IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Gitanyow First Nation v. British Columbia (Minister of Forests),*** 2004 BCSC 1734

Date: 20041230
Docket: L021243
Registry: Vancouver

Between:

Gwasslam also known as George Phillip Daniels, Gwinuu also known as Godfrey Good, Gamlaxyeltxw also known as Edger Good, Sindihl also known as Robert Good, Widaxhayetsxw also known as Agatha Bright, Wiilitsque also known as Morris Derrick, Malii also known as Gordon Johnson, on behalf of themselves and in their capacity as the Gitanyow Hereditary Chiefs and on behalf of all members of the Gitanyow First Nation having their principal office at P.O. Box 148, Kitwanga, British Columbia, V0J 2A0

Petitioners

and:

The Minister of Forests for the Province of British Columbia, Skeena Cellulose Inc. and NWBC Timber & Pulp Ltd.

Respondents

Before: The Honourable Mr. Justice Tysoe

Reasons for Judgment

Counsel for the Petitioners:	Peter R.A. Grant David Kalmakoff and Lee Schmidt
Counsel for the Respondent, Minister of Forests:	Paul J. Pearlman, Q.C. and Paul Yearwood
Counsel for the Ernst & Whinney Inc., the Receiver of the Respondent, Skeena Cellulose Inc.:	Charles F. Willms and Kevin G. O'Callaghan
Dates and place of hearing:	November 29 & 30 and December 1 & 2, 2004 Vancouver, B.C.

(a) Introduction

[1] In the fall of 2002, I heard Petitions in three proceedings, including this proceeding, challenging the decision of the Minister of Forests (the "Minister") by which he consented to the change of control of Skeena Cellulose Inc. ("Skeena") from its previous owners (one of which was the Province of British Columbia) to NWBC Timber & Pulp Ltd. ("NWBC"). The challenges were based on the duty of consultation and accommodation as articulated in, among others, the decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 and the decisions of the B.C. Court of Appeal in *Taku River Tlingit First Nation v. Telsequah Mr. Mine Project*, 2002 BCCA 59 and *Haida Nation v. British Columbia (Minister of Finance)*, 2002 BCCA 147 and 2002 BCCA 462.

[2] On December 10, 2002, I issued a single set of Reasons for Judgment in all three proceedings, the citation of which is *Gitxsan and other First Nations v. British Columbia (Minister of Forests)*, 2002 BCSC 1701 (the "Initial Reasons"). I held that each of the petitioning First Nations had a good *prima facie* claim of Aboriginal title and a strong *prima facie* claim of Aboriginal rights with respect to at least part of the areas included within the lands covered by Skeena's tree farm and forest licenses. I further held that the Minister had not satisfied his duty of consultation and accommodation before he consented to the change in control of Skeena. I declined to quash the decision of the Minister at that time, with the view that he should be given further opportunity to fulfil his duty, and I granted liberty to apply with respect to any question relation to the fulfillment of his duty and to re-apply to quash the decision in the event that the Minister failed to fulfill his duty.

[3] The Gitanyow First Nation is not satisfied with the level of consultation and accommodation which has been afforded by the Minister. It now applies for various forms of relief, including a declaration that the Minister has failed to provide meaningful and adequate consultation and accommodation and an order quashing the decision of the Minister to consent to the change in control of Skeena. At the hearing of the present application, counsel for the Gitanyow First Nation withdrew a request for relief in connection with the enactment of the *Forest (Revitalization)*

Amendment Act, S.B.C. 2003, c. 30, which replaced s. 54 of the *Forest Act*, R.S.B.C. 1996, c. 157 with a new provision which no longer requires the consent of the Minister to a transfer of a license or a change of control of a licensee.

(b) Additional Facts

[4] I do not propose to set out all of the facts which pre-dated the Initial Reasons because most of the relevant facts are set out in the Initial Reasons. However, the genesis of the events giving rise to the present application is not the Initial Reasons alone, but also a letter which was sent a few days prior to the first hearing in this proceeding in October 2002.

[5] On October 18, 2002, the Deputy Minister of Forests wrote to Glen Williams, Chief Negotiator for the Gitanyow Hereditary Chiefs, offering to have the Ministry of Forests (i) provide capacity funding of $25,000 to the Gitanyow, (ii) enter into negotiations with the Gitanyow for a consultation work plan, and (iii) participate in a workshop to discuss the consultation framework agreement which had been drafted by the Gitanyow. On November 18, 2002, while my decision was still under reserve, Mr. Williams replied favourably to the Deputy Minister but requested more capacity funds. A funding agreement for $40,000 was eventually entered into by the parties.

[6] On November 21, 2002, the Government of British Columbia (the “Province” or the “Crown”), as represented by the Ministry of Forests, the Ministry of Sustainable Resource Management and the Treaty Negotiation Office, provided the Gitanyow with a draft document entitled Memorandum of Understanding on Recognition and Consultation (the “Memorandum of Understanding”). The draft Memorandum of Understanding covered topics such as consultation funding, consultation on anticipated forest development activities and administrative decisions, communication and dialogue, a workshop on sustainable resource management planning and exploring economic opportunities for the Gitanyow in the Cranberry and Buffalo Head tenure areas.

[7] Legal counsel for the Gitanyow reviewed the draft Memorandum of Understanding and produced a revised version of it on November 25, 2002. The revisions included a recognition by the Province of the Gitanyow having a good *prima facie* case of title, the right of the Gitanyow to share the land and resources of the territory it claimed, an acknowledgement that the statutory decision maker must consider various aspects of Aboriginal title, including the economic component, and a commitment that the parties would endeavour in the Memorandum of Understanding to provide for an economic component for the Gitanyow.

[8] I issued the Initial Reasons on December 10, 2002. On December 16, 2002, Mr. Williams wrote to B.C.'s Chief Treaty Negotiator and, referring to my comment in the Initial Reasons that the first step of a consultation process is to discuss the process itself, indicated a willingness to continue negotiating the draft Memorandum of Understanding.

[9] Negotiations between the Province and the Gitanyow on the Memorandum of Understanding continued over the course of the following six months in the form of all day meetings and correspondence. By April 2003, the negotiations had expanded beyond the scope of a consultation process. The Province offered to pay the Gitanyow the sum of $325,000 annually to address the economic component of the infringement of the Gitanyow's *prima facie* claim to Aboriginal title. The Province was also willing to give the Gitanyow the opportunity to access 400,000 cubic metres of timber. The negotiations had also become linked to the treaty process (for example, there was an issue whether land use planning should be linked to or contingent upon the parties entering into an agreement in principle in the treaty process).

[10] A meeting took place at the beginning of June 2003, but a number of issues remained outstanding. A further meeting was held on June 24, 2003 to discuss the outstanding issues, but an impasse was reached. The unresolved issues included the basis of revenue sharing, details of the tenure to be made available to the Gitanyow and the silviculture obligations associated with the Buffalo

Head tenure. The Province says that it has been following the consultation process set out in the Memorandum of Agreement since the impasse, but this is disputed by the Gitanyow, who say that the Gitanyow Forest Consultation Council has not been created as contemplated in the Memorandum.

[11] In February 2003, the Province announced that it intended to pursue two initiatives with First Nations, which were revenue sharing and access to forest tenure. In March 2003, the Province introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which took back from licensees 20% of the annual allowable cut from replaceable forest licenses and tree farm licenses, with the view of allocating forest tenures to First Nations. The Province also appropriated the sum of $95 million for forestry revenue sharing with First Nations over the period from 2003 to 2005.

[12] It was apparently intended by the Province that these two initiatives would be accomplished primarily by way of reaching accords with participating First Nations in the form of an agreement known by several different names, including a Forest and Range Agreement. Presumably as a result of the ongoing negotiations with the Gitanyow in respect of the Memorandum of Agreement, the Province initially decided to forgo the negotiation of a Forest and Range Agreement with the Gitanyow and to incorporate the topics of revenue sharing and tenure allocation into the ongoing negotiations. It was these topics which led, at least in part, to the impasse in the negotiations on the Memorandum of Agreement.

[13] There were some further meetings and letters between the Province and the Gitanyow in the summer and fall of 2003, but nothing of substance was accomplished with respect to the Memorandum of Understanding. On December 5, 2003, Mr. Friesen, an Assistant Deputy Minister of Forests, wrote to Mr. Williams stating that the Ministry of Forests was prepared to meet with the Gitanyow to outline the components of a five year Forest and Range Agreement, which would include economic benefits of revenue sharing of $340,000 per year and access to 86,000 cubic metres of timber per year. The letter stated that the Agreement would deal

with economic benefits, but that the Province would still have the obligation to consult and seek workable accommodations of the cultural interests of the Gitanyow.

[14] Legal counsel for the Gitanyow replied to this letter by proposing a meeting to discuss the Forest and Range Agreement. A draft of the Agreement was sent by the Province to Mr. Williams in early January 2004. The affidavit materials filed in connection with this application did not include a copy of the draft Agreement, but they did include two versions of the form of the Agreement entered into by two of the other First Nations which had also challenged the decision of the Minister to consent to the change of control of Skeena, the Lax Kw'alaams Indian Band and the Metlakatla Indian Band. The Agreements are approximately 15 pages in length, and some of the more important provisions are as follows:

(a) a forest licence will be made available by the Minister to enable the First Nation to harvest a specified volume of timber over the 5 year term of the Agreement (650,000 cubic metres in the case the Lax Kw'alaams and 160,000 cubic metres in the case of the Metlakatla);

(b) the Province will provide a specified amount of money to the First Nation to develop a tenure business plan ($40,000 in the case of the Lax Kw'alaams and $25,000 in the case of the Metlakatla);

(c) the Province will provide a specified annual amount of money to the First Nation as a revenue sharing economic benefit to address workable interim accommodation of the First Nation's economic interest during the term of the Agreement ($1,370,000 in the case of the Lax Kw'alaams and $345,000 in the case of the Metlakatla);

(d) the Province will consult with the First Nation on all forest development plans, forest stewardship plans and range plans;

(e) the First Nation agreed that the Province has fulfilled its duties to consult and seek workable interim accommodation with respect to the Minister's consent to the change of control of Skeena and the economic component of potential infringements of Aboriginal interests from logging operations and decisions made by a Ministry of Forests statutory decision maker during the term of the Agreement;

(f) the First Nation will participate in the timber supply review processes affecting the lands claimed by the First Nation;

(g) the payments of the annual sums under the Agreements can be suspended or cancelled by the Province in certain specified circumstances.

The two Agreements are similar, but they are not identical. For example, the Metlakatla Agreement has an express provision making it clear that the Province is still required to fulfill its duty to consult and seek a workable accommodation if a statutory decision maker is of the opinion that a decision will create a potential infringement beyond the economic component of Metlakatla's Aboriginal interests (i.e., the cultural component of the Aboriginal interests).

[15] Mr. Williams replied to the Province that the draft Forest and Range Agreement did not incorporate two critical elements which had been negotiated in the context of the Memorandum of Understanding; namely, (i) an acknowledgement of the Gitanyow's *prima facie* case of Aboriginal rights and title, and (ii) negotiations with respect to long term land use planning for the Gitanyow territory.

[16] By letter dated January 27, 2004, the Province replied to Mr. Williams that the Forest and Range Agreements were intended to provide interim economic accommodation during the negotiations of treaties and that the only negotiations available in connection with the Agreements were restricted to the topics of specific elements of the forest tenures and process elements for consultation and accommodation of non-economic components.

[17] Additional correspondence was exchanged in February and March 2004, but no progress was achieved. The Gitanyow arranged through Trial Division to attend before me on April 19, 2004 for further judicial input. This hearing date was adjourned until late June 2004 so that the parties could have further discussions to determine whether agreement could be reached on forestry consultation and accommodation. The parties met in each of April and May, but concluded that there was insufficient common ground to reach a forestry accommodation agreement.

[18] On May 18, 2004, Mr. Williams wrote to Mr. Friesen outlining the major four areas of disagreement in connection with the attempts to reach a forestry accommodation agreement; namely, revenue sharing, consultation in advance, forest tenure and joint planning. I will discuss the details of the disagreement under the next heading. Mr. Friesen replied by letter dated June 17, 2004, in which he set out the Province's position on these four areas. He subsequently updated the Province's position with respect to joint planning by letter dated November 1, 2004, which was followed by a further exchange of letters between Mr. Williams and Mr. Friesen.

[19] The June hearing dates were adjourned by the parties until September 2004 and, at my instance in view of the pending decisions of the Supreme Court of Canada in the *Haida* and *Taku River Tlingit* cases, they were adjourned again until late November 2004.

[20] Before I turn to the main areas of disagreement between the Gitanyow and the Province, I should briefly update the situation with respect to Skeena (which changed its name to New Skeena Forest Products Inc.). Skeena's pulp mill in Prince Rupert has not reopened and Skeena continued to encounter financial difficulties. It again filed for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, but it was not successful in restructuring its affairs. On September 20, 2004, Brenner C.J.S.C. appointed Ernst & Young Inc. as interim receiver pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and as receiver pursuant to the *Law and Equity Act*, R.S.B.C. 1996, c. 253. Ernst & Young Inc. is now in the process of selling Skeena's assets. One of the sales which has been approved by Brenner C.J.S.C. is a sale of Skeena's tree farm license.

[21] In the two years since the Initial Reasons, there has not been a significant amount of harvesting pursuant to Skeena's forest licenses. This has given rise to available tenure in the hands of the Province as a result of Skeena's undercut (i.e., the difference between the annual allowable cut ("AAC") under the licenses and the annual amount which was actually cut). In addition, the Province

has available tenure as a result of the 5% AAC takeback at the time of the change of control of Skeena and a 20% AAC takeback effected by way of the *Forestry Revitalization Act*, S.B.C. 2003, c. 17.

(c) Areas of Disagreement or Complaint

[22] Mr. Williams' May 18 letter grouped the areas of disagreement into four categories relating to revenue sharing, consultation in advance, forest tenure and joint planning. In his submissions, counsel for the Gitanyow argued that the conduct of the Minister was inconsistent with the Crown's duty in five respects, three of which coincide with Mr. Williams' letter. I will list them in accordance with the submissions of counsel, but I will first deal briefly with the topic in Mr. Williams' letter which, while addressed by counsel, was not put in a separate category. The Province had offered access to 86,000 cubic metres of timber a year. Mr. Williams' point was that the specifics of the offered tenure were left to be determined in the future. He reiterated the Gitanyow proposal that they be provided with 100,000 cubic metres of timber a year and that the specifics of the tenure be contained in the Agreement.

(i) Standard Form of Agreement

[23] The Gitanyow say that the Minister has failed to take account of the specific nature of their rights by refusing to deviate from a standard form of Forest and Range Agreement. There are some differences between the forms of Agreement which the Province has entered into but, as stated in the January 27, 2004 letter to Mr. Williams, the only areas which the Province allowed for some negotiation were the topics of specific elements of forest tenures and process elements in connection with non-economic components.

(ii) Revenue Sharing

[24] The amount which the Province has offered to each First Nation as a revenue sharing economic benefit under the Forest and Range Agreements was calculated on the basis of $500 a year for each member of the First Nation according

to the records of the Federal Department of Indian and Northern Affairs. As at March 31, 2003, there were 680 Gitanyow registered with the Department of Indian and Northern Affairs, and this figure was the basis of the $340,000 offer made by the Province to the Gitanyow.

[25] The Gitanyow make two points about the basis of the calculation. First, they say that, rather than basing the economic benefit on the number of people in each First Nation, it should be more properly based on the volume of timber harvested in their territory. Second, they say that, if they are to accept the per capita basis of calculation, the revenue sharing should be based on the Gitanyow's Wilp (house) membership rather than the number of people registered with the Department of Indian and Northern Affairs.

[26] On the second point, the Gitanyow point to the treaty negotiations, where it has been agreed with the Province and Canada that the Gitanyow are an Aboriginal group whose membership is not based on membership under the *Indian Act*. As part of the treaty negotiations, it has been agreed that participation in the final treaty will be determined in accordance with a chapter in the draft Agreement in Principle entitled Eligibility and Enrolment. Under that chapter, a person is eligible to be enrolled under the final treaty if the person is a member of a Wilp by birth or adoption or is a descendant of such a person. Mr. Williams estimates that the approximate number of Gitanyow members on this basis of eligibility is 2,500. If this figure is used in place of the 680 registered Gitanyow, the annual per capita payment would increase from $340,000 to $1,250,000.

[27] In his June 17, 2004 reply to Mr. Williams, Mr. Friesen stated that the Province was willing to include a clause in the Forest and Range Agreement that would amend the calculation of the revenue sharing benefit once a satisfactory enrolment and eligibility review is concluded as part of the treaty process. Counsel for the Gitanyow submitted that this position is disingenuous because the Province has refused to provide the capacity funding for the Gitanyow to conduct a proper census based on the provisions of the Eligibility and Enrolment chapter.

(iii) Consultation in Advance

[28] In addition to agreeing in the Forest and Range Agreement that the Minister has satisfied his duty of consultation and accommodation with respect to his decision to consent to the change of control of Skeena, the Gitanyow are being asked to agree that the Province has fulfilled its duty with respect to the economic component of potential infringements of their Aboriginal interests for the next five years.

[29] In essence, the Province is offering the annual payment in exchange for the Gitanyow agreeing to waive their interim rights with respect to the economic aspect of infringement for a period of 5 years, together with the Minister's past action in consenting to the change of control of Skeena.

(iv) Joint Planning

[30] The Gitanyow want to be involved in strategic joint planning of higher level decisions. There was a section of the draft Memorandum of Understanding dealing with the joint preparation of a sustainable resource management plan, but the Province stipulated that it would be dependent on an agreement with either Canada or the Province on funding being provided through a treaty related measure. It was then proposed that there would be a pilot landscape unit planning process for the Gitanyow territory. However, things did not progress further when the impasse on the Memorandum of Understanding was reached in June 2003.

[31] The Gitanyow raised the topic again when the Forest and Range Agreement was being discussed, but the Province did not want to include it in the Agreement. Mr. Williams raised it in his May 18, 2004 letter to Mr. Friesen, who replied in his June 17, 2004 letter that, although the Ministry of Sustainable Resource Management, which has the mandate for resource planning, has an interest in engaging the Gitanyow in higher level planning, it does not have the funds to support a planning initiative in the Gitanyow territory.

[32] In his November 1, 2004 letter, Mr. Friesen invited the Gitanyow to participate in forest resource management planning for the Cranberry timber supply area. The process would include the Gitanyow gathering and mapping information relating to their interests in the area, followed by the joint development of an ecosystem network map providing for integrated management objectives. The subsequent exchange of correspondence between Mr. Williams and Mr. Friesen clarified that (i) the process was not intended to be the same as the pilot project contained in the draft Memorandum of Understanding, (ii) the process was intended to assist the District Manager in determining the availability of additional timber in the Cranberry timber supply area in a manner that incorporates Gitanyow interests, and (iii) any management objectives developed by the joint planning team would be used by licensees on a voluntary basis only. The Gitanyow say that this process does not offer any meaningful form of joint land use planning.

(v) Buffalo Head Silviculture Obligations

[33] In the transaction by which NWBC acquired control of Skeena, one of its subsidiaries, Buffalo Head Resources Ltd. (“Buffalo Head”), was excluded from the transaction because it appeared that the value of the timber license held by Buffalo Head may be outweighed by the accrued silviculture obligations attached to the license. At the time of the change of control, the shares of Buffalo Head were transferred to a numbered company owned by the Crown.

[34] In September 2002, which was shortly after the change of control of Skeena, the Province entered into an agreement for the transfer of the shares in Buffalo Head to Kaos Holdings Ltd. It was a term of the agreement that Buffalo Head’s existing silviculture obligations would be assumed by Kaos Holdings Ltd. The President of Kaos Holdings Ltd. wrote to the Minister on November 27, 2002 requesting his consent pursuant to s. 54 of the *Forest Act*.

[35] It is not clear when the transaction was completed and whether the transferred asset was the shares in Buffalo Head or the license held by it. When Mr. Williams wrote to the Ministry of Forests in December 2003 requesting a meeting to

discuss the proposed acquisition of the Buffalo Head license by Timber Baron Contracting Ltd. (which is the name to which Kaos Holdings Ltd. changed its name), the reply was that there was no longer a statutory decision required by the Minister in view of enactment of the *Forest (Revitalization) Act, 2003*, on November 4, 2003.

[36] One of the amendments effected by the *Forest (Revitalization) Act, 2003,* was the introduction of a new s. 54.6 of the *Forest Act.* The new section provides that both the transferor and the transferee of a forest license are liable for unfulfilled obligations which have accrued under the license up to the date of the transfer.

(d) Supreme Court of Canada Decisions

[37] As I mentioned above, one of the adjournments of this application was for the purpose of awaiting the decisions of the Supreme Court of Canada in the *Haida* and *Taku River Tlingit* cases. Those decisions were rendered on November 18, 2004 under the citations of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74.

[38] In *Haida*, the Supreme Court dismissed the Crown's appeal, but allowed the appeal of Weyerhaeuser Company Limited against the finding that it owed a duty of consultation and accommodation to the Haida First Nation. The Court ruled that the Minister of Forests had failed to engage in any meaningful consultation with respect to the replacement of a tree farm license affecting the territory claimed by the Haida.

[39] The Supreme Court reiterated the Crown's duty in *Taku River Tlingit*, but held that the consultation and accommodation by the Crown in that case was adequate to satisfy the Crown's duty.

[40] Some of the more important principles to be taken from the Court's decisions for the purpose of the present application are as follows:

(a) the Crown's duty of consultation and accommodation is founded not in a fiduciary duty as had been held by the B.C. Court of Appeal, but in the honour of the Crown (¶16, *Haida*);

(b) the duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it (¶35, *Haida*);

(c) the scope of the Crown's duty is proportionate to a preliminary assessment of the strength of the asserted Aboriginal right or title and to the seriousness of the potentially adverse effect upon the right or title (¶39, *Haida*);

(d) the consultation must be meaningful, in good faith and with a willingness of the Crown to make changes based on the information that emerges during the consultation process (¶29, *Taku River Tlingit*);

(e) sharp dealing is not permitted, but mere hard bargaining will not offend the right of the Aboriginal group to be consulted (¶42, *Haida*);

(f) there is no duty to reach agreement and Aboriginal groups do not have a veto power over what can be done with land claimed by them; rather, it is a process of balancing interests, of give and take (¶10 and ¶48, *Haida*); and

(g) where accommodation is required in making decisions that may adversely affect an asserted Aboriginal right or title, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and other societal interests (¶50, *Haida* and ¶42, *Taku River Tlingit*).

Bearing these principles in mind, I will now discuss the Crown's efforts to fulfill its duty of consultation and accommodation in respect of the change of control of Skeena.

(e) Discussion

(i) General Comments

[41] In *Haida*, McLachlin C.J. commented at ¶11 that the task of the Supreme Court was a modest one of establishing a general framework for the duty to consult and accommodate and that, in the age-old tradition of the common law, the courts will fill in the details of the duty. She subsequently made comments at ¶60 - 63 with respect to the standard of review that the courts would likely apply in judging the adequacy of the government's efforts to discharge its duty to consult and accommodate pending claims resolution. However, these latter comments were made in the context of an administrative process which the Province had yet to establish in that case. Similarly, no administrative process was in place for the purposes of this case. In *Taku River Tlingit*, the Supreme Court did make a decision with respect to the adequacy of the Crown's effort to consult and accommodate but, in that case, there was a process under the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119, which included consultation with affected Aboriginal peoples.

[42] When discussing the standard of review applicable to administrative decisions, McLachlin C.J. stated at ¶61 of *Haida* that the standard to be applied with respect to questions of law, such as the seriousness of the claim of Aboriginal title or rights or the impact of the infringement, would likely be correctness. She further stated at ¶62 that if there was no error on these questions of law, the administrative process would likely fall to be examined on a standard of reasonableness. She said that reasonableness, not perfection, is what is required and that the focus is on the process, as opposed to the outcome.

[43] In the present case, I have already held in the Initial Reasons that the Gitanyow have a good *prima facie* claim of Aboriginal title and a strong *prima facie* claim of Aboriginal rights with respect to at least part of the territories claimed by them. I also held that there was an infringement of asserted Aboriginal title or rights which required the Minister to fulfill the Crown's duty of consultation and

accommodation prior to consenting to the change of control. In this latter regard, I held that (i) the decision of the Minister to give his consent to the change of control of Skeena did have an impact on the Gitanyow and, in any event, (ii) (a) the duty is continuing and the Crown is obliged to honour its duty each time it deals with the license if it has not fulfilled its duty when previously dealing with the licence, and (b) the Crown did not fulfil its duty of consultation and accommodation when it had last replaced the forest tenure licences. Although my holding that the duty is a continuing one was drawn from the comments of Lambert J.A. in the supplementary decision of the B.C. Court of Appeal in *Haida*, 2002 BCCA 462 at ¶64 in the context of a fiduciary duty, the same reasoning applies to the duty as founded in the honour of the Crown.

[44] During the course of submissions, I raised the issue of whether the scope of the Crown's duty to consult and accommodate is narrower in respect of a decision of the Minister relating to a change of control of the holder of a licence or a transfer of a licence than a decision of the Minister relating to the granting or replacement of a licence. Counsel for the Crown and the Receiver of Skeena submitted that the duty is narrower in the former situation.

[45] I raised the issue in view of the statement of the Supreme Court of Canada in *Haida* that the scope of the duty is proportionate to a preliminary assessment of the claim for Aboriginal rights or title and the seriousness of the potentially adverse effect upon the asserted rights or title. It seemed to me that the impact of a transfer of an existing licence or a change of control of the holder of an existing licence will normally be less than the impact of the granting or replacement of a licence. My reasoning was that the holder of the existing licence already has the right to harvest timber in accordance with the licence, with the result that a transfer of the licence or a change in control of the holder of the licence will not have as great an impact as is the case when the licence is initially granted or is replaced.

[46] However, this reasoning presupposes that there has not been a previous, unremedied, breach of the Crown's duty to consult and accommodate.

The Supreme Court held in *Haida* that the Crown's duty arises when the Crown has knowledge of the potential existence of the Aboriginal right or title. The Crown has probably had knowledge of the Gitanyow's claims for many years, and the affidavit materials in this case demonstrate that the Crown has had knowledge of the claims since at least 1993, when the Gitanyow submitted its Statement of Intent for the purpose of entering into treaty negotiations. All of Skeena's licences have been replaced since 1993 without adequate consultation and accommodation by the Crown.

[47] The holdings in my Initial Reasons were not appealed. In particular, there was no appeal of my holdings that Crown's duty to consult and accommodate is continuing and that the Crown is obliged to honour its duty each time it deals with the license if it has not fulfilled its duty when previously dealing with the license. As a result, the doctrine of *res judicata* prohibits a revisiting of this issue. I must proceed on the basis that in dealing with the request for consent to the change of control of Skeena, the Crown was obliged to honour its previously unfulfilled duty of consultation and accommodation when it last replaced the licences.

[48] Accordingly, I have already dealt with the two questions of law concerning the strength of the Gitanyow's claim of Aboriginal title and rights, and the impact of the infringement by the Crown. The outstanding issue on this application is whether the Crown has fulfilled its duty of consultation and accommodation with respect to the Gitanyow.

[49] In the present case, there was no administrative process to deal with the Crown's duty of consultation and accommodation. The Crown first undertook *ad hoc* negotiations with respect to the Memorandum of Understanding and subsequently with respect to the Forest and Range Agreement. There was no administrative review regarding the adequacy of those negotiations. Accordingly, the comments of McLachlin C.J. in *Haida* with respect to the applicable standard of review are of no assistance in this case.

[50] The honour of the Crown requires it to conduct such negotiations in good faith and with a willingness to accommodate Aboriginal interests where necessary. The standard by which the court will assess the efforts of the Crown must, of necessity, depend on the reasonableness of the Crown's position. While the Crown may bargain hard and has no duty to reach an agreement, it must be willing to make reasonable concessions based on the strength of the Aboriginal claim and the potentially adverse effect of the infringement in question. If the Crown does not make reasonable concessions, it is open to the court to conclude that the Crown is not negotiating in good faith with a willingness to accommodate Aboriginal interests.

(ii) Negotiation of the Forest and Range Agreement

[51] There is a fundamental point about the negotiations with respect to the Forest and Range Agreement which none of the counsel addressed directly. One of the Gitanyow's complaints is that it is a term of the Agreement that they must agree that the Province will have fulfilled its duty with respect to the economic component of potential infringements over the next five years. This does not mean that the Province is acting in bad faith and is therefore acting in breach of its duty of consultation and accommodation. What it does mean, however, is that the parties have been negotiating something different than an accommodation in respect of the change of control of Skeena. They have been negotiating a broader financial accommodation, one that encompasses future dealings with Skeena's licences as well as the change of control.

[52] I can understand why the Province would want to negotiate a broader accommodation. It may not be commercially expedient for the Province to have to fulfill its duty of consultation and accommodation every time it has a dealing with a licence. The Province will usually be able to deal with the cultural component of infringements of Aboriginal interests on an operational level, but dealing with the economic component will normally require decisions at higher levels on both sides, which may take a considerable period of time. The Province has apparently made a

business decision that it will offer funds to First Nations to compensate them for the economic component of all infringements over a five year period. The evidence is that 22 First Nations had entered into Forest and Range Agreements with the Province by June 2004, and counsel for the Province advised that there were 35 Agreements by the time of the hearing of this application.

[53] The Province's overall approach is not unreasonable in my view. It did not attempt to force the Forest and Range Agreement upon the Gitanyow. After an impasse was reached in the negotiations of the Memorandum of Understanding, the Province inquired of the Gitanyow whether they wished to discuss a Forest and Range Agreement, and counsel for the Gitanyow responded in a positive manner.

[54] At the same time, I can understand the reluctance of the Gitanyow to effectively waive the non-cultural aspect of the duty of consultation and accommodation for a five year period in exchange for a monetary payment. The amount of the payment is established in advance, but the degree and nature of the infringements of Aboriginal interests over the five year period is not known. The Gitanyow have a business decision to make: is the offered monetary payment adequate to compensate them for the anticipated infringements and the risk that there could be other infringements during the five year period?

[55] An assessment of the positions of the parties with respect to the Forestry and Range Agreement will not answer the question of whether the Crown has fulfilled its duty of consultation and accommodation in respect of the change of control of Skeena. I cannot decide whether the Province has fulfilled its duty on the basis of the negotiations on the Forestry and Range Agreement because the parties have been negotiating something different from an accommodation pursuant to the Crown's duty in relation to the change of control of Skeena.

[56] I do not agree with the submission of counsel for the Gitanyow that the Crown has breached its duty as a result of the inclusion of this provision in the Forest and Range Agreement. The Crown has simply offered a sum of money (and other concessions) in exchange for an agreement that it will have fulfilled its duty of

consultation and accommodation for a period of five years, as well as its duty in respect of the change of control of Skeena. This does not constitute a breach of the Crown's duty in respect of the Skeena change of control. But it does mean that the Crown's offer to enter into the Forest and Range Agreement will not fulfill the Crown's duty in respect of the Skeena change of control unless the Gitanyow are prepared to accept the offered sum of money and other concessions as adequate non-cultural accommodation in respect of the Skeena change of control and all logging operations and decisions affecting their claimed territory over the next five years.

[57] As a result, it would not be appropriate for me to reach any conclusions with respect to the negotiations in respect of the Forest and Range Agreement. However, I will offer the following non-binding observations to assist the parties in the event that they decide to continue their negotiations on the Agreement:

1. The Province has demonstrated a limited degree of flexibility in changing the terms of the Agreement. I can understand the reluctance of the Province to make substantial changes to the form of the Agreement in a round of negotiations with a First Nation because it would provide an impetus for further changes in the ensuing rounds of negotiations.
2. I agree with the position of the Gitanyow that it is more theoretically logical for the First Nations to be compensated in respect of the economic component of infringement on the basis of the volume of trees harvested in their claimed territory. However, the Province has committed itself to a system of compensation based on the number of Aboriginal people. It is understandable that the Province would not want to deviate from this system of compensation once established.
3. On the one hand, if compensation is to be based on the number of Aboriginal people, it is reasonable for the Gitanyow to be compensated on the basis of their true numbers, as opposed to their numbers according to the records of the Department of Indian and Northern Affairs. On the other hand, it was not unreasonable for the Province to look to the number of registered Gitanyow in view of the fact that the 1993 Statement of Intent

filed by the Gitanyow stated that there were 714 Aboriginal people represented by them. The Province has offered to include a clause in the Agreement which would adjust the revenue sharing calculation when the census pursuant to the Eligibility and Enrolment chapter is completed. One potential solution would be to make the adjustment retroactive to the beginning of the Agreement.

4. While I certainly understand the desire of the Gitanyow to be involved in a joint planning process, I also appreciate at least two of the Province's difficulties. The first is that, while input of the Gitanyow may be desirable, they are not entitled to a veto. The second is the cost of funding of such a process.

I will comment separately on the topic of Buffalo Head silviculture obligations under the next heading.

(iii) Negotiation of the Memorandum of Understanding

[58] The parties began negotiations on the Memorandum of Understanding as a means of establishing a framework for consultation. The negotiations expanded to address the economic component of the infringement of Aboriginal interests, but an impasse was reached in June 2003.

[59] Counsel did not make detailed submissions with respect to whether the Province fulfilled its duty of consultation and accommodation in the negotiations on the Memorandum of Understanding because their submissions focused on the negotiations on the Forest and Range Agreement. One exception to this comment relates to the unfulfilled silviculture obligations of Buffalo Head, which was one of the unresolved issues when the parties ended their negotiations in June 2003.

[60] In my opinion, the Crown has not yet fulfilled its duty of consultation and accommodation with respect to this issue. This is a unique situation because the Crown was a part owner of Skeena and benefited from the change of control. NWBC did not want to be burdened with the obligations associated with Buffalo Head, and the shares were transferred to a numbered company owned by the

Crown. The affidavit evidence is unclear whether Timber Baron Contracting Ltd. acquired the shares of Buffalo Head from the Crown's numbered company or whether it acquired the forest licence from Buffalo Head.

[61] In these circumstances, the Crown's duty of consultation and accommodation is not fulfilled in my opinion by the fact that Buffalo Head's unfulfilled silviculture obligations appear to have been assumed by Timber Baron Contracting Ltd. (either as a result of a provision of the share purchase agreement or the provisions of s. 54.6 of the *Forest Act*). There is no evidence that Timber Baron Contracting Ltd. has the capability or intention of fulfilling these obligations. The Province has not indicated what will done if Timber Baron does not fulfill the obligations.

[62] Apart from the other aspects of the negotiations, the Crown's failure to adequately address the issue of the Buffalo Head silviculture obligations leads me to conclude that it has not fulfilled its duty of consultation and accommodation as a result of the offers it made in the course of the negotiations on the Memorandum of Understanding.

[63] In assessing the adequacy of the Crown's efforts to fulfill its duty to consult and accommodate, the court will usually look at the overall offer of accommodation made by the Crown and weigh it against the potential impact of the infringement on the asserted Aboriginal interests having regard to the strength of those asserted interests. The court will not normally focus on one aspect of the negotiations because the process of give and take requires giving in some areas and taking in other areas. It is the overall result which must be assessed. However, the situation with respect to the Buffalo Head silviculture obligations is unique as a result of the fact that these obligations relate to the replenishment of timber which has already been harvested in the territory claimed by the Gitanyow. There are also the facts that the Crown had an ownership interest in Skeena and that the Crown became the indirect owner of Buffalo Head when it was excluded from NWBC's acquisition of Skeena. It may be possible to address this issue by way of a

monetary payment to the Gitanyow, but there has been no suggestion that a part of the compensation offered during the negotiations on the Memorandum of Understanding was intended to provide an accommodation in respect of this aspect.

(f) Remedies

[64] The relief sought by the Gitanyow on this application is the following:

(a) a declaration that the Minister has failed to provide meaningful and adequate consultation and accommodation to the Gitanyow with respect to his consent to the change of control of Skeena;

(b) an order quashing or setting aside the Minister's decision to consent to the change of control of Skeena;

(c) a declaration that the decision of the Minister to give consent to the change of control of Skeena was a breach of the Crown's duty of consultation and accommodation and of the Crown's constitutional duties towards the Gitanyow;

(d) a declaration that the Crown's duty to consult is not an obligation owed to "status" Indians under the *Indian Act* but rather is an obligation owed to all persons who have the right to exercise their Aboriginal rights in the affected territory and, in this case, is an obligation to the Gitanyow;

(e) a declaration that the conduct of the Minister subsequent to the Initial Reasons was a breach of the Crown's duty of consultation and accommodation in that the Minister made the Forest and Range Agreement conditional on the requirement that the Gitanyow agree that consultation and accommodation had been fulfilled in respect of other decisions on forestry activities within the Gitanyow territory; and

(f) an order prohibiting the Minister and the District Manager from advertising for sale any forest tenures arising out of Skeena's licences.

[65] Although significant progress has been made by the parties since I issued the Initial Reasons, the Crown has not yet fulfilled its duty of consultation and accommodation with respect to the decision of the Minister to consent to the change

of control of Skeena. I am prepared to make a declaration to that effect, but I do not believe that the remaining relief sought by the Gitanyow is appropriate or necessary at this stage. It is my view that the parties should resume negotiations on the Memorandum of Understanding (or the Forest and Range Agreement if both parties wish to do so) with the benefit of my views contained in these Reasons and the guidance provided by the Supreme Court of Canada in *Haida* and *Taku River Tlingit*.

[66] The declaration which I am prepared to make will address the relief referred to in clauses (a) and (c) above. With respect to the relief referred to in clause (b) above, I continue to believe that it would not be appropriate to quash or set aside the Minister's consent to the change of control of Skeena for the reasons expressed in the Initial Reasons and for the additional reason that the Crown has demonstrated a willingness to consult with the Gitanyow and accommodate their interests (albeit not yet adequately).

[67] It is my opinion that the relief referred to in each of clauses (d), (e) and (f) goes beyond the parameters of the relief requested in the Petition and, in any event, I would not be inclined to grant such relief. The relief requested in clauses (d) and (e) is for declarations on isolated aspects of the negotiations related to the Forest and Range Agreement, and I have held that negotiations on the Agreement does not constitute consultation and accommodation for the purposes of the Minister's consent to the change of control of Skeena. The relief requested in clause (f) relates to the forest tenure which the Crown has taken back from Skeena as a result of Skeena's undercut over the past two years and the take-back provisions of the *Forest Act* and the *Forestry Revitalization Act*. Although the Gitanyow are hoping to obtain some of this forest tenure and it has been part of the negotiations to date, I cannot conclude that no form of accommodation by the Crown would be adequate unless it included this forest tenure being given to the Gitanyow.

(g) Conclusion

[68] I declare that the Crown has not yet fulfilled its duty of consultation and accommodation with respect to the decision of the Minister to consent to the change

of control of Skeena. I encourage the parties to resume negotiations. Each of the parties will continue to have liberty to apply to this Court with respect to any question relating to the duty of consultation and accommodation, and the Gitanyow will continue to have liberty to re-apply for an order quashing or setting aside the consent of the Minister to the change of control of Skeena.

"D.F. Tysoe, J."
The Honourable Mr. Justice D.F. Tysoe