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A910693  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:	)	
	)	
KATHERINE WALLACE, Chief of the	)	
Mount Currie Indian Band, suing on	)	
behalf of herself and all other	)	
members of the Mount Currie Indian	)	REASONS FOR JUDGMENT
Band and on behalf of members of	)	
the Lil'wat Nation	)	
	)	
PLAINTIFF	)	OF THE HONOURABLE
	)	
AND:	)	
	)	
INTERNATIONAL FOREST PRODUCTS	)	MR. JUSTICE MACDONELL
LIMITED and HOWE SOUND TIMBER	)	
COMPANY LTD. and HER MAJESTY	)	
THE QUEEN IN RIGHT OF THE	)	
PROVINCE OF BRITISH COLUMBIA	)	(IN CHAMBERS)
	)	
DEFENDANTS	)	

Counsel for the Plaintiff:	L. Mandell, B. Gaertner and L. J. Pinder;
Counsel for the Defendants International Forest Products Limited and Howe Sound Timber Company Ltd. :	E. C. Chiasson, Q.C. and D. Satanove;
Counsel for the Province of British Columbia:	P. G. Plant and C. F. Willms;
Place and Dates of Hearing:	Vancouver, B.C. 27th February to 6th March, 1991 incl.

The plaintiff's application is for an interim interlocutory injunction restraining the defendants International Forest Products Limited ("Interfor") and Howe Sound Timber Company

Limited ("Howe Sound") and their agents, servants and employees, or any other person acting on their behalf, from constructing and/or using a road so as to trespass or interfere with the existing aboriginal title and rights of the members of the Lil'wat Nations to the Boulder Creek area.

The background leading to the action taken by the plaintiff in this application is conveniently summarized in the reasons for judgment of The Honourable Mr. Justice Lambert in the International Forest Product Limited v. Harold Pascal, et al. case given on an application for leave to appeal. That action is a companion action to the present one in the sense that there the forest company was applying to enjoin those that interfered with their construction of the road and this action is an action to prohibit the forest company from building the road. At p. 2 of his reasons, Lambert, J. said:

International Forest Products Limited ("Interfor") is the holder of Forest Licence A19209, granted by the Ministry of Forests on 19 August, 1982. The licence confers the right to harvest 59,300 cubic metres of Crown Timber from the Soo Timber Supply area each year for fifteen years from the date of the grant. It has been slightly modified since 1982.

Howe Sound Timber Co. Ltd. ("Howe Sound") is a logging and road-building contractor which has been hired under a five year contract by Interfor to log and to construct logging roads.

...

One of the logging roads being constructed by Howe Sound for Interfor is the Ure Creek Mainline haul road. That road branches south

from the Pemberton-Duffy Lake Road near the north end of Lillooet Lake and is designed to run down the west side of Lillooet Lake to Ure Creek. Interfor has planned to have the haul road completed in 1992. The haul road will be used for hauling out logs that have been harvested on the west slopes of Lillooet Lake under the terms of the Forest Licence.

Construction of the road began in January 1990. Between then and May, 1990, Howe Sound constructed 1,709 metres of road from the north end. In May, 1990 an Indian pictograph was uncovered in the course of construction and construction stopped.

Meetings were held between representatives of the Mount Currie Indian Band, the Ministry of Forests, and Interfor. Interfor retained I. R. Wilson Consultants Ltd., Cultural Resource Specialists, to do an archaeological survey and prepare a report. The archaeological survey was done in the summer of 1990. In late November, 1990 the Ministry of Forests approved a change to the route of the road to protect an archaeological cache site. In December, 1990 Howe Sound resumed work on the road. About 10,300 metres then remained to be completed. In mid-December construction was stopped for the Christmas holidays. Work was to begin again in early January. There is evidence that the road building equipment of Howe Sound was vandalized over the Christmas period. Construction did not start again until 21 January. On 22 January, a number of Indians stood in front of the bulldozer that was leading the construction work. There is evidence that they said they intended to stop the construction of the road.... Construction stopped again.

On 23rd January, 1991 Interfor and Howe Sound began action against Pascal et al. who were alleged to have stopped the construction, which resulted in an interim injunction issued by Mr. Justice Wetmore on February 1st, 1991 pending the trial of the action.

On the 21st February, 1991 the plaintiff started this action which sought a declaration that the plaintiff's have aboriginal title to the area bounded by the Lillooet River and Lillooet Lake to the north, the Boulder Creek Valley to the east, Mount Currie mountain to the south and Gravell Creek to the east. In addition, a claim was advanced for an interim and permanent injunction restraining the defendants from constructing and/or using a road so as to trespass or interfere with the existing aboriginal title and rights of the members of the Lil'wat Nation to the Boulder Creek area. A further claim is advanced for damages for trespass and interference with existing aboriginal title and rights of the plaintiff to the Boulder Creek area.

A great deal of the argument advanced on behalf of the plaintiff and countered, of course, by the defendants involved arguments of law dealing with the concept of aboriginal title and rights and, to a lesser extent, fiduciary duty was argued. A great number of authorities were canvassed relating to those heads. In addition, a great deal of affidavit material was filed going to the issues of the plaintiff's connection to the land historically and its use and occupation, which was necessary to found a factual matrix for a claim of aboriginal title or, alternatively, aboriginal rights. The defendants, of course, filed affidavit material showing their right to build the subject road.

As it happened, all these issues of law, in my view, were determined several days after I reserved my decision in this

application by the decision of the Chief Justice of British Columbia in Delgamuukw et al. v. Her Majesty The Queen in Right of the Province of British Columbia and The Attorney General of Canada. As I view this case, all the efforts of counsel are in vain with respect to the principal legal issues of aboriginal title and aboriginal rights as the Chief Justice, in my view, has found that any rights that aboriginal peoples had at the time of the formation of the Crown Colony of British Columbia were extinguished by the Crown during the colonial period. At p. 225 of his judgment, the Chief Justice said:

As to ownership, I have concluded that the interest of the plaintiffs' ancestors, at the time of British sovereignty, except for village sites, was nothing more than the right to use the land for aboriginal purposes and I shall consider that question more fully in this next section of the Part.

It follows, therefore, that the plaintiff's claims for aboriginal jurisdiction or sovereignty over, and ownership of, the territory must be dismissed.

With respect to aboriginal rights, they are defined in the definition portion of the Chief Justice's judgment as:

"aboriginal rights" ... describe rights arising from ancient occupation or use of land, to hunt, fish, take game animals, wood berries and other foods and materials for sustenance and generally to use the lands in the manner they say their ancestors used them.

The Chief Justice has decided that aboriginal rights have never been absolute and such rights have been recognized to exist merely

at the Crown's pleasure. At p. 231 of his judgment under **"Conclusions on Aboriginal Rights"** he said:

Subject to what follows, the plaintiffs have established, as of the date of British sovereignty, the requirements for continued residence in their villages, and for non-exclusive aboriginal sustenance rights within those portions of the territory I shall later define. These aboriginal rights do not include commercial practices.

The effect of his decision, in my view, is that he has held that aboriginal peoples in British Columbia have no right to title in the lands that they have inhabited, other than those that have been conveyed to them as reserves and, with respect to aboriginal rights, that they have no other than usufructuary rights to use unoccupied vacant Crown lands within their territory for aboriginal sustenance activities until it is required for an adverse purpose. In his judgment, the Chief Justice said:

I limit this declaration to the territory because that is the only land which is in issue in this action but I see no reason why it should not apply to the province generally.

The question of use for sustenance and aboriginal purposes is dealt with by the Chief Justice on the basis of a fiduciary duty owed to the aboriginal peoples to continue their use of unoccupied or vacant Crown lands until otherwise alienated.

In the case at bar, in order to make out a case for an interim injunction, I have to consider the tests laid down over the years to be applied in resolving whether an interim injunction

should go or not. The review starts with Wheatley v. Ellis (1944), 61 B.C.R. 55 at 58; American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504 (H.L.) and Attorney General of British Columbia v. Wale (1987) 2 W.W.R. 331 at 345. The first part of the test that has to be met is that the applicant must satisfy the Court there is a fair question to be tried as to the existence of the right which is alleged and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction. Third, irreparable harm may result which cannot be adequately compensated in damages.

With respect to the threshold test in granting an injunction, I have to decide in this case if there is a fair question to be tried as to the existence of a right of the plaintiff. The right advanced is aboriginal title and, alternatively, aboriginal rights including exclusive use of the territory in question, not only for the sustenance activities that have been referred to by the Chief Justice but also for spiritual purposes and the protection of sacred areas, such as burial sites.

Aboriginal Title

With respect to the first head of aboriginal title it cannot be said at this time that there is a fair question to be tried as to the existence of a right to aboriginal title as, in my view, this has been canvassed by the Chief Justice and decided. Until such time as that decision is overturned, I am obliged to

follow it. Thus there is not a fair question to be tried under that head.

#### Aboriginal Rights

Under the head of aboriginal rights the plaintiff claims the exclusive right of use and occupancy of the lands in question for aboriginal purposes, including sustenance and spiritual. This head also does not establish a fair question to be tried in the light of the decision of the Chief Justice in declaring that aboriginal peoples have no exclusive right to use or occupy vacant or unoccupied Crown lands. Consequently, this also fails to establish a fair question to be tried as to the existence of a right.

#### Fiduciary Duty

Under this head again a fair question does not exist to be tried or decided as there is no suggestion in the evidence that the plaintiff is precluded from entering upon the territories to pursue its rights to sustenance and, no doubt, to roam the area and absorb the spiritual surroundings.

The only matters left in contention are the area over which the road is to be built and whether there are any historical or heritage sites or objects contained within the road allowance, bearing in mind that the road has already been rerouted to avoid any interference with possible pictographs or historic sites.

Examination of the evidence before me leads me to the conclusion that there are no demonstrated burial grounds,



pictographs or other matters of heritage or historical significance within the road allowance. The evidence advanced by the plaintiff is of a very general nature, lacking any specificity which would make it possible to determine affirmatively or otherwise the existence of any area or site within the road allowance which should be protected. It is my view from all of the evidence, and it is considerable, that a case has not been made out of any burial grounds or objects that are in any jeopardy because of the road being built. I conclude therefore that there is not a fair question to be tried under this head either. The use of the lands by the plaintiff and its ancestors for hunting, fishing, trapping, food gathering and tree bark gathering is not affected by the road but, even if it were, the concepts of fiduciary duty do not extend to the exclusive use of any territory and those rights that they have are unaffected by the road. Therefore there is not a fair question to be tried as to the existence of a right.

In view of the conclusion I have reached with respect to the threshold question of a right to be protected, it is not necessary for me to deal with the other criteria for injunctive relief. However, I think it appropriate that I touch on the other matters in passing.

The second test to which I referred earlier is dealing with the balance of convenience. This is not applicable because I do not consider that there is a right to be preserved. However, the third question of irreparable harm, should I be wrong, probably

should be addressed. It is my view, on the whole of the evidence, that there is nothing to support the argument of possible irreparable harm in constructing the road. The road is constructed under the supervision of the Forest Service and the other departments of Government involved with the environment and of course heritage sites are preserved under the Heritage Conservation Act R.S.B.C. 1979, c. 16. In addition, the defendant companies have undertaken to divert the road where it becomes apparent that there are any sites or objects of historical or heritage significance. This in itself should suffice as protection. However, the Heritage Conservation Act is very general in its nature and provides a remedy of prosecution for breaches of the Act. The definitions of heritage objects and heritage sites are very broad and include not only actual heritage sites but sites of heritage significance. Those definitions are sufficiently broad to protect any burial grounds, pictographs, or anything else of heritage significance from damage in the construction of the road. Therefore, it is my view that there cannot be any irreparable harm in the construction of the road.

On the other side of the coin, however, the companies stand to suffer irreparable harm if they are not allowed to proceed with the construction of the road and harvest the timber within the area that Interfor is entitled to log with approval by the Forest Minister. The harm is manifold to all those in the area who depend

on the woods industry, and of course that includes a great number of the members of the Lil'wat Band who work in the woods.

I conclude, therefore, that the plaintiff's application for an interim injunction must be dismissed with costs.

"A. A. W. Macdonell, J."

VANCOUVER, B.C.

26th March, 1991.