Court File No. FC-202-2014

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

CHIEF MARY ANN SIMON, on behalf of herself and the members of the Buctouche First Nation, CHIEF GEORGE GINNISH, on behalf of himself and the members of the Eel Ground First Nation, CHIEF AAREN SCOK, on behalf of himself and the members of the Elsipogtog First Nation, CHIEF ALVERY PAUL, on behalf of himself and the members of the Esgenoopetitj First Nation, CHIEF REBECCA KNOCKWOOD, on behalf of herself and the members of the Fort Folly First Nation, CHIEF KENNETH BARLOW, on behalf of himself and the members of the Metepenagiag Mi'Kmaq First Nation, CHIEF JOE SACOBIE, on behalf of himself and the members of the Oromocto First Nation, CHIEF DAVID PETER-PAUL, on behalf of himself and the members of the Pabineau First Nation, CHIEF BRENDA PERLEY, on behalf of herself and the members of the Tobique First Nation & ASSEMBLY OF FIRST NATION'S CHIEFS IN NEW BRUNSWICK INC.

APPLICANTS

COURT OF QUEEN'S BENCH
FREDERICTON, NB
RECEIVED AND FILED
AUG 2 2 2014
COUR DU BANC DE LA REINE
FREDERICTON, N-B
REÇU ET DÉPOSÉ

– and –

THE PROVINCE OF NEW BRUNSWICK, AV CELL INC., FORNEBU LUMBER COMPANY INC., J.D.IRVING LTD., AV NACKAWIC INC. & TWIN RIVERS PAPER.

RESPONDENTS

Date of Hearing: August 18, 2014

Date of Decision: August 22, 2014

Before: Madam Justice J. L. Clendening

Appearances:

Derek Simon	)	For the Applicants
Jason Cooke	)	
William Gould	)	For the Respondent Province of New Brunswick
James O'Connell, Q.C.	)	For the Respondents AV Cell Inc., Fornebu Lumber
Rebecca Atkinson	)	Company Inc. and AV Nackawic Inc.
Mohammed Jamal	)	
Catherine Lahey, Q.C.	)	For the Respondent J.D. Irving Ltd.
David Rankin	)	
Matthew Hayes	)	For the Respondent Twin Rivers

Clendening, J. (orally)

[1] This is an application for interim relief, pursuant to Rule 40.01 of the Rules of Court of New Brunswick, and subsections 14(2) and 14(4) of the *Proceedings Against the Crown Act* RSNB 1973, cP-18.

[2] The Applicants are comprised of ten Chiefs of First Nations, in their own right. They are also members of the Assembly of First Nation's Chiefs in New Brunswick, and they bring this motion also on behalf of the members of the First Nations they represent. The Respondents are the Province of New Brunswick, AV Cell Inc., Fornebu Lumber Company Inc., J.D. Irving Ltd., AV Nackawic Inc., and Twin Rivers Paper Company.

[3] The Applicants seek an order for an interim injunction to prohibit the Government of the Province of New Brunswick from entering into Forest Management Agreements (FMAs) with the Respondent corporations in accordance with the terms of the Department of Natural Resources 2014 Forest Strategy Plan. In the alternative, the Applicant's seek an order declaratory of the rights of the parties in lieu of an Interim Injunction. They seek further an Interim Injunction to prohibit the Province from implementing any term of the FMAs, and finally they seek an order to waive the requirement to undertake to abide by any order concerning damages arising from the granting or extension of an Injunction, under *Rule 40.04.*

[4] An abridgement of time was granted to the Applicants.

[5] Counsel for the Applicants, Derek Simon, acknowledged that the parties had had very little time to respond to the materials. He conceded also that an Interim Injunction, at this stage, would be for a much shorter duration than they had anticipated.

[6] The Applicants object to the implementation of the 2014 Forestry Strategy, and they submit further that any agreement entered into in furtherance of the Strategy "will infringe the proven, constitutionally protected Aboriginal and Treaty rights of the Applicants by moving to a results based framework for forest management." It is their position that they did not consent to, and were not adequately consulted or accommodated regarding the 2014 strategy, or the FMAs.

Facts

[7] It is submitted that the Province updates the Forest Strategies quite frequently. The Applicant submits that under the 2012 Forestry Strategy, the Province committed to maintaining an annual allowable cut of soft wood timber at a level of 3.27 million cubic meters. This would ensure that at least 28% of the Crown Forest area would continue as Conservation Forest. The new 2014 Forestry Strategy has changed in several aspects. At page five of the brief filed by the Applicants, they submit that the following will have the effect of violating their proven Aboriginal Treaty Rights:

1. The increase in the AAC of softwood timber on Crown land by 20%, or 660,000 cubic meters to a total objective of 3.9 million cubic meters;

2. The decrease in the amount of the Crown Forest protected as Conservation Forest, including the decrease in deer wintering areas and riparian buffers;

3. The shift to a "result based framework" between the Minister and the Licensees for managing Crown lands, which does not adequately address Aboriginal and Treaty Rights and will limit the Minister's discretion to reduce the annual allowable cut in the future.

[8] The Applicants request an Injunction to stop the signing of the Forestry Management Agreement with the various Respondents. As set out in the brief of JDI and it was learned from Counsel for the Respondent, J.D. Irving Ltd. (JDI), that the Forestry Management Agreement had been signed by the Province of New Brunswick on August 13 and J.D. Irving Ltd. on August 14, 2014. At the hearing both the PNB and JDI conceded that public notice of the signing of the FMA had not been provided. The evidence also disclosed that the other Respondent's AV Cell Inc., Fornebu Lumber Company Inc., AV Nackawic Inc., and Twin Rivers Paper Company have not yet finalized the FMAs with the Province of New Brunswick.

[9] Counsel for each of the other Respondents suggest that they have not had sufficient time to actually seek advice on the various issues raised by the Applicants. They further contend that in any event this matter is not urgent because they will each be continuing to harvest timber at the current rate for the remainder of 2014, and the FMAs would, in all likelihood, not take effect until February 2015.

[10] Each of the Respondents, other than the Province of New Brunswick, carry on business of managing and harvesting timber both from private woodlots and Crown lands in the Province of New Brunswick. Each of these Respondents has entered into memorandums of agreement (MOA) with the Province of New Brunswick, and contained within these MOAs, there

was an increased allocation of timber. It is this increased allocation of timber, as set out in the MOAs that has caused concern to the Applicants.

Decision

[11] Counsels for the various Respondents were each of the view that the Applicant's motion did not reveal any urgency. They each submitted that without advance notice, it was very difficult to prepare adequately for the hearing of this motion. In addition to the various affidavits of the Applicants, there were several affidavits filed by various individuals, not parties to this particular motion, purporting to provide the Court with expert evidence on forestry management, riparian zones in the various rivers and streams in New Brunswick and the impact on deer population, to name just a few. Because these affidavits offered opinion evidence, they were ignored by me in arriving at my decision in this matter.

[12] The various Respondents in this motion for injunctive relief submitted a similar argument that an award for an injunction prior to actual harm being suffered should be refused by the court. It is stated in *Injunction and Specific Performance*, Robert J. Sharpe, at page 1-32, paragraph 1.690 that:

> Despite this apparent enthusiasm, the Courts have adapted a cautious approach when asked to award an injunction prior to actual harm being suffered, and have said that there must be a high degree of probability that harm will in fact occur.

[13] The starting point in considering the interim injunctive relief requested is set out in the Supreme Court of Canada decision *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The three part test is:

- Is there a serious question to be tried?
- Will the Moving Party suffer irreparable harm unless the injunction is granted?
- Does the balance of convenience favor the granting of an injunction?

[14] With respect to whether or not there is a serious question to be tried, the Applicants raise the argument that if the Respondents enter into a FMA, they may unjustifiably infringe on the Applicants individual Aboriginal Treaty Rights, and they believe it raises a question with respect to the Constitutional and Legal Rights of the Applicants. The Applicants and the Respondents concede that the threshold for this branch of the test is a low one. The Court must consider whether the motion is vexatious or frivolous. In this case it is neither.

[15] In *LEBY Fixtures and Interiors Ltd v. The Bank of Nova Scotia*, 2006. NBCA 93 (CanLII), the New Brunswick Court of Appeal addressed the first part of the test, that is, a serious issue to be tried. At paragraph 23, the Court stated:

> The first part of the three stage test is the determination of whether LEBY Fixtures' action against the bank raises one or more serious triable issues. It is not the function of the Court at this stage to determine whether LEBY Fixtures might succeed in its action. The threshold has been described as a low one (see *Sunny Corner Enterprises Inc. v. Saint Anne Industries Ltd.*, 2005. NBCA 54, at paragraph 14 and the cases cited therein). In *Canada East Manufacturing*, this Court described the first stage of the test in the following words (at paragraph nine):

> There is no requirement that a reasonable prospect of succeeding be established...In *RJR – MacDonald Inc.*, the Supreme Court of Canada states at 337 – 338:
>
> What then are the indicators of a serious question to be tried? There are no specific requirements which must be met in order to satisfy the test. The threshold is a low one. The Judge on the application must make a preliminary assessment of the merits of the case....
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions Judge should proceed to consider the second and third tests, even if of the opinion the Plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[16] The issue of whether or not the Province of New Brunswick should have entered into the 2014 Forestry Management Agreement with J.D. Irving Ltd. is moot, as discussed earlier. It is unlikely that the courts would have issued an injunction prohibiting J.D. Irving Ltd. from entering into the 2014 Forestry Management Agreement, because, as submitted by J.D. Irving Ltd., the signing of the agreement was done in the ordinary course of its business.

[17] That leads then to the issue of whether or not there is still any urgency with respect to granting an injunction. As I stated previously, the parties have all agreed that it would be some time in 2015 before the Respondents will reach the increased volume granted under the 2014 FMAs. For arguments sake, and in order to move on to the second point of whether or not there was any evidence of irreparable harm, I will state that on a very cursory review of the material filed, and because I have found that this matter is neither vexatious or frivolous, I find that perhaps the

Applicants may have a triable issue with regard to consultation and accommodation about the terms of the forestry management strategy.

[18] That leads to the next point under *RJR MacDonald*; whether or not the moving party will suffer irreparable harm. Determining whether there might be irreparable harm, according to the brief filed by the Applicants, is based to some extent on the information from affiants purporting to provide the court with expert evidence. As I indicated, I have ignored those affidavits in arriving at my decision.

[19] The standard for finding irreparable harm is generally a high one. The Applicants submitted that this may be relaxed in Aboriginal cases involving a breach of the duty to consult. I submit at this stage, that the parties have not had the opportunity to produce the evidence of irreparable harm. As submitted by counsel for J.D.I., in quoting from the *Musqueam Indian Band v. Canada,* 2008 FCA 214, the law is clear that inadequate consultation does not always constitute irreparable harm. If it is determined that the Applicants have been kept in the dark, they will have another day in court to be able to support that contention. At this stage, it is my view that the facts have not been fleshed out to the extent necessary to determine the issue of irreparable harm. It is conceded that from *RJR MacDonald*, that irreparable harm refers to the nature of the harm suffered rather than its magnitude. The disruption of government business is a mere possibility, if an injunction were granted. I find that the alleged harm to any Aboriginal interest has, at this point, not crystallized. As pointed out by counsel for Province of New Brunswick, the rubicon has not been crossed. In other words, the "status quo" will be maintained for some period of time.

[20] The balance of convenience argument, at this stage, does not favour the granting of an interim injunction. Balancing the rights of all parties at this stage is not possible on the evidence before the Court, hence, the "status quo" will be maintained.

[21] The request by the Applicants for interim interlocutory relief is denied.

J. L. Clendening, J.C.Q.B.