolko has a tree farm licence granted by the Crown. It has complied with the various procedures established by the MFR and is in a position to start logging the specific cut-blocks in issue. A tree farm licence is equivalent to a

profit a prendre and may be enforced by an action in trespass: *MacMillan Bloedel Ltd. v. Simpson* (1993), 106 D.L.R. (4th) 556 at para. 14.

[36] I am also satisfied that Tolko faces irreparable harm if it is not permitted to log; see: *International Forest Products Ltd. v. Kern* 2000 BCSC 1141 at para. 33.

> The question of irreparable harm is easily addressed. There is no doubt that the activities of the protestors have had an effect upon the business of Interfor and its contractors who are also plaintiffs in this action. Interference with a business as a going concern amounts to irreparable harm: *Tlowitsis Nation and Mumtagila Nation v. MacMillan Bloedel Ltd.*, [1991] 2 C.N.L.R. 164 (B.C.S.C.).

[37] Similarly here, the activities of the protestors, blocking Tolko's access, have interfered with Tolko's ongoing business, and there is no basis to conclude that damages, if awarded, could be recovered.

[38] Further, there is no dispute on the evidence that the trees are degrading because of the pine beetle infestation and that the economic value of the timber is declining. I accept that it will have no value to Tolko in short order.

[39] The more difficult question is the overall balance of convenience as between Tolko and the ONA.

[40] I turn now to the application of the ONA. The legal foundation of the ONA action is more difficult. The ONA have brought an action in trespass. They also seek damages for interference with aboriginal rights and destruction of their cultural heritage.

[41] They summarize their argument:

> The injunction sought by the Okanagan is grounded on the tort of trespass. Trespass does not involve proof of Aboriginal title and the constitutional consequences therefrom; nor is the Crown present to prove the legitimacy of asserted Crown title, or that they have jurisdiction to apply the *Forest Act* to the Watersheds. The essence of a trespass action is interference with possession, and the Okanagan Nation have been and are in actual possession on the Watersheds today. It will be argued that this possession is sufficient to support a claim in trespass against Tolko, whose logging will directly interfere with the possessory rights of the Okanagan in the Watersheds, as well as an admitted Aboriginal right to harvest trees in the

> Watersheds and a preservation order permitting the Okanagan to collect evidence of Aboriginal title in the Watersheds where Tolko seeks to log.

[42] To the extent that the claim of the ONA relies on 'possession' of the Brown's Creek litigation area to support its claim in trespass, I have some doubt that the claim meets the relatively low threshold of a fair question to be tried. The tort of trespass is committed by entry on land in the exclusive possession of another, without lawful justification. I doubt that the ONA could establish exclusive possession of Brown's Creek. It is my understanding that the area is also used by other, non-native hunters, fishermen and hikers, as well as Tolko in its forestry activities. The evidence from the ONA does not suggest exclusive possession.

[43] Second, as Tolko argues, Tolko has authority from the Crown to enter the area. While the ONA does not recognise Crown title to the area, until the Okanagan establish their title, I must presume that it is Crown land: *Tsilhqot'n Nation v. British Columbia* 2007 BCSC 1700, at para. 978.

[44] However there are two aspects of the ONA claim which do pose a 'fair question to be tried': first, the recognized right to harvest timber; second, the evidence-gathering/ trail-mapping/ artefact-collecting activities which are ongoing. I will deal with each of these in turn.

[45] As set out above, the Crown has recognized that the Okanagan Indian Band has an Aboriginal right to harvest timber in "its traditional territories". With respect to the right of the ONA (not just the OKIB), the Crown refused to comment on the basis that that was not in issue in the Wilson litigation. Although the Crown did not expressly recognize a right for each member of the ONA, the OKIB are members of the ONA and it is arguable that the right is also held by other members of the ONA. For the purposes of this action, that is a fair question to be tried. Second, although the Crown's acknowledgement does not define "traditional territories", as Brown's Creek is in issue in the Wilson litigation, it is certainly arguable, if not likely, that the 'traditional territories' include that area. Both parties acknowledge that a profit a

prendre can found a trespass claim. An Aboriginal right to harvest timber is akin to a profit a prendre and arguably can also found a trespass claim.

[46] With respect to the evidence gathering and the collection of artefacts, this has been ongoing for several years. There is no order directing or permitting this activity, but there is an order providing for funding for the activity. It appears that all parties in the Wilson litigation accepted the right of the defendants in that action to collect the evidence and artefacts and thus no enforcement order was required.

[47] I have considered whether this action is the proper action to bring a claim such as this for damages for an interference of this nature, or whether the ONA should be seeking relief in the Wilson litigation. I have decided that, at least for the purposes of this application, the ONA claim is a fair question to be tried in this action. First, I recognize that Mr. Justice Sigurdson directed the Okanagan to seek an injunction in a separate action. Second, the ONA claim is not limited to trespass on real property, but includes a claim for damages for interference with Aboriginal rights and destruction of cultural heritage. While it may be a novel claim, it is in my view sufficient to pass the "fair question to be tried" threshold.

[48] I now turn to irreparable harm/balance of convenience. The ONA says that it will suffer irreparable harm if Tolko is permit to harvest on the identified cut-blocks because it will interfere with the ability of the Okanagan to manage and conserve the forest in accordance with Okanagan laws; Tolko's logging will expose soils, cause erosion and potential pollution, increase populations of invasive weeds, impact native species and amount to major environmental restructuring; significantly impact the ability to protect and gather evidence of undocumented sites and trails; and destroy undiscovered archaeology and culturally modified trees.

[49] Fundamentally, of course, the contest between these parties is a dispute over title to the land and resources of the land. The ONA take issue with the pre-eminence of the common law to determine their rights on what they say is their land. Any infringement on the land, its resources and management is an unacceptable infringement. However, this is not an action in which the ONA claim title to the land.

I have already discussed my misgivings about an action such as this, grounded in trespass, as a vehicle for an assertion, direct or indirect, of aboriginal sovereignty. Although it may not be a perfect method, the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, has addressed the difficulty of dealing with land claims, which may take years to resolve, while the Crown and others harvest resources from the claimed lands:

> ...proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants? (para. 26)
>
> 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. (para. 27)

[50] This does not preclude the ONA from seeking an injunction:

> It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.

[51] The ONA have various remedies that they may pursue. They may seek an injunction, or they may seek consultation and accommodation. They are not confined to a particular remedy.

[52] The ONA has not sought judicial review of consultation and accommodation by the Crown with respect to these lands, and I have very little information about any

consultation or accommodation which may have taken place. The evidence before me does not satisfy me that the Okanagan interests have been accommodated sufficiently to preclude an injunction in their favour. The accommodation provided in the FRA appears to be population based, rather than the "active consideration of the specific interests" of the Okanagan contemplated by *Haida*. See: *Huu-Ay-Aht First Nation et al v. The Minister of Forests* 2005 BCSC 697.

[53] Tolko has satisfied the MFR that its harvesting will meet appropriate environmental safeguards. Although the ONA are not satisfied by the approval given by the MFR and have a different approach to forest management, I cannot prefer one approach over another, and am not satisfied that the environmental impacts are such that the ONA will suffer irreparable harm.

[54] With respect to the right to harvest timber for domestic purposes, I have no information with respect to how the Crown proposes to reconcile two apparently conflicting rights: the right granted by the Crown to Tolko to log cut-blocks in OKIB traditional territory and the right of the OKIB to harvest in the same area. I am satisfied that the infringement to the OKIB harvesting rights caused by Tolko logging these particular cut-blocks can be compensated in damages, and is therefore not irreparable harm. Tolko proposes to log at most 30% of the area, leaving 70%. This application deals with only 50,000 cubic metres. I cannot conclude that logging this relatively small amount of timber would cause such an infringement of OKIB's right to harvest as to constitute irreparable harm. It may be that more extensive logging would cross the threshold to irreparable harm, but that issue is not before me at this time.

[55] I am satisfied, however, that Tolko's proposed harvest on these particular cut-blocks will likely destroy sensitive archaeological sites and artefacts and will cause irreparable harm. The cut-blocks in issue are cut-blocks AA 4002, 4005, 1054, 4007, 4008, 4006, 4004 and 4001. Although Tolko says that it has satisfied the MFR and the cut-blocks are at high elevations and hence unlikely to have any

archaeological significance, Tolko did not conduct on site archaeological investigation.

[56] David Pokotylo, Associate Professor of Archaeology at the University of British Columbia was engaged by the Okanagan as part of their site investigation and accumulation of archaeological evidence. He directed archaeological surveys and test excavations in Brown's Creek in 2005, 2006 and 2008. He says in part:

> Given that nearly all archaeological sites recorded in the Provincial Heritage Register prior to this fieldwork were located along the Okanagan Lake shoreline and adjacent lower hills and terraces, and the fact that most of [Brown's Creek] is located in the highlands, the fieldwork emphasized highland areas considered to have high potential for archaeological sites to determine the nature and extent of the archaeological record present there. Select areas identified by Okanagan Indian Band elders were also surveyed for archaeological material. This resulted in the evaluative testing of a previously recorded pre-1846 site(EbQv-10) and the recording of eight pre-1846 and 14 post-1846 archaeological sites.
>
> Archaeological site EbQv-10, located at Bouleau Lake, indicates the occupation of upland forest areas as early as 7500 years ago. ...[Carbon]dating results indicate the deposits have an antiquity spanning approximately 7,500 to at least 1,700 years ago....
>
> Sites T6 to T10 are lithic scatter sites characterized by the presence of flaked stone artefacts. Site T6 is located along the western shore of Little Bouleau Lake, and T7 is situated at the east end of Bouleau Lake. Evaluative testing at both sites revealed flaked stone debris in the subsurface deposits. Sites T8 and T9 are small scatters of one to two pieces of lithic debris, located on ridge crests near the summit of Tahaetkun Mountain. The location of sites T8 and T9 on these crests provide excellent overviews of the surrounding slopes, which makes them an ideal spot to "gear up" and stage hunting activities.

He continues:

> [Brown's Creek] has already been subjected to a considerable amount of industrial logging and more is proposed in the immediate future . The very limited archaeological research carried out in [Brown's Creek] has established the presence of in-ground archaeological sites extending over 7,500 years of antiquity, and CMT's [culturally modified trees] dating back to the early 19th century. In-ground pre-contact archaeological sites in upland environments are expected to consist of small, shallow deposits that are very susceptible to disturbance from alteration of the landscape....Given the nature of the in-ground and above-ground upland archaeological record, it is my opinion that a substantial portion of the archaeological record in [Brown's Creek] has already been severely impacted, if not eradicated, due to past logging activity. It is also my opinion...that yet-undocumented archaeological

> sites would be significantly impacted if further conventional industrial logging activity is carried out in [Brown's Creek].

[57] From the maps provided to me, sites EbQv-10 and T12, T2, T7 and T1 appear to be within or immediately adjacent to cut-block AA1054. Although the other cut-blocks have not been investigated by Dr. Pokotylo and some are at higher elevations, given the findings at sites T8 and T9, as well as EbQv-10 and T12, T2, T7 and T1, I expect that there will be similar findings in these cut-blocks, even though they are at higher elevations. Dr. Pokotylo states that there has not been enough time to investigate all of the sites identified by Okanagan elders.

[58] This evidence satisfies me that the ONA (and the public at large) are likely to suffer irreparable harm if Tolko logs the proposed cut blocks without restriction. This evidence (using the term in its colloquial sense) would require some expertise to identify. For example, the lithic scatter and stone flakes are tiny pieces of stone or flake fragments. Materials like these would require some expertise to identify. Although I have no doubt that Tolko and its employees would endeavour to protect such historic information, I doubt that it would be recognised in the course of logging and would be lost forever.

[59] I have considered whether the Okanagan have delayed or engaged in self-help, such that they should be refused relief. I have concluded that the application should not be refused for either of these reasons. First, Tolko does not argue relief should be refused because of the conduct of the protestors. Second, the impact of the loss of the archaeological heritage extends beyond the parties before me. It is not appropriate in the circumstances before me to penalize the public, or future generations, for the actions of the immediate parties to the litigation. The court may, in appropriate circumstances, consider interests beyond those of the immediate parties when granting an injunction : *MacMillan Bloedel Ltd. v. Mullin* [1985] 61 B.C.L.R. 145, 2 C.N.L.R. 58 (C.A.). Further, I am not satisfied that the Okanagan have inappropriately delayed. They applied for an injunction before Mr. Justice Sigurdson shortly after being advised in November 2008 that Tolko intended to start logging. Tolko's plans changed and Tolko did not proceed with logging in the spring

of 2009. This application was brought when Tolko started logging activities in the fall of 2009.

[60] In my view, Tolko's application should be granted on terms. Given the limited area to be logged, I expect that it is possible to log after or while taking necessary steps to preserve archaeological evidence. I will give the parties two weeks within which to agree on a method for this to occur. If the parties are not able to agree, they may return before me with their respective proposals and I will determine the appropriate terms for the injunction.

"B.J. Brown J."

The Honourable Madam Justice B.J. Brown