CITATION: Petahtegoose et al. v. Eacom Timber et al., 2016 ONSC 2481
COURT FILE NO.: A-12956-16
DATE: 2016-04-12

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ART PETAHTEGOOSE, and CLYDE MCNICHOL Applicants	A. Petahtegoose, Applicant, in person C. McNichol, Applicant, in person
– and –	B. Ronson McNichol, Applicant, in person
BARBARA RONSON MCNICHOL, and CAMP EAGLE NEST Applicants	
- and –	
All SUSTAINABLE FOREST LICENCE HOLDERS known as NORTHSHORE FOREST INC., and VERMILION FOREST MANAGEMENT COMPANY LTD. Respondents	P. David McCutcheon/M. Saunders, Counsel for the Respondents, EACOM Timber Corporation, Northshore Forest Inc., and Vermilion Forest Management Company Ltd.
MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS CANADA Respondent	C. Lindsay, Counsel for the Respondent, Minister of Indigenous and Northern Affairs Canada
MINISTER OF NATURAL RESOURCES AND FORESTRY ONTARIO Respondent	C. Perruzza/J. Claydon, Counsel for the Respondent, Minister of Natural Resources and Forestry Ontario
	HEARD: March 24, 2016

GAREAU J.

REASONS ON MOTION

[1] On March 24, 2016 the court heard argument with respect to the applicant's request for an interlocutory injunction. On April 4, 2016, I released a brief endorsement indicating that the motion for an interlocutory injunction brought by the applicants was dismissed.

[2] The following are my reasons for dismissing the motion for an interlocutory injunction.

[3] The applicants brought their claim for an interlocutory injunction by way of a notice of application dated March 2, 2016. In that application the applicants claim an "Interlocutory injunction enjoining sustainable forest licence holders to stop immediately any cutting, road building, or aerial spraying of herbicides on lands promised for survey by treaty in the Benny area."

[4] The grounds of the application are set out in paragraph 2 of the application as follows:

> Cutting, road building and spraying are taking place on lands promised for survey by Treaty, without meaningful consultation and consent of the applicants as modern day descendants of the ancestral clan hunting territory of the Benny area and part of the group of impacted Treaty and Aboriginal rights holders in the area.

[5] The respondents took the position that this "notice of application' was to be treated as a notice of motion and although no notice of action or statement of claim had yet been delivered by the applicants, the court could hear the request for an injunction as a motion in an intended action, thereby giving the court jurisdiction to hear the matter.

[6] The court also raised the issue of standing and whether the applicants had standing before the court to bring the application seeking an interlocutory injunction against the respondents. It was the position of the respondents that the applicant's claim should not be defeated on the basis of standing and that the issue of standing is a factor to be considered in applying the test for an injunction but should not be determinative of the matter.

[7] It was clear that the parties wanted the matter disposed of on its merits and the court accepted the fact that the applicants had standing to bring the motion for an interlocutory injunction and proceeded on that basis.

[8] The applicants, Art Petahtegoose and Clyde McNichol are persons of First Nations heritage and are members of the Atikameksheng Anishnawbek First Nation (AAFN), hereinafter referred to as "AAFN".

[9] The applicant Barbara McNichol is not a person of First Nation heritage. She is married to the applicant Clyde McNichol and together they operate Camp Eagle Nest, another

named applicant. Camp Eagle Nest is described at paragraph 8 of the applicant's factum as follows:

> Camp Eagle Nest is a not-for-profit corporation established by Barbara and Clyde McNichol in 2012. The Camp develops and delivers arts, wilderness education and Anishnawbek cultural and spiritual training sessions that improve First Nations cultural literacy, and also delivers employment training for First Nations youth and families. Camp Eagle Nest operates its programming in Mr. McNichol's ancestral and traditional Clan territory in the Benny Forest area. The health and protection of the land, water, flora and fauna in Benny Forest are crucial to sustaining Camp Eagle Nest's community and economic development work.

[10] The logging being done by the respondents EACOM Timber Corporation, Northshore Forest Inc. and Vermilion Forest Management Company Ltd. is being done in the territory in question as part of a forest management plan in the Spanish Forest Management Unit. Paragraphs 34 to 40 inclusive of the affidavit of Trevor Griffin, sworn on March 18, 2016, provides a useful summary of the land area on which the logging is occurring and where the injunction is being sought by the applicants. Trevor Griffin is employed by the Ontario Ministry of Natural Resources and Forestry as the District Manager of the Sudbury District, a position he has held since June, 2012.

[11] Paragraphs 34 to 40 of Mr. Griffin's affidavit reads as follows:

> 34. The Spanish Forest management unit is located in Northeastern Ontario, north of the city of Sudbury and south of the town of Gogama. The towns of Cartier and Bicostasing are located within the Forest, as well the hamlet of Benny.
>
> 35. Benny is an unincorporated community on private land, located approximately 80 kilometers north of Sudbury.
>
> 36. AAFN is a party to the Robinson-Huron Treaty of 1850, by which various First Nations surrendered their interests in the land, including in respect of the area now in dispute. Under this treaty, AAFN possesses rights to a block of land known as a "Reserve", and its members enjoy rights to fish and hunt throughout the territory covered by the Treaty. The Crown also has a treaty right to use lands within the treaty territory (outside of the reserves) for other uses such as forestry, subject to its duty to consult.
>
> 37. The AAFN Reserve is located adjacent to the city of Sudbury and is outside of the Spanish Forest. In addition to rights to hunt and fish held under the Robinson-Huron Treaty, AAFN asserts that it has traditional territory rights in the area of Benny, within the Spanish Forest, Sagamok Anishnawbek First Nation ("SAFN") is also a party to the Robinson-Huron Treaty, and also asserts traditional territory rights in this same area.
>
> 38. Planning for Phase I of the 2010-2020 Spanish Forest FMP commenced in April 2007. The final plan was approved on February 9, 2010 and the FMP took effect on April 1, 2010.
>
> 39. Planning for Phase II of the 2010-2020 Spanish Forest FMP commenced in April 2013. Phase II was approved on December 5, 2014 and took effect on April 1, 2015.

> 40. The Spanish Forest Management Unit is managed under a Sustainable Forest Licence issued pursuant to the *CFSA* to EACOM Timber Corporation. The adjacent Forest Management Units (Northshore Forest and Sudbury Forest) are licenced to Northshore Forest Inc. and Vermilion Forest Management Company Inc. respectively.

[12] Before a forestry plan is approved several years of planning takes place. Forests in Ontario are managed by various pieces of legislation. One such piece of legislation is the *Crown Forest Sustainability Act*. The purpose of this legislation is to provide sustainability of Crown forests and to manage forests to meet social, economic and environmental needs of present and future generations.

[13] The Forest Management Plan for the Spanish Forest around the hamlet of Benny was developed and approved as indicated above. The Spanish Forest Management Unit covers most of the territory in the 20 mile radius around Benny, which is the radius which the applicants are requesting the interlocutory injunction cover.

[14] A useful map of the forest around Benny and the 20 mile radius being sought by the applicants is found in Exhibit 97 of the affidavit of Trevor Griffin, sworn March 18, 2016. The court was provided with an enlarged copy of Exhibit 97 during argument. The map shows the exact location of the hamlet of Benny and where the tree removal will take place in both Phase I and Phase II of the Forest Management Plan. The circle in red on the map depicts the 20 mile radius from the Benny townsite, in other words, the area that would be affected if the court granted the injunction that the applicants seek.

[15] It is important to note and recognize that these forest management plans for the removal of timber and the sustainability of forests are created after a long process of consultation and negotiation with stakeholders and people who will be directly affected.

[16] The three part test for an interlocutory injunction is set out in *RJR-MacDonald Inc. v. Canada,* [1994] 1 SCR 311 as follows:

> (1) The applicant must demonstrate a serious question to be tried;
>
> (2) The applicant must convince the court that it will suffer irreparable harm if the relief is not granted;
>
> (3) The balance of convenience must favour the applicant.

[17] As noted in *RJR-MacDonald Inc. v. Canada,* whether the first test (a serious issue to be tried) "has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on its merits".

[18] As to the second test, the court in *RJR-MacDonald Inc.* stated at paragraph 84,

> At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude.

[19] As noted by Brown J. in *Wahgoshig First Nation v. Ontario*, 108 O.R. (3d) 647, at paragraph 52,

> Irreparable harm to aboriginal peoples has further been judicially recognized when activities such as logging and other development activities would interfere with or damage culturally significant sites and artifacts such as burial sites and sacred sites.

[20] The court goes on in *Wahgoshig First Nation* to state at paragraph 53,

> Moreover, Canadian jurisprudence has recognized that the lost opportunity to be meaningfully consulted and obtain accommodation for impacts on treat and Aboriginal rights constitutes irreparable harm.

[21] As to the third test, the balance of convenience favouring the applicant, the court notes in paragraph 62 of *Wahgoshig First Nation*,

> The balance of convenience test requires a determination of which party will suffer the greater harm from granting or refusal of injunctive relief. In constitutional cases, the public interest is a special factor to be considered.

[22] The jurisprudence makes it abundantly clear that in disputes involving First Nation peoples and the protection of First Nation culture and heritage that there is a duty to consult and to accommodate the concerns of First Nation peoples wherever possible.

[23] The leading case in that regard is *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73. The issue before the court in *Haida* is succinctly summarized by McLachlin C.J.C. in paragraph 6 of the decision as follows:

> ...More concretely, is the government required to consult with them about decisions to harvest the forest and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?"

[24] In *Haida*, the Crown was arguing that the Government had no obligation to consult with the Haida people and that the granting of an injunction was the appropriate remedy for the court to impose. The Supreme Court of Canada disagreed. In paragraphs 12 to 15 of the *Haida* decision, the court considered whether the law of injunctions governed the situation. Those paragraphs read as follows:

> 12. It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.
>
> 13. It is open to the 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.
>
> 14. Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), at para. 31, and *Delgamuukw v. British Columbia*, [1977] 3 S.C.R. 1010 (S.C.C.), at para 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J.J.L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.
>
> 15. I conclude that the remedy of interlocutory injunction does not preclude the Haida's claim. We must go further and see whether the special relationship with the Crown upon which the Haida rely gives rise to a duty to consult and, if appropriate, accommodate. In what follows, I discuss the source of the duty, when the duty arises, the scope of content of the duty, whether the duty extends to third parties, and whether it applies to the provincial government and not exclusively the federal government. I then apply the conclusions flowing from this discussion to the facts of this case.

[25] The remedy of an injunction is an all-or-nothing solution – either the project proceeds or not. By contrast, the duty to consult assists in balancing Aboriginal interests and societal interests by reconciling Crown interests with Aboriginal interests.

[26] As stated in paragraph 26 and 27 of *Haida*,

> 26. Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude honourable agreement reflecting the claimants' inherent rights. But 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?
>
> 27. The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interest 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 resources 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.

[27] In finding that the Crown has a duty to consult with First Nations peoples, the court states at paragraph 32 of *Haida,*

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 3591) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in control of that people. As stated in *Mitchell v. Minister of National Revenue,* [2001] 1 S.C.R. 911, 2011 SCC 33 (S.C.R.), at para 9, "[w]this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourable, and to protect from them from exploitation..."

[28] As stated in paragraph 35 of the *Haida* decision, "the foundation of the duty in the Crown honour and the goal of reconciliation, suggests that the duty 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."

[29] This principle is repeated by the Supreme Court of Canada at paragraph 33 in the case of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, and in paragraph 31 in the case of *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43.

[30] To accommodate the obligation to consult, "...claimants should outline their claims with clarity, focusing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements..." (*Haida,* para 36).

[31] The Supreme Court of Canada makes it clear in *Haida* that it is the duty to consult that is paramount, not the duty to agree. It is consultation not consent that his paramount. As is stated in paragraph 42 of *Haida,*

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be, "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw, supra,* at para 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.

[32] The duty to consult not to reach consensus was again recognized by the Supreme Court of Canada in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),*2004 SCC 74. At paragraph 22 of that decision, McLachlin C.J.C., in referring to the applicants, stated,

> ...The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

[33] The applicants argue, among other things, that there has been a lack of consultation and that the logging in the Benny area has occurred "without meaningful consultation and consent of the applicants".

[34] Whether the Crown's duty to consult has been met is considered in the first test to be met for *injunctive* relief as set out in *RJR-MacDonald Inv. v. Canada*, namely, the applicants must establish that there is a serious issue to be tried. The applicants argue that the Crown's duty to consult and accommodate the concerns of Aboriginal peoples have been breached in this case, thereby raising a serious issue to be tried.

[35] I am cognizant of the fact that the threshold for the serious question test is low and that the court is to make a preliminary assessment of the merits. Having said this, in my view, it is imperative that the court take a close look and make a thorough examination of the consultation process to be able to assess whether meaningful consultation has in fact taken place between the Crown and the First Nation peoples. I am supported in that view by the case of *Sapotaweyak Cree Nation v. Manitoba,* 251 A.C.W.S (3d) 362 (Man. Q.B.).

[36] In that regard, I am aided by the consultative summary prepared and attached as Exhibit 96 to the affidavit of Trevor Griffin, sworn on March 18, 2016. This sets out the particulars and history of contact between the Ministry of Natural Resources and relevant First Nations Band in the Benny area, the Atikameksheng Anishnawbek First Nation (AAFN).

[37] The consultative summary is detailed and extensive. It spans from November 8, 2002 to February 9, 2016. It covers the period for both Phase I and Phase II of the Spanish Forest Management Plan.

[38] As noted in Exhibit 96, the majority of the entries in the consultative summary or record, are from April 14, 2015 to February 9, 2016. This is in the period after Phase I of the Spanish Forest Management Plan was completed and Phase II of the plan had been approved and was about to commence.

[39] Paragraph 45 of the affidavit of Trevor Griffin, sworn on March 18, 2016, details the consultation that took place between the Ministry of Natural Resources and the stakeholders, including AAFN, in both Phase I and Phase II of the Spanish Forest Management Plan. Paragraph 45 of his affidavit, dealing with the consultation that took place, runs from page 10 of his affidavit to page 26 of this affidavit. The entries are detailed and extensive. In commenting on paragraph 45 of his affidavit, Mr. Griffin states at paragraph 46 of his affidavit, sworn on March 18, 2016,

> Although the above captures most of the consultation efforts that occurred in relation to the Project, there may have been other meetings, telephone calls, informal discussions and offline communications that are not described above. A copy of the Ministry's contact summary for the AAFN with respect to the 2010-2020 Spanish Forest FMP is attached as Exhibit "96" to this affidavit.

[40] Mr. Griffin goes on to state at paragraph 47 of his affidavit, sworn on March 18, 2016,

> As I indicated to the applicants by telephone on March 14, the Ministry is open to further discussions with the applicants and AAFN about identifying and protecting values during forest operations. Moreover, the Ministry continues to remain open to further amendments to the FMP should other values be identified and require protection in the future.

[41] I do not intend to set out in these reasons every consultation that took place between the Ministry of Natural Resources and the stakeholders, including the AAFN and the applicants. This is amply detailed in the affidavit of Trevor Griffin, sworn on March 18, 2016. However, there are specific interactions and consultations set out in the affidavit that need to be commented on and highlighted as follows:

(a) Exhibits 1 to 6 of Mr. Griffin's affidavit are letters by MNR to Chief Arthur Petahtegoose in 2007 and 2008 attempting to engage AAFN in consultations. The applicant Arthur Petahtegoose was the Chief of AAFN at the time and the correspondence is addressed to him as Chief. The lack of response indicates little interest in the First Nation to consult at that point in time and it appears that no concerns were raised by Arthur Petahtegoose as Chief;

(b) Exhibit 13 to Mr Griffin's affidavit is a letter dated April 14, 2015 from Chief Steve Miller of AAFN raising concerns about logging activities in the Township of Moncrieff, Village of Benny. That letter reads as follows:

> April 14th, 2015
>
> **RE: LOGGING ACTIVITIES TWP OF MONCRIEFF VILLAGE OF BENNY**
>
> To Whom It May Concern:
>
> This letter is written in support of the residence of the Village of Benny which is situated in the Moncrieff Twp.

> It has been brought to my attention that logging activities in the Benny area has many of the town residence [sic] upset and concerned for various reasons.
>
> I have also been notified that there has been no consultation regarding the logging in the area with residence in Benny who are and will be the ones directly affected and the greatest impacted by the logging activities.
>
> Atikameksheng Anishnawbek has Band Members living in Benny and surrounding area and have not been notified on the impacts these logging activities have on their Aboriginal and Treaty Rights, specifically hunting, fishing and gathering. There are cultural and spiritual sites in the area and Atikameksheng Anishnawbek does have a long history of accessing and occupying this area.
>
> A meeting with the First Nations People in the area who are affected by these logging activities must take place to accommodate the concerns and issues and should include not only the First Nations Peoples in the area but also other parties that may have concerns regarding the logging activities.
>
> I would also recommend that the logging activities cease until at such time all issues and concerns are addressed,
>
> Sincerely,
>
> Chief Steve Miller
>
> cc. Atikameksheng Council
> Chief Paul Eshkagogan, Sagamok Anishnawbek
> Rick Reynen, Ministry of Natural Resources

(c) The Ministry replied by letter dated April 16, 2015 to Chief Miller, Brian Riche, Resource Management Supervisor, Ministry of Natural Resources and Forestry, Sudbury District. That letter appears as Exhibit 14 to Mr. Griffin's affidavit. That letter indicates that the forestry company operating the area has voluntarily moved their operations temporarily to another location to allow for time for dialogue with the area residents. This letter opens up the dialogue;

(d) From the aforementioned letters, dialogue beings and meetings with the Benny residents and the applicants take place. A meeting on June 9, 2015 includes Chief Steven Miller, the three applicants in this injunction application, their solicitor and MNR staff. The Minutes of that meeting appear as Exhibit 34 to Mr. Griffin's affidavit;

(e) Subsequent to that meeting, discussions took place with respect to the preparation of independent reports to address the concerns of AAFN and the Benny residents. The Ministry of Natural Resources agreed to fund the preparation of an Aboriginal Background Information Report and a Values Identification Report (Exhibit 39 of the affidavit of Trevor Griffin, sworn March 18, 2016);

(f) At a meeting that took place on September 11, 2015, various reports were delivered and discussed. Attending the September 11, 2015 meeting were the same individuals that attended the June 9, 2015 meeting, including the three applicants and Chief Miller for AAFN. The minutes for the meeting on September 11, 2015 appear as Exhibit 51 to the affidavit of Trevor Griffin;

(g) At the September 11, 2015 meeting, three reports were delivered, namely,

(i) An archaeological assessment of Benny Forest, District of Sudbury, prepared by Dr. Patrick Julig (Exhibit 54)

(ii) Ecological study prepared by Premiere Environmental Services (Exhibit 53)

(iii) Benny Forest Traditional Knowledge Study, prepared by Barbara Ronson McNichol (one of the applicants) and Dr. Dean Fitzgerald (Exhibit 52)

(h) After the delivery of the aforementioned there was a follow-up meeting on October 1, 2015. Present at that meeting were Chief Miller of the AAFN, and representatives of the Ministry of Natural Resources. The minutes of that meeting appear at Exhibit 57 to the affidavit of Trevor Griffin, dated March 18, 2016. There are some noteworthy notations in those minutes. At the bottom of the first page there is a note that the Band indicated that they are not pursuing the assertion that the area should be reserved, set aside in 1850 and will not use this assertion to stop forestry in the area. At the bottom of the second page of the minutes there is a notation that "Chief acknowledge that 20 km radius is extensive and not reasonable". There is a further notation in these minutes that "Chief is to inform Julie Aboucher", who was legal counsel for AAFN.

(i) From this meeting there is discussion between the Ministry of Natural Resources and Dr. Julig to address areas of concern raised in his report. Exhibits 60 to 65 in the affidavit of Trevor Griffin sets out the details of those discussions

(j) As a result of those discussions protective measures are developed which are supported by Dr. Julig. In an e-mail from Dr. Julig to Rick Reynen, Resource Liaison Specialist for the Ministry of Natural Resources and Forestry dated November 19, 2015, Dr. Julig states:

> Hello Rick,
>
> I have reviewed the updated summary of recommendations for the identified cultural heritage values in the Stage 1 assessment of the Benny area forests. These new recommendations are acceptable in my opinion, and will be incorporated into our Final report."
>
> Thank you very much, and sorry for the delay.

Patrick Julig.

(Exhibit 69 - affidavit of Trevor Griffin, sworn on March 18, 2016)

(k) Following the e-mail from Dr. Julig, Rick Reynen sent an e-mail to Chief Miller of AAFN on November 20, 2015. That email reads as follows:

> Hello Chief Miller:
>
> MNRF staff have worked with Patrick Julig to confirm the values identified in the Stage 1 Report and to consider appropriate potential protection during forest operations in the Benny area. The attached is a Summary of the identified values from the Stage 1 Report and how those values are proposed to be considered during forest operations.
>
> MNRF is now inquiring if Atikameksheng Anishnawbek (AA) would consider these proposed actions as appropriate in the protection of the identified values from the Stage 1 Report, and other informational provided, is proposed to be considered during forest operations in the Benny area.
>
> I will follow up with you by phone in a few days to discuss moving forward together.
>
> Thank you
>
> Rick Reynen
>
> (Exhibit 69 - affidavit of Trevor Griffin, sworn on March 18, 2016)

(l) A meeting on December 15, 2015 took place with Chief Steve Miller and representatives of the Ministry of Natural Resources. The minutes of that meeting appear at Exhibit 72 of the affidavit of Trevor Griffin, sworn on March 18, 2016. Those minutes have the following comments:

> "Not supportive of claim of 20 mile radius. Spoke with OPP regarding future actions of individuals."
>
> "Medicines can be found throughout the area and few community members have identified their use of medicinal plants in the area. The Chief did not think it warranted special protective measures."
>
> "Similar to above, harvesting in the area by AA members is not significant enough to warrant a protection from logging activities in the area. The MNRFS application of stand and site guidelines appear to be reasonable."

(m) There is a clear indication in the consultative record that the AAFN approved the remedial measures put in place by the Ministry as a result of the consultative process and the reports commissioned by agreement between AAFN and the Ministry of Natural Resources and Forestry and paid for by the Ministry.

(n) By motion dated December 15, 2016, the Atikameksheng Anishnawbek First Nation Band Council approved the protective and remedial measures put in place after discussions between the stakeholders and the Ministry. Exhibit 73 to Mr. Griffin's affidavit is an e-mail dated December 17, 2015 from Chief Steve Miller to Rick Reynen of MNRF. That e-mail reads as follows:

> Good morning Rick,
>
> At the Band Council Meeting yesterday Council approved the recommendations as per our meeting and discussions on December 15th, 2015 and as a result of the studies in the Benny area. As per EACOM's Sustainable Forestry Licence, are there provision [sic] set out in the licence that the company include benefits and/or accommodations for First Nations that are affected by the harvesting in the area? If so how does the First Nations benefit from EACOM's activity of harvesting? Is the only accommodation given to First Nations the Consultation Process set out in the policies of obtaining a sustainable forestry licences? Is the only accommodation and benefit to the First Nation is the protection of areas in which First Nations are concerned with and want protected while the company harvests the trees? Currently and in the past, Atikameksheng has never received any type of benefits from the harvesting by EB Eddy, Domtar or EACOM. Atikameksheng believes that these resources are shared resources but it seems that the only ones benefiting from this resource is EACOM and the Ontario government. Below is the motion passed by Counsel at yesterday's meeting.
>
> Motion to accept the recommendations as presented to Counsel as a result of a Stage 1 Archaeological Assessment of the Benny Forest, the Benny traditional Knowledge Study and the Ecological Inspection Report. The recommendations will set buffer zones in the areas of concern in the Benny area regarding the harvest activities by EACOM. Ongoing communications with Atikameksheng Anishnawbek and the MNRF will occur as the company, EACOM or its successors moves forward to harvest the Harvest Blocks in 3030, 3032, 3033 and 3034 west of Hwy 144 as per the Spanish Forest Management Plan (FMP) 2010-2020. MNRF will notify EACOM that these Harvest Blocks are culturally sensitive areas and must be respected when harvesting the areas and report immediately to the MNRF if any anomalies regarding First Nation cultural sites be located.
>
> Thank you
>
> Chief Steve Miller

[42] In paragraph 50 of his affidavit sworn on March 18, 2015, Mr. Griffin sets out the remedial and protective measures that ended up being put in place in the Benny area. These measures were as a result of the consultative process initiated after Chief Miller's letter (Exhibit 13) and were ultimately approved by the AAFN Chief and Council (Exhibit 73).

[43] In my view, there is overwhelming evidence that the duty to consult as set out previously in these reasons has been met by the Ministry of Natural Resources and Forestry in

attempting to accommodate the concerns of the First Nations Peoples in the Spanish Forest Management Plan in and around the area of the hamlet of Benny. Even applying a low threshold, that threshold has not been met to establish that there is a serious question to be tried, and I find that this test in the three-part test for injunctive relief has not been established by the applicants.

[44] Additionally, I am not satisfied on the evidence before me that the applicants have demonstrated that they will suffer irreparable harm if the injunction is not grated. I am mindful that irreparable harm to Aboriginal peoples have been recognized when activities such as logging would interfere with or damage culturally significant sites and artifacts such as burial sites and sacred rights. (para 52 *Wahgoshig First Nation v. Ontario,* 108 O.R. (3d) 647.

[45] The fact is that the applicants have not been specific about the harm that they would suffer if an injunction is not granted. The applicants have spoken in terms of generalities. Generalities do not satisfy the degree of proof required to be proven to establish irreparable harm. As stated by the Manitoba Court of Queen's Bench in *Sapotoweyak Cree Nation v. Manitoba,* 251 ACWS (3d) 362, at paragraph 220,

> In this application SCN has alluded to irreparable harm in general rather than specific terms. It is not enough for SCN to simply allege that harvesting rights and culturally significant sites or burial grounds stand to be negatively affected by clearing and cutting. In order to establish irreparable harm, SCN is required to specifically identify what harvesting rights will be affected and how and what significant sites and burial grounds will be disturbed.

[46] As in the *Sapotaweyak* case, the remedial and protective measures put in place by the Crown after consultation with the First Nation representatives took place are likely ample to offset any harm alleged by the applicants.

[47] I also find on the evidence before me that the applicants have failed to satisfactorily establish the third ground for the granting of an interlocutory injunction, namely, that the balance of convenience favours granting the injunction. The applicants spoke in general terms about the harm that would be suffered if an injunction were not granted. The respondents were very specific about what would likely occur if an injunction was granted. In paragraphs 52 to 63 of the affidavit of Trevor Griffin, sworn on March 18, 2016, Mr. Griffin specifically sets out the harm to the local economy in the Sudbury District if an injunction is granted. In paragraph 56 of his affidavit, Mr. Griffin states, "based on analysis conducted by the Ministry specific to this present application, I verily believe that the loss of employment for that number of workers would, in the manner described below, have a major economic impact to the Greater Sudbury area and the small communities of Nairn, Webbwood and Espanola. Mr. Griffin goes on at paragraph 57 of his affidavit to state:

> The economic impact would consist of the following:
>
> (a) Job losses at the Nairn Centre sawmill;

(b) Job losses in the woodlands;

(c) Lost income directly attributable to the loss of those jobs;

(d) Lost income to suppliers to the sawmill and to secondary businesses in the area; and

(e) A loss of tax revenue at the municipal, provincial, and federal level from decreased earnings and spending.

[48] The respondent corporations filed an affidavit of Keith Ley, sworn on March 15, 2016. Mr. Ley is the General Manager, Forest Management with EACOM Timber Corporation.

[49] Paragraphs 26 to 36 inclusive of Mr. Ley's affidavit reads as follows:

> 26. The Nairn sawmill is owned and operated by EACOM and employs approximately 160 employees.
>
> 27. On an annual basis, wood from the Spanish Forest falling within the 20 mile radius of the Hamlet of Benny constitutes about 25% of the Nairn sawmill's wood supply. However, in the spring and early part of the year it constitutes nearly 100% as a result of load weight restrictions which are imposed on many roadways by the Ontario Ministry of Transportation (the "MTO") during that time of year. These restricted roads would otherwise permit wood to be supplied from other forest areas.
>
> 28. Due to higher than normal temperatures this year, most roadways are already subject to the MTO's load weight restrictions and so the Nairn mill is already heavily reliant on wood supplies from the Highway 144 corridor, which is within the area of the injunction request.
>
> 29. If the injunction is granted as requested, it would cut off the supply of wood to the Nairn Sawmill from the area of the injunction request and by approximately the first week of May 2016, the mill will have exhausted its wood supply resulting in its not being able to resume normal operations until the spring load weight restrictions are lifted.
>
> 30. In summary, if the injunction is granted, EACOM would not be able to resume operations until early July 2016 if a sufficient supply of logs could be delivered.
>
> 31. If the Nairn mill were to close, most, if not all, of the 160 jobs it currently provides for local residents and those of the surround area would be lost.
>
> 32. In addition to supplying the Nairn sawmill, I have been advised by Don Drouin, Manager Co-Product Sales with EACOM, that the Nairn sawmill also supplies the following customers and volumes on a weekly basis, whose supplies would cease should the injunction be granted:
>
> (a) Domtar, Espanola, 76 truckloads of sawmill chips;
>
> (b) Panolam Industsries, Huntsville, 22 truckloads sawdust;
>
> (c) Flakeboard, (Arauco), Sault Ste. Marie, 15 truckloads sawdust;

(d) ATC, Pembroke MDF, Pembroke, 3 truckloads sawdust;

(e) TC Forest Products, Mt. Albert, 1.5 truckloads sawdust; and

(f) Gro-Bark Ltd., Georgetown, 9 truckloads bark.

33. Mr. Drouin has advised me that a shutdown of the Nairn sawmill would have a large impact on at least two of the co-product customers. Supplies of sawmill co-products are tight in Northeast Ontario and customers would have a difficult, if not impossible time sourcing replacement supply.

34. In addition to those employed at the sawmill, EACOM's harvesting operations in the area of the injunction request employs about 160 people, many of whom would also likely become unemployed if the injunction were to be granted.

35. In addition to closure of the mills, an injunction would also result in disruption to the silviculture operations planned for areas within the proposed injunction. Attached as Exhibit 4 is a summary I prepared, which outlines the impacts of the potential injunction on silviculture operations in the Spanish Forest.

36. I am advised by Jeff Webber, Chief Operating Officer at EACOM, that if the injunction were granted it would jeopardize the ongoing existence of EACOM.

[50] In reviewing all of the evidence and facts of this case, I conclude that the respondents would suffer greater harm if an interlocutory injunction was granted than the harm the applicants will suffer if an injunction was refused. The balance of convenience favours the refusal of an interlocutory injunction.

[51] In an analysis of all three factors to be considered in granting an interlocutory injunction, namely, there must be a serious issue to be tried, there must be irreparable harm and the balance of convenience must favour the applicant, I conclude on the evidence and the facts of this case that the applicants have failed to establish all three requirements for the interlocutory injunction and that their motion must fail.

[52] In addition to arguing that there has been a failure of "meaningful consultation and consent" the applicants raised other ancillary arguments in support of their position that an interlocutory injunction should be granted by the court. The applicants, Art Petahtegoose and Clyde McNichol, assert that as First Nations people they are entitled to be consulted separate and apart from the Atikameksheng Anishnawbek First Nation. In the case of *Behn v. Moulton Contracting Ltd.* 2013 S.C.C. 26, the Supreme Court of Canada confirmed that the duty to consult exists to protect the collective rights of First Nation peoples and therefore the duty to consult is owed to First Nation groups as a whole and not to individual members of the band. As stated by LeBel J. in *Behn* at paragraph 30,

> The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature.

[53] As set out in the *Behn* decision, a First Nations band may authorize an individual to represent its interest for the purpose of asserting the rights of the band, but that was not the situation in the case at bar. Neither Art Petahtegoose nor Clyde McNichol were authorized by the AAFN to represent or speak for the band in its dealings with the Ministry of Natural Resources and Forestry concerning the Spanish Forest Management Unit in or around the hamlet of Benny. On the contrary, the AAFS was very much involved in the consultative process as can be seen by the consultative record. (Exhibit 96 to the affidavit of Trevor Griffin, sworn on March 18, 2016). In fact, it was the AAFN Chief and Council who ultimately approved the remedial measures for forestation in the Benny area that resulted from the consultative process that AAFN was involved in. I, therefore, cannot conclude that the applicants, Art Petahtegoose and Clyde McNichol were entitled to be consulted separately.

[54] If I had decided that their separate consultation was required, on the evidence presented on the motion, I would have been satisfied that they were afforded the right to consult by the Ministry and that they had in fact participated in the consultation process. As the jurisprudence indicates, consent or agreement is not required; it is consultation that is important and all of the applicants were provided with this.

[55] Mr. Petahtegoose and Mr. McNichol also argue that under the Robinson Huron Treaty of 1850 each hereditary clan leader was promised a reserve of their traditional harvesting territory and that those reserves were never surveyed or granted. A text of the Robinson Huron Treaty of 1850 is attached to the affidavit of Kelly Roy, sworn on March 17, 2016, as Exhibit "A". That text indicates that the agreement was entered into on September 9, 1850 at Sault Ste. Marie in the Province of Canada. The text identifies the parties present, specifically the Chiefs present. The treaty contemplates a surrender of all lands with the exception of the reserves identified in the schedule attached to the treaty. Specifically, after identifying the parties present, the Robinson-Huron Treaty reads:

> THAT for, and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada, to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said Chiefs and their Tribes at a convenient season of each year, of which due notice will be given, at such places as may be appointed for that purpose, they the said Chiefs and Principal men, on behalf of their respective Tribes or Bands, do hereby fully, freely, and voluntarily surrender, cede, grant, and convey unto Her Majesty, her heirs and successors for ever, all their right, title, and interest to, and in the whole of, the territory above described, save and except the reservations set forth in the schedule hereunto annexed; which reservations shall be held and occupied by the said Chiefs and their Tribes in common, for their own use and benefit.
>
> ...

[56] The schedule numbered "SIXTH – Shawenakishick and his Band, a tract of land now occupied by them, and contained between two rivers, called Whitefish River and Wanabitaseke, seven miles inland" is land occupied by the Atikameksheng Anishnawbek First Nation.

[57] A reading of the Robinson-Huron Treaty of 1850 does not lead to the conclusion that each hereditary clan leader will get a reserve or a tract of land in addition to the reserves specifically set out in the schedule attached to the Treaty. Attached as Exhibit "C" to the affidavit of Kelly Roy, sworn March 17, 2016 is a copy of the report of the Treaty Commissioner, William Robinson, dated September 24, 1850. In the first paragraph of that report Mr. Robinson writes:

> Sir: I have the honor herewith to transmit the Treaty which on the part of the Government I was commissioned to negotiate with the Tribes of Indians inhabiting the Northern shore of Lakes Huron and Superior; and I trust that the terms on which I succeeded in obtaining the surrender of all the lands in question with the exception of some small reservations made by the Indians, may be considered satisfactory.

[58] There is no mention in Mr. Robinsons' report of any additional reserves or tracts of lands committed to each hereditary clan leaders. It is not unreasonable to assume if such an agreement formed part of the Robinson-Huron Treaty it would have been referred to in the report of William Robinson but there is no mentioned of it in his report.

[59] On the facts and evidence before me, I cannot give effect to the argument of Mr. Petahtegoose and McNichol that as hereditary clan leaders they are entitled to rights over harvesting territories' which would justify an interlocutory injunction to issue in the case at bar.

[60] For the aforementioned reasons, the applicant's application for an interlocutory injunction is dismissed.

[61] Counsel for the named respondent, Minister of Indigeneous and Northern Affairs Canada, submitted that although the Minister is a named party, there is no relief being claimed against the Minister. Furthermore, counsel submitted that the proper party to be named under Section 23(1) of the *Crown Liability and Proceedings Act* is the Attorney General of Canada. I agree with this submission and order that any notice of action or statement of claim shall name the Attorney General of Canada as the party respondent and not the Minister of Indigenous and Northern Affairs Canada.

[62] If costs of the application for an interlocutory injunction are in issue, the applicants and counsel for the respondents can make written submissions, no longer than five typed pages in length, excluding offers to settle and bills of costs. Those submissions shall be filed within 30 days of the date of these reasons.

Gareau J.

Released: 2016-04-12

CITATION: Petahtegoose et al. v. Eacom Timber et al., 2016 ONSC 2481

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ART PETAHTEGOOSE, and CLYDE MCNICHOL

Applicants

– and –

BARBARA RONSON MCNICHOL, and CAMP EAGLE NEST

Applicants

- and –

All SUSTAINABLE FOREST LICENCE HOLDERS known as

NORTHSHORE FOREST INC., and VERMILION FOREST MANAGEMENT COMPANY LTD.

Respondents

MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS CANADA

Respondent

MINISTER OF NATURAL RESOURCES AND FORESTRY ONTARIO

Respondent

REASONS ON MOTION

Gareau J.

Released: April 12, 2016