Court File No.: F/C/ 202 /14

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 ARREN SOCK** 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 **INDIAN ISLAND FIRST NATION, CHIEF JOSEPH WARD** ON BEHALF OF HIMSELF AND THE MEMBERS OF THE **METEPENAGIAG MI'KMAQ 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**

COUR DU BANC DE LA REINE DU NOUVEAU-BRUNSWICK

DIVISION DE PREMIERE INSTANCE

CIRCONSCRIPTION JUDICIAIRE DE

ENTRE:

Demandeur

- et -

Défendeur

COURT OF QUEEN'S BENCH
FREDERICTON, NB
RECEIVED AND FILED
AUG 13 2014
COUR DU BANC DE LA REINE
FREDERICTON, N-B
REÇU ET DÉPOSÉ

NATIONS' CHIEFS IN NEW BRUNSWICK INC.

APPLICANTS

AND

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

RESPONDENTS

NOTICE OF PRELIMINARY MOTION
(FORM 37B)

AVIS DE MOTION PRÉLIMINAIRE
(FORMULE 37B)

TO: Province of New Brunswick
Chancery Place
Room 2078, 2nd Floor
PO Box 6000
Fredericton, NB E3B 5H1

DESTINATAIRE:

And to: AV Cell Inc.
1 Germain Street, Suite 1500
Saint John, NB E2L 4V1

Fornebu Lumber Company Inc.
626 Boulevard Newcastle
Miramichi, NB E1V 2L3

J.D. Irving Ltd.
300 Union Street
P.O.Box 5777
Saint John, NB E2L 4M3

AV Nackawic Inc.
1 Germain Street, Suite 1500
Saint John, NB E2L 4V1

Twin Rivers Paper

Company
Brookfield Place
181 Bay Street, Suite 300
Toronto, ON M5J 2T3

The Applicants will apply to the Court of Queen's Bench at 427 Queen Street, Fredericton, New Brunswick, on the 18th day of August, 2014 at 1:30 ~~a.m./~~ p.m. for an Order that:

Le requérant presentera une requite à la Cour à....., le ..... 200_ à .....h en vue d'obtenir l'ordonnance décrite ci-dessous.

PRECISE ORDERS SOUGHT

1. An Order for an interim injunction to prohibit the Government of the Province of New Brunswick ("Province") from entering into any Forest Management Agreements ("FMAs") with the Respondent corporations in accordance with the terms of the Department of Natural Resources' 2014 Forest Strategy ("2014 Strategy"), for a period from the date of the Order to the date of any further order made by this Honourable Court with respect to an interlocutory injunction;

2. In the alternative, an Order declaratory of the rights of the parties in lieu of an interim injunction, pursuant to Rule 40.01 of the *Rules of Court*, NB Reg 82-73 and ss. 14(2) and 14(4) of the *Proceedings Against the Crown Act*, RSNB 1973, c P-18, stating that the Province cannot enter into any FMAs with the Respondent corporations in accordance with the terms of the 2014 Strategy, for a period from the date of the

Order to the date of any further order made by this Honourable Court with respect to an interlocutory injunction;

3. An Order for an interim injunction to prohibit the Province from implementing the terms of any FMAs, or in the alternative, an Order declaratory of the rights of the parties in lieu of an interim injunction stating that the Province cannot implement the terms of any FMAs, in the event that the Province enters into an FMA with any of the Respondent corporations prior to the hearing of this motion;

4. An Order for any such further relief as this Honourable Court may deem fair and just in the circumstances, including the exercise of the Court's inherent supervisory power to ensure that the Province complies with its constitutional duties towards the Applicants;

5. An Order to waive the requirement to undertake to abide by any order concerning damages arising from the granting or extension of the injunction under Rule 40.04; and

6. An Order for an abridgment of time for the filing and service of the within Notice of Motion pursuant to Rule 3.02 of the *Rules of Court*; and

7. An Order for substituted service of this Notice under Rules

18.01, 18.04 and 18.09 of the *Rules of Court* to permit the Applicants to validly serve this Notice on the Respondents via personal service or email.

GROUNDS TO BE ARGUED

1. The Applicants are the Chiefs of the 15 Mi'gmaq and Maliseet First Nations of New Brunswick, and they bring this motion on their own behalf and on behalf of the members of their respective First Nations.

2. The Applicant Assembly of First Nations' Chiefs in New Brunswick Inc. is a rights-based organization mandated to protect and advance the implementation of existing Aboriginal and Treaty rights for its member First Nations.

3. The Respondents are the Government of the Province of New Brunswick ("Province") and the five corporate bodies who hold Crown timber licences ("Licensees").

The Applicants' Proven Aboriginal and Treaty Rights

4. The Applicants possess valid Aboriginal and Treaty rights to hunt, fish and gather in the lands and waters of what is today know as New Brunswick, and these rights have been confirmed in several decisions of the Supreme Court of Canada and the courts of New Brunswick.

5. In addition, the Mi'gmaq and

Wolastoqiyik of New Brunswick have continually asserted and practiced other Aboriginal and Treaty Rights, and asserted their Aboriginal Title over the lands and waters of New Brunswick.

6. The Province owes certain fiduciary obligations towards the Applicants, based on the Honour of the Crown, including obligations in respect of the management, allocation, and use of Crown forests in traditional First Nations territories or territories over which the Applicants exercise their proven Aboriginal and Treaty rights.

7. Where First Nations have proven Aboriginal and Treaty rights and can show that government conduct has or will infringe or limit those rights, it falls to government to show that such infringement or limitation is justified.

New Brunswick 2014 Forest Strategy

8. In March 2014, the Minister of Natural Resources ("Minister") released the Province's most recent forest strategy document entitled *A Strategy for Crown Lands Forest Management* ("2014 Strategy").

9. The Applicants challenge several aspects of the 2014 Strategy that have or will have the effect of violating their proven Aboriginal and treaty rights, including an increase in the annual allowable cut of softwood timber on Crown lands, a decrease in conservation forest areas, and a shift to a "results-based framework" for managing Crown lands.

10. The Applicants also challenge the Province's entry into the 2014 Strategy—and the Memoranda of Agreement, FMAs, and Forest Management Plan contemplated under the Strategy—without first seeking the consent or input of affected First Nations and without discharging its duty to consult and accommodate Aboriginal peoples.

11. On February 7, 2014, the Minister entered into a Memorandum of Agreement ("MOA") with JD Irving ("Irving"). This MOA states that the parties will negotiate a new outcome-based FMA covering Crown Timber Licences 6 and 7.

12. The MOA between the Province and Irving states that the FMA will include a term or condition binding the parties to an initial term of 25 years, with five-year extensions therein provided Irving satisfies the key performance indicators set out in the FMA.

13. On July 28, 2014, the Province announced that it had completed an MOA with Twin Rivers Paper Company. The Applicants have not been provided with a copy of this MOA and are unaware if it has been released to the public.

14. The Applicant is unaware at this time if the Minister has entered into similar MOAs with the other Licensees.

15. On August 12, 2014, the Applicants learned that the Province intends to sign its FMA with Irving within a matter of days.

Test for granting an interlocutory injunction

16. The facts and circumstances giving rise to this motion permit a court to grant the orders sought in the nature of interim injunctive relief, according to the test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199.

17. First, the action raises a serious question to be tried with respect to the constitutional and legal rights of the Applicants, the Province's legal and constitutional duties towards the Applicants, and the reconciliation of the Applicants' Aboriginal and treaty rights with the Province's management strategies for Crown lands and forests.

18. Second, the Applicants will suffer irreparable harm if the Minister is not restrained from implementing the 2014 Strategy through the FMAs. Proceeding with the FMAs will result in serious and irreversible harm to the environment in the Province of New Brunswick, including its plants and wildlife species, in a way that will unjustifiably infringe and permanently restrict the Aboriginal and Treaty rights of the Applicants to hunt, fish, harvest and gather from their traditional lands and waters in the province.

19. Irreparable harm will also result if the Crown is allowed to pursue activities that affect Aboriginal interests without honouring its duty

to consult and other fiduciary duties arising from Section 35.

20. Third, the balance of convenience, including consideration of the public interest, favors granting the interim injunction, or alternatively granting interim declaratory relief.

21. The Applicants seek to make this motion before any FMA is signed, as after such agreements are signed it may be difficult or impossible for the Province to renegotiate terms and conditions that will take into consideration Aboriginal rights and interests before such time as they are irreparably damaged or rendered nugatory.

22. The Applicants are unable to provide an undertaking to abide by an order for damages caused by the granting of an injunction, as they do not have the financial ability to pay any such damages.

23. The Applicants undertake to file a Notice of Motion for an interlocutory injunction, as well as the underlying Notice of Action, without delay.

The statutory provisions or rules to be relied upon are:

1. *Rules of Court*, Rule 40 (Interlocutory injunctions), Rule 3 (Time); Rule 18 (Service of Process);

2. *Proceedings Against the Crown Act*, RSNB 1989, c P-18;

3. *Crown Lands and Forests Act*, SNB 1980, c C-38.1;

4. Section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 and s. 91(24) of the *Constitution Act, 1867*;

5. The legal and constitutional duties and obligations of the Province of New Brunswick towards the Applicants, including fiduciary duties, the duty to act in good faith, the duty to consult with and accommodate the Applicants, the Honour of the Crown, and the obligation to justify any infringement of the Applicants' proven treaty rights.

DOCUMENTARY EVIDENCE:

UPON the hearing of the Motion, the following Affidavits or other documentary evidence will be presented:

A l'audition de la motion, les Affidavits ou les autre preuves littérales suivantes seront présentées:

1. Affidavit of Chief George Ginnish, sworn on August 13, 2014 and filed with this notice;

2. Affidavit of Michael Scully, sworn on August 8, 2014 and filed with this notice;

3. Affidavit of Stephen Wyatt, sworn on August 6, 2014 and filed with this notice;

4. Affidavit of Rod Cumberland, sworn on August 7, 2014 and filed with this notice;

5. Affidavit of Graham Forbes, sworn on August 13, 2014 and filed with this notice;

6. Affidavit of Cynthia Doucette, sworn on August 13, 2014 and filed with this notice;

7. Affidavit of Brad Sappier, to be sworn and filed without delay;

8. Affidavit of Alan Madden, to be sworn and filed without delay;

9. Affidavit of Chief Brenda Perley, to be sworn and filed without delay;

10. Affidavit of Vince Zelazny, to be sworn and filed without delay;

11. Copy of the affidavit of Chief Rebecca Knockwood, sworn on August 11, 2014 with original to follow;

12. Copy of the affidavit of Jason Cooke, sworn on August 13, 2014 with original to follow; and

13. Such other material as counsel may advise and this Court may allow.

You are advised that:

a. you are entitled to issue documents and present evidence in the proceeding in English or French or both;

b. the Applicants intend to proceed in the English language; and

c. if you require the services of an interpreter at the hearing, you must advise the Clerk at least 5 days before the hearing.

Sachez que:

a. vous avez le droit dans la présente instance, d'émettre des documents et de presenter votre prevue en français, en anglais, our dans les deux langues;

b. le demandeur a l'intention d'utiliser la langue.... ; et

c. si vous avez besoin des services d'un interprète à l'audience, vous devez en aviser le greffier au moins 5 jours avant l'audience.

DATED at Saint John, New Brunswick, this 13th day of August, 2014.

FAIT à _____ le _____ 20__.

_____

for. Derek A. Simon
BURCHELLS LLP
Solicitors for the Applicants

_____

Avocat du demandeur

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