IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.,*** 2005 BCSC 697

Date: 20050510
Docket: L042292
Registry: Vancouver

Between:

Huu-Ay-Aht First Nation by Chief Councillor Robert Dennis on his own behalf and on behalf of the members of the Huu-ay-aht First Nation

Petitioners

And

The Minister of Forests and Her Majesty The Queen In Right of the Province of British Columbia

Respondents

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

Counsel for the Petitioners:	G. McDade, Q.C. J. Tate
Counsel for the Respondents:	G. R. Thompson K. J. Chapman
Date and Place of Trial/Hearing:	January 24-27, 2005 and February 10-11, 2005 Vancouver, B.C.

I. NATURE OF APPLICATION

[1] This is an application by the petitioners, the Huu-ay-aht First Nation (the "HFN"), for:

> (a) a declaration that the Crown as represented by the Ministry of Forests (the "MOF") has a legally enforceable duty to the HFN to exercise its discretion pursuant to the ***Forestry Revitalization Act***, S.B.C. 2003, c. 17 and section 47.3 of the ***Forest Act***, R.S.B.C. 1996, c. 157, as amended by the ***Forestry (First Nations Development) Amendment Act***, S.B.C. 2002, c. 44, in a manner consistent with the Crown's duty to consult in good faith and to endeavour to seek workable economic accommodation between aboriginal rights and title interests of the HFN, on the one hand, and the short-term and long-term objectives of the Crown to manage forestry permits and approvals in HFN traditional territory in accordance with the public interest, both aboriginal and non-aboriginal;
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> (b) a declaration that in its application of the Forest and Range Agreement ("FRA") program pursuant to the ***Forestry Revitalization Act*** and the ***Forest Act,*** the MOF as an agent of the Crown in right of British Columbia has an administrative duty to endeavour in good faith to reach accommodation agreements with the HFN that are responsive to the degree of infringement of the HFN aboriginal rights and title represented by forestry operations in HFN traditional territory;
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> (c) a declaration that application of a population-based formula to determine accommodation pursuant to the FRA programme does not constitute good faith consultation and accommodation in respect of the HFN aboriginal rights and title interests;
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> (d) a declaration that application of a population-based formula to determine accommodation arrangements pursuant to the FRA programme does not fulfill the administrative obligations of the Crown to provide accommodation for the aboriginal rights and title interests of the HFN;
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> (e) a declaration that application of a population-based formula to determine accommodation agreements for the HFN pursuant to the FRA programme has no rational connection with the legislative objectives of the FRA programme, including but not limited to, the objective of promoting economic development by addressing asserted aboriginal rights and title; and

(f) an order in the nature of mandamus, directing the provincial Crown, through its agent the MOF, to negotiate with the HFN in good faith, including negotiating in a manner which takes into account the HFN's claim of aboriginal title and rights, and the infringement of that claim of title and rights in respect of decisions pursuant to the ***Forestry Revitalization Act*** and the ***Forest Act*** within the HFN territory;

(g) costs; and

(h) such further relief as this honourable court may seem just.

[2] The HFN are not seeking injunctive relief.

[3] In response to the formal relief sought by the petitioners, the respondents, the MOF and the province of British Columbia, oppose the relief by submitting that:

(a) the relief sought is premature and is not appropriate for judicial review as set out in the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 ("***JRPA***");

(b) the Crown's legally enforceable duty to consult and accommodate aboriginal interests is not triggered by the Crown's general management of forestry permits and approvals. Rather, the Crown's duty is triggered by specific decisions that have the potential to infringe on s. 35 rights;

(c) the Crown does not owe a duty here because aboriginal rights and title have only been asserted, rather than defined or proven;

(d) the FRA initiative is only one component of the MOF's exercise of any constitutional and administrative law duties that arise with respect to protection of aboriginal rights. Thus, the petitioner's relief should be denied on the basis that it is inappropriate for the court to assess only one aspect of negotiations, rather than the overall process which has not yet been completed. In any event, the Crown submits that it has met any obligations it may have with respect to consultation with the HFN to date;

(e) the FRA initiative is an entirely voluntary interim measure, the Province engaged in good faith efforts to reach an agreement with the HFN, and has deposed to the fact that it intends to continue to fulfill its obligations with respect to consultation and accommodation should the HFN decide that they do not wish to enter a FRA;

(f) the petitioners seek a declaration that the application of a population-based formula to determine accommodation pursuant to the FRA initiative has no rational connection with the legislative objectives of the FRA initiative. The respondents submit that this relief should be denied on the basis that the FRA initiative is a policy initiative not directly authorized by statute and no such declaration can issue; and

(g) they are prepared to consult with the HFN on a decision by decision basis should the HFN wish to avail themselves of the accommodation offered under the FRA initiative. The respondents submit that it would be inappropriate to order the Crown to consult with the HFN with respect to forest operations within the HFN territory generally, as such a general claim is not sufficient to trigger the duty to consult. Rather, the duty is triggered by specific decisions or activities which have the potential to infringe aboriginal interests.

II. FACTS

a) The Huu-ay-aht First Nation Claim of Aboriginal Title and Rights and the Alleged Infringement of Aboriginal Title

[4] Prior to the assertion of British sovereignty, the HFN claim that "they occupied a traditional territory (the "Hahoothlee") located on the western coast of Vancouver Island in and near Barclay Sound, Pachena Bay, and southern portions of Alberni inlet, including the watersheds of the Sarita River, Pachena River, Klanawa River and Coleman Creek."

[5] The HFN are asserting that most of their traditional territory falls within a tree farm licence held by Weyerhaeuser ("TFL 44"). The Province has issued TFL 44, granted subsequent replacements of the licence pursuant to provincial forestry legislation, and directly authorized harvesting within the territory covered by TFL 44. The HFN are claiming that their aboriginal title and rights are being infringed by the logging taking place within their traditional territory pursuant to TFL 44. The HFN

claim that their rights and title were infringed from "March 2004 to January 18, 2005, when logging operations continued within HFN territory despite the fact that the Province has not consulted with the HFN about the level of forestry operations within the Hahoothlee and despite the fact that HFN title and rights interests have not been accommodated." The HFN claim that such an infringement warrants economic accommodation and they "seek a forest tenure to take a fair allocation for the development of their lands, and revenue sharing until a treaty is determined."

[6] The HFN consists of the members of the Huu-ay-aht Indian Band. The Huu-ay-aht Indian Band is the designated representative of its members pursuant to the ***Indian Act***, R.S.C. 1985, c. I-5. The HFN consists of aboriginal peoples of Canada pursuant to section 32(2) of the ***Constitution Act, 1982***, being Schedule B to the ***Canada Act 1982*** (U.K.), 1982, c. 11 [***Constitution Act, 1982***], and has approximately 570 members and thirteen reserves under the ***Indian Act***.

[7] The HFN are engaged in negotiations towards a comprehensive treaty settlement within the British Columbia treaty process as part of the Maa-nulth Treaty Group. The Maa-nulth First Nations (the "MFN") that comprise the Maa-nulth Treaty Group entered the treaty process in January 1994, as part of the Nuu-chah-nulth Tribal Council (the "NTC"). On March 10, 2001, a draft Agreement in Principle (the "AIP") was initialled at the NTC treaty table. Each of the 12 First Nations that comprised the NTC undertook consultations and requests for ratification with their respective communities. Six of the NTC First Nations, including the HFN, ratified the AIP, and six did not. Five of the six First Nations, including the HFN, that ratified the AIP joined to form the MFN. The MFN is composed of the HFN, the Uchucklesaht

Tribe, the Ucluelet First Nation, the Toquaht Nation, and the Ka:'yu:t'h'/Chek:k'tles7et'h'.

[8] The MFN approached British Columbia and Canada to negotiate a final agreement based on the draft 2001 AIP and accordingly the MFN are now at their own treaty table as the Maa-nulth Treaty Group. The MFN signed the AIP on October 3, 2003. Among other things, the AIP provides that each MFN member will own forest resources on their land and will have exclusive authority to determine charges relating to the harvesting of forest resources on its land. However, the AIP does not provide any detail regarding forest resources as this is to be determined in the final agreement which takes place at the end of stage 5 of the treaty process. The AIP itself does not legally recognize aboriginal rights and title. The MFN are presently at stage 5 of the treaty process, namely negotiation towards a final agreement. In stage 5 of the treaty process, technical and legal issues are resolved to produce a final agreement that embodies the principles outlined in the AIP and formalizes the new relationship among the parties. Once signed and formally ratified, the final agreement becomes a treaty and legally recognizes aboriginal rights and title. Stage 6 of the treaty process is merely implementation of the agreement reached at in stage 5.

[9] The land component of the AIP includes up to 20,900 hectares of provincial Crown land and 2,105 hectares of existing Indian reserve land, which will include the existing HFN Indian reserve land and up to 6,500 hectares of additional lands. According to the Crown, the capital transfer provided by Canada is $62.5 million.

The AIP outlines major components of a treaty, including rights to resources such as wildlife, fish and timber, culture and related self-government provisions.

[10] The Ditidaht and Tseshaht First Nations have asserted claims to territories which overlap with the territory claimed by the HFN. Nonetheless, the HFN claim that "since time immemorial they have had a special connection with forest resources in the Hahoothlee." In the "Traditional Use Study, Final Report of the HFN" which was prepared for the HFN and the Ministry of Forests (with their approval) by a private company called Shoreline Archaeological Services, Inc., there is clear evidence of traditional use of forest resources within the Hahoothlee. The study found that forestry is the activity with the "seventh highest frequency" and reflects "the traditional independence the HFN had on natural resources." The study found that the HFN have traditionally used forest resources "for the source of much of the material required for clothing, canoes, house building material, household implements and more." Many of the HFN still use the forest resources for traditional activities. The study found that "the forestry activity frequency represents 5.6% of all activities and is included as an activity for 8% of the 905 archaeological sites studied." However, the study noted that "it is estimated that only about 5% of the inland areas of the traditional territory of the HFN have been systematically surveyed for archaeological resources."

[11] The HFN assert that approximately 95% of the HFN traditional territory is within the boundaries of TFL 44. A TFL is a large area based tenure granting the rights to manage the forest lands and to apply for cutting permits to harvest timber. MOF is responsible for the administration of TFLs and for dealing with all TFL

licenses. The present licensee of TFL 44 is Weyerhaeuser whose current forest development plan contemplates a further 5.4 million cubic metres of timber ("m3") out of the Hahoothlee territory within the next 5 years. The estimated stumpage payable to the Province in relation to the anticipated volume of harvest of 5.4 million m3 over the next 5 years is in the range of $143 million. The Province will receive additional revenues from income, property and sales tax. The HFN claim, and the respondents have not disputed, that between 1940 and 1996, approximately 35,000,000 m3 has been harvested from the Hahoothlee. Over 56% of old growth forests within the Hahoothlee were harvested from 1940 to 1996.

[12] The HFN has submitted that the rate of harvest proposed for the HFN territory far exceeds the geographic proportion of the annual allowable cut ("AAC") for the entire TFL. The HFN maintain that a sustainable AAC in their territory would be limited to 225,000 m3 per year, whereas Weyerhaeuser plans to harvest approximately 1,000,000 m3 per year out of the Hahoothlee in each of the next 5 years. The HFN is claiming that much of this future harvesting will take place within areas of significant cultural importance to the HFN and that the removal of this economically valuable timber represents a serious, ongoing, and unaccommodated infringement of HFN's aboriginal title and forestry rights.

b) Previous Accommodation Agreements

[13] As part of the effort to participate in the forestry processes within the Hahoothlee, in 1998 the HFN signed an Interim Measures Agreement ("IMA") with the MOF. The term of the IMA was for 3 years, and provided, *inter alia*, for: (a) an

inter-governmental working relationship between the HFN and the MOF; (b) the establishment of a joint forest council to resolve issues of forest management, cultural heritage and economic development; (c) joint planning in relation to forestry activities in the HFN territory; (d) protection of cultural heritage resources; (e) the creation of economic development opportunities; and (f) dispute resolution processes. The IMA arose out of a conflict regarding harvest levels in TFL 44 and the HFN request for accommodation. It addressed economic development issues through direct funding from MOF and by engaging Forestry Renewal BC multi-year funding for forest restoration and enhancement. The IMA also established at section 11 that "the agreement does not define or limit the aboriginal rights, title and interests of the HFN" and that the map of the Hahoothlee which is used for the purposes of the IMA agreement is to "define the territorial scope of the application of this agreement only."

[14] On March 5, 2001, the parties renewed the IMA through the Interim Measures Extension Agreement ("IMEA"), and included the Uchucklesaht First Nation as an additional party. Section 11 of the IMEA mirrored section 11 in the IMA. However, the IMEA included an agreement regarding a direct tenure award, which was not part of the original IMA. Recent amendments to the ***Forest Act*** had allowed MOF to enter into a direct tenure award agreement. In accordance with the direct tenure award agreement included in the IMEA and s. 47.3 of the ***Forest Act***, the MOF invited the HFN and the Uchucklesaht to jointly apply for a timber sale licence for a volume of up to 265,000 m3. This licence agreement was dated January 28, 2003.

[15] On March 5, 2004, the IMEA expired. In the fall of 2003, the HFN attempted to negotiate a renewal of the IMA and IMEA. The HFN claim that the Province refused to enter into a renewal unless the HFN entered into a FRA. The MOF, on the other hand, claims that it was impossible for it to renew the IMEA in its current form due to significant changes in the mandate and structure of MOF during the period between 2002 and 2004. As of April 24, 2004, MOF was no longer involved in strategic planning, inventory, or restoration and enhancement priority setting and funding. The Ministry of Sustainable Resource Management is now responsible for economic sustainable development of Crown land. Further, new legislation, namely the ***Forest and Range Practices Act***, S.B.C. 2002, c. 69, changed the operations planning and approvals process within the MOF. As a result of these changes, the MOF claims that the referral process under the IMEA did not reflect the provisions of the ***Forest and Range Practices Act***.

[16] It is important to note that during the time in which the IMA and IMEA were in force, the HFN were satisfied with the terms and did not challenge any provincial decisions.

c) The Forest and Range Agreement Policy

[17] In March 2003, the MOF announced its forest revitalization plan. Part of that plan included the enactment of the ***Forestry Revitalization Act*** to take back 20% of the annual allowable cut from major replaceable forest licences and tree farm licences throughout the Province. This decision was made, in part, in order to provide volume for direct awards of forest tenures to First Nations. The 20% take-

back is to be re-allocated and divided so that 10% is sold through a market-based system, the British Columbia Timber Sales Program. Approximately 8% is to be used for First Nation tenure opportunities to address accommodation of potential aboriginal interests, and the remaining amount is to be used for small tenures. At the same time, the Province appropriated a total of $95 million for forestry revenue sharing with First Nations throughout British Columbia over the period of 2003-2005. The Ministry claims that these initiatives have provided it with the means to provide significant interim economic accommodation to those First Nations that choose to negotiate forestry agreements with the Province.

[18] The FRA initiative was a component of the forest revitalization plan and was called the First Nations Forest Strategy ("FNFS"). The FNFS was enabled by the following events:

- Direct invitation tenures – In Spring 2002, the Province amended the ***Forest Act*** (creating s. 47.3) to allow the Minister of Forests to directly invite tenure applications from First Nations, without competition;
- Revenue sharing – In February 2003, the Province announced that it would begin to share forest revenues with First Nations; and
- Timber reallocation – In March 2003, the Province passed the ***Forestry Revitalization Act*** that resulted in major reallocation of AAC for major licences in the Province. This reallocated timber included volume for the FNFS as well as other initiatives associated with revitalizing British Columbia's forest economy.

[19] Between 2002 and 2003, the MOF developed and began implementing the FRA programme which was a strategic policy approach to fulfilling the Province's duty to consult with aboriginal peoples with respect to possible infringements of

potential aboriginal or treaty rights in the face of uncertainty surrounding First Nations' claims yet to be proven.

[20] The FRA programme is in fact a "fast-track" program in which the MOF and First Nations sign an agreement which gives the First Nation economic accommodation for forestry infringements within its territory. The FRA programme is a "fast-track" program because a First Nation is not required to prove the strength of their claim to an asserted territory. The FRA programme is based on an assumption that there is a potential that exists somewhere in the asserted traditional territory of each First Nation for a *prima facie* claim for title. The FRA programme is based on an offer of forest revenue sharing and tenure allocation in an amount calculated on the registered population of the Indian Band to whom the offer is made. The calculation is based on population alone and has no relation to the strength of a First Nation's claim of aboriginal title and rights, the amount of timber or timber harvesting in the First Nation's territory, or the seriousness of the potential infringement of title and rights. The MOF claims that they extensively reviewed a number of complex distribution models, including those considering values and amounts of timber harvested from specific areas, as well as regional approaches. The MOF claims that it ultimately chose the population-based approach because it had the fewest variations and disparities for an equitable distribution across the province.

[21] The MOF's "Strategic Policy on their Approaches to Accommodation", dated July 31, 2003, sets out the MOF's policy on the FRA initiative. Section 2 of the policy reads:

> In consideration of the provincial objective to create certainty on Crown lands and promote economic development by addressing asserted aboriginal rights and title, it is the policy of the Ministry of Forests to provide access to timber and revenue sharing through a negotiated agreement with a First Nation.

[22] Section 3 of the policy recognizes that aboriginal title, where it exists, has been determined by the courts to have an economic component:

> Recent legal decisions (Haida, Skeena) have determined that an obligation of the Crown exists to seek to accommodate potential First Nation aboriginal rights and title interests when making forest management decisions.

[23] Section 4 of the policy reads:

> Court decisions have increased the requirements for the Ministry of Forests to consult with First Nations on a wide-range of forest and range management decisions. The Courts have indicated that if First Nations have a reasonable probability of aboriginal title, then the Province is obligated to seek to accommodate the First Nation for unjustifiable infringements of that title.
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> Further, if there is the potential that somewhere in the asserted traditional territory the First Nation has a *prima facie* ("on the face of it") aboriginal title claim, and forestry and range activities/approvals cover significant areas within that territory so as to make it likely that they may unjustifiably infringe on as yet unproven aboriginal title, there may be a need to provide accommodation in respect to that possible infringement, even though the areas where that aboriginal title is a real probability have not been ascertained.
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> …
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> The policy approach to implementing the accommodation strategy is to offer access to economic benefits (revenue sharing and access to timber) through negotiated agreements with individual First Nations. In exchange for the economic benefits, agreements will contain provisions that promote a stable operating environment for the forest and range section, including consultation procedures and terms indicating that the Province is providing workable accommodation of the First Nation's economic interests arising from forest and range decisions.

[24] The eligibility requirements are produced at section 5:

> The Province has introduced this initiative to respond to calls by the courts to seek to accommodate First Nations' interests in areas where First Nations have a reasonable probability of title. BC also wants to improve the provincial economy by enhancing operational stability. As such, there are two primary filters to determine eligibility for the initiative:
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> > (a) the First Nation must have bona fide claims of unresolved aboriginal rights and title; and
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> > (b) forestry and range activities (including timber harvesting, tenure transfers, AAC determinations and operational planning) must be likely to impact potential aboriginal rights and title in the First Nation's asserted traditional territory. If there is no appreciable forestry or range activity in the area (i.e. in urban areas) then aboriginal title is not likely being infringed by the forestry and range activity.

[25] At section 6, the FRA policy states that access to the revenue and timber volumes will be through a negotiated interim measures agreement between the MOF and the First Nation. The main components of this agreement are revenue sharing, tenure invitation (which will be non-replaceable and non-transferable), and volume. As defined in section 80.1 of the ***Forest Act***, a "non-replaceable licence" means a licence that provides that a replacement for it must not be offered, and a "replaceable licence" means a licence for which a replacement licence must be offered under section 15 or 36.

[26] Within section 6, the provincial policy on revenue sharing states that:

> The government has allocated funding in the Ministry of Forests' budget as follows: $15 million in 2003/04; $30 million in 2004/05; and, $50 million in 2005/06… In 2005/06, the government will have allocated the full amount available for forestry revenue sharing with

> First Nations in the pre-treaty environment. As a result, it is the policy of the Ministry of Forests that, should all First Nations participate in the initiative, each First Nation in the Province will receive an equitable share of the budgeted forestry revenue. The amount available for an individual First Nation will be set though a mandate provided by the Deputy Minister of Forests.

[27] Also within section 6, the provincial policy on volume states that "the Ministry of Forests is setting a target of 8% (about 5.6 million m3) of the provincial AAC to be held by First Nations."

[28] Further, under section 6, the provincial policy states that:

> The FRA will contain clauses that indicate the government is providing economic benefits to accommodate the economic aspect of the First Nation's potential aboriginal title interests that may be infringed by the issuance of tenures and administrative or operational decisions made by statutory decision makers. As a result, the Ministry of Forests will, on an annual basis provide a list to the First Nation of the following administrative decisions that may affect the First Nations aboriginal interests during the term of the FRA:
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> a) decisions that set or vary AAC for a timber supply area or a forest tenure;
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> b) the issuance, consolidation, subdivision or amendment of a forest tenure;
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> c) the replacement of forest tenures;
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> d) the disposition of timber volumes arising from licence undercuts;
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> e) AAC apportionment and reallocation decisions;
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> f) timber sale licence conversion to other forms of tenure and timber licence term extensions;
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> g) the reallocation of harvesting;
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> h) the issuance of special use permits; and

> i) establishment of interpretive forest sites, recreation sites and recreation trails.

[29] The HFN submit that in order to obtain interim economic accommodation in relation to infringements of HFN title and rights, the Province is forcing the HFN to agree that its duty to consult has been met in relation to a long list of administrative decisions, each of which authorize the infringements of HFN title and rights. Therefore, after entering into a FRA, the Ministry will make administrative decisions that affect the title and rights of the First Nation without consulting the First Nation.

[30] Under the FRA initiative, any First Nation which takes the view that the FRA would not provide a fair return may choose not to enter into the FRA and may continue to consult with the MOF to address accommodation for forestry activities in the asserted territory. Section 7 of the policy states:

> In situations where an agreement cannot be reached, Ministry staff should continue to consult with First Nations in a manner consistent with the Ministry of Forests' Protection of Aboriginal Rights Policy. Any offer made to a First Nation, even if it ends up ultimately being rejected, will be made on a "with prejudice" basis. This means that if faced with litigation, the province will provide information to the court that an accommodation offer was made, and will inform the court of the terms of that offer. It is important that Ministry staff inform the First Nation of this fact.

[31] The Province has no program available to offer tenure or revenue sharing other than the FRA programme. Moreover, according to the FRA policy, the entire tenure volume and budget for revenue sharing available for First Nations through the forest revitalization legislation has been reserved to the FRA programme.

d) The FRA Drafts

[32] The first draft of the FRA which the parties drew up for discussion is dated November 4, 2003. It states that "the parties wish to enter into an interim measures agreement in relation to forest resource development and related economic benefits arising from this development within the Traditional Territory;" and, that "the parties have an interest in seeking interim workable accommodation of Huu-ay-aht's and Uchucklesaht's Aboriginal Interests where forest development activities are proposed with the Traditional Territory that may lead to the potential infringement of Huu-ay-aht's and Uchucklesaht's Aboriginal Interests." At section 1.7, "Interim Workable Accommodation means accommodation of the potential infringement of Huu-ay-aht's and Uchucklesaht's Aboriginal Interests arising from or a result of forest and/or range development, prior to the full reconciliation of these interests through a land claim settlement."

[33] The significant sections of the first draft of the FRA are:

- Section 3.1 invites the HFN to apply for a 265,000 m3 TSL as per the IMEA regarding a direct award tenure. The TSL is non-transferable, non-replaceable, and for a 5 year-term in TFL 44.
- Section 3.2 states that during the term of the FRA, the Government of British Columbia would share revenue with the HFN, being approximately $280,000 annually.
- The timber and revenue sharing distribution is decided on a population-based, per capita approach. This approach is based on the population of rural, First Nation individuals.
- Section 4.2 states that "during the term of this Agreement, the Huu-ay-aht and Uchucklesaht agree that the Government of British Columbia has filled its duties to consult and seek interim workable accommodation with respect to the economic component of

> potential infringements of Huu-ay-aht's and Uchucklesaht's Aboriginal Interests or proven aboriginal rights in the context of Operational Plan decisions that the Government of British Columbia will make." The same statement is at section 5.8 in reference to administrative decisions.
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> - The FRA is to terminate on the occurrence of the earliest of "five years from the date this Agreement is executed; or the coming into effect of a treaty; or the mutual agreement of the parties; or the Government of British Columbia cancels economic benefits under this Agreement pursuant to Section 9.0."

[34] The terms of this draft have remained relatively unchanged. For instance, after the first draft FRA was proposed by the Ministry, the HFN requested that an agreement in the form of an IMEA be substituted for the FRA. Thereafter, the Ministry simply changed the title, but not the substance of the second draft of the FRA to reflect the HFN's request. The Ministry changed the title of the draft FRA to "Interim Measures (Extension) Agreement", but simply renumbered the paragraphs rather than changing the substance of the agreement. Therefore, any changes that the government made were essentially window dressings.

[35] One change which is important to note is that the Ministry inserted section 16.9 into draft 5 of the FRA, which states:

> The parties differ on the question of the existence or extent of any duty or duties of consultation and/or accommodation owed by the forest licensees to the Huu-ay-aht First Nation. Nothing in this Agreement, or the fact that the parties have entered into this Agreement, is intended to limit or prejudice the position that either Party may take in litigation or other negotiations on the existence or extent of any duty or duties of consultation and/or accommodation owed by forest licensees or other third parties to the Huu-ay-aht First Nation.

[36] The court will consider section 16.9 after discussing the negotiations which have taken place up to this litigation.

[37] The only term which actually changed in substance was with regard to forest tenure. Section 3.1 of the FRA changed on June 22, 2004, when MOF increased the tenure award offer from 30 m3 per person to an amount of 54 m3 per person. This would result in an annual award of 30,500 m3 annually for the 5 year term of the FRA agreement. However, the offer of 54 m3 per person was within the MOF's target according to the FNFS proposal. At paragraph 59 of Ministry official, Sharon Hadway's affidavit, she outlines the FNFS proposal:

> 59. The amount of available timber was intended to be fixed: in fact, under the FNFS proposal, both the targets of allocated timber and the quantum of funds available as revenue sharing were intended to be fixed. For the FRA Initiative MOF had available to it:
>
> > (a) timber volume to be dedicated to First Nation direct awards in the amount of 3 million m3, that is 30 m3/person from the reallocation process with an upper target of 54 m3/person if volume from other sources is available to 'top up' the tenure opportunity from sources such as undercut.

[38] This target rate is reiterated in several internal MOF e-mails. For instance, in an internal e-mail sent from Ministry worker, Darrell Robb, on June 17, 2004, he states that "[m]y interest here is an outcome which is defendable to numerous parties. A defendable allocation of the undercut would meet the policy for FN tenure (i.e. 8% population, thus 54 m3 per capita), and is distributed in geographical areas."

[39] Although the specific target rate of 54 m3/person is not listed in the FRA policy, nor mentioned in any other government documents, there is a reference in

the FRA policy to "setting a target of 8% (about 5.6 million m3) of the provincial AAC to be held by First Nations". This per-capita, population-based approach is expressly stated under "Revenue Sharing" in the FRA policy and is repeated under "Current Tenures held by the First Nation". This target is further outlined in a MOF memorandum titled "Opening up new partnerships with First Nations", dated March 26, 2003, where forest tenure was linked to the per-capita, population-based criteria: "[the] Government is proposing to allocate up to eight per cent, or about 5.5 million cubic metres, of the province's total allowable annual cut to First Nations. This would be roughly equivalent to the proportion of First Nations people in the rural population."

e) Negotiation of Accommodation Agreements

[40] As set out above, the parties initially met on November 4, 2003 to discuss a timber and revenue sharing agreement. The HFN sought to renew the existing IMEA, while the MOF proposed a FRA. At the November 4 meeting, the MOF presented a formal offer and first draft FRA which offered $280,000 in revenue sharing annually for the term of the FRA and requested recognition of the existing 265,000 m3 Direct Award Agreement as a component of the FRA. The FRA offer was based upon the HFN membership number of 565 as taken from January 2003 information. As well, MOF offered to commit to the provision of an annual list of all proposed administrative decisions anticipated within that year and to continue to consult with HFN in regard to operational planning decisions in respect of existing forest tenures. The MOF sought agreement from the HFN that, in consideration of the economic benefits and consultation processes set out in the draft FRA, the

Government of British Columbia has fulfilled its duties to seek interim workable accommodation with respect to the economic component of potential infringements of HFN's potential aboriginal interests resulting from administrative decisions made by statutory decisions makers from time to time during the FRA. This FRA was intended to replace the existing IMEA that expired March 5, 2004.

[41] In a letter dated November 19, 2003, the Assistant Deputy Minister of Tenure and Revenue at MOF, Bob Friesen, wrote to Chief Counsellor Robert Dennis and Chief Counsellor Charlie Cootes Sr. to convey MOF's offer as articulated at the November 4 meeting. Through this offer, MOF sought to achieve a "pragmatic interim solution" to HFN's economic interests.

[42] On December 1, 2003, Chief Dennis wrote to the Assistant Deputy Minister advising that HFN wished to extend the IMEA rather than enter a FRA.

[43] On December 17, 2003, the HFN met with the provincial Treaty Negotiation Office ("TNO") as a member of the Maa-nulth Treaty Group. At the TNO meeting, the HFN requested the extension of the IMEA arrangement for forestry, including a revenue sharing and tenure component, as an alternative to the FRA offer. The HFN also asked for an accommodation of aboriginal title and rights interests that would be connected to the volume and value of ongoing logging within the Hahoothlee. However, the provincial policy provides that their agents, including the TNO, may not negotiate IMAs that commit to tenure or revenue sharing in excess of the FRA policy.

[44] On January 14, 2004, the HFN met with Premier Gordon Campbell in order to discuss the extension of the IMEA. HFN presented Premier Campbell with a briefing document titled “Investing in Certainty” which included a request to renew the IMEA which was set to expire on March 4, 2004. The HFN was unwilling to sacrifice the structures established under the IMEA and informed the premier that the FRA was not reasonably connected to the extent of forestry operations in HFN territory.

[45] By e-mail dated January 26, 2004, Tom Happynook of HFN responded to the FRA offer tabled by MOF. Mr. Happynook stated his appreciation for the extension of the offer of the FRA, but turned down the offer on that basis that “the FRA has the potential to create economic and political problems for our leadership and ultimately our Nation.” He then itemized HFN’s reasons for requesting an extension of the IMEA and offered to negotiate.

[46] In an internal MOF e-mail sent by MOF aboriginal affairs officer, Rhonda Morris, on January 27, 2004, the MOF confirmed its position that “we are not looking to renew IMAs except in the form of FRAs” and confirmed the per capita target range of 30 to 50 m3 per person:

> MOF can not offer any more volume without creating a large discrepancy with regards to the amount of volume other neighbouring FNs are being offered. H/U [HFN], with their present direct award of 262,000 m3 over 5 years, is already at 45 m3/person target which is well within the volume target range we are working within – 30-50 m3/person.

[47] The MOF was prepared to review options suggested by HFN with respect to meeting with provincial officials, but only within the context of the resource

constraints faced by MOF. There were insufficient resources available to the MOF to continue the IMEA processes as a result of MOF district staff being stretched in terms of resources and thus no longer being able to commit to monthly joint forest council meetings.

[48] On February 5, 2004, Cindy Stern, the District Manager of the South Island Forest District, wrote to Chief Dennis and other chiefs and councils whose asserted traditional territories were within the South Island Forest District. Ms. Stern was writing to clarify the process undertaken by MOF in seeking to consult with First Nations who might have an interest in respect of forest development decisions and approvals. Ms. Stern indicated that the Maa-nulth First Nations had expressed a concern that the MOF, in seeking to consult with the Tseshaht First Nation on proposed forest development activities located within an expanded traditional territory, was in some way acknowledging or verifying the validity of territorial claims which might be disputed by other First Nations. Ms. Stern clarified that the MOF process was intended to be inclusive of First Nations who asserted some aboriginal interest in respect of areas where forest development decisions were contemplated. Ms. Stern further clarified that the discussions with respect to forest development proposals with First Nations were “not predicated in any way upon an acknowledgment, recognition or verification by the MOF that asserted claims necessarily had legal or factual validity”.

[49] On February 5, 2004, MOF staff met with representatives of the HFN to discuss the FRA initiative.

[50] On February 25, 2004, the MOF and HFN discussed the expiring IMEA and the proposed FRA via a conference call. As agreed during the call, the parties would meet on March 12, 2004 to review the effectiveness of the IMEA and to identify the essential components of the expiring IMEA and the proposed FRA with the mind to incorporate the components into one, new agreement respecting forest resource activities within the asserted traditional territories.

[51] On March 5, 2004, Assistant Deputy Minister Friesen wrote to Chief Dennis of the HFN and to Chief Cootes of the Uchucklesaht as a follow-up to the February 25, 2004 conference call.

[52] On March 12, 2004, the HFN met with Assistant Deputy Minister Friesen to discuss the extension of the IMEA. At this meeting, the Assistant Deputy advised that he had no authority to negotiate and was bound by the provincial FRA policy. MOF confirmed at this meeting that both the offer of revenue sharing and tenure under the FRA offer were based on a fixed per-capita formula derived from provincial targets, and were non-negotiable. The HFN again requested accommodation of aboriginal title and rights interests that would be connected to the volume and value of ongoing logging within the Hahoothlee.

[53] Chief Dennis sent a letter to the MOF dated March 19, 2004, stating that the Province was not taking a good faith approach to accommodation because the strictly limited pre-set population-based funding formula ignored the strength of the HFN claim, the high stage at which the HFN was in their treaty negotiations, and the quantity and value of timber proposed to be logged from HFN territory:

> Further, we have now been advised by your Ministry officials that their ability to negotiate proper economic accommodations for loss of forests in our territory is strictly limited by a pre-set population-based funding formula, without regard to our particular circumstances, the strength of our title claim, our AIP Treaty status, or disproportionate quantity and value of timber proposed to be logged from our territory.

[54] Chief Dennis then advised that the HFN intended to prohibit any logging activity within their claimed territory if a renewed IMEA could not be negotiated prior to April 30, 2004.

[55] Chief Dennis sent a letter to Ms. Stern dated March 19, 2004, stating that until the IMEA is renewed, the HFN:

> …will not be authorizing any new logging approvals in our territory without requiring that you undertake a full consultation and accommodation process…at present, there is no agreement in place with the Ministry of Forests that provides proper economic or cultural accommodation for on-going logging, or that provides appropriate process for reaching such accommodations…we must ask that you put all current Cutting Permits and other logging approval applications on hold until we have adequate time together to put a proper consultation and accommodation processes and economic mechanisms into place.

[56] On March 23, 2004, the HFN had a meeting with the Minister, the last such meeting provided for under the IMEA. The HFN used the meeting to reiterate the points made in the March 19, 2004 letter. The Minister indicated that the revenue available for distribution was fixed under the FRA initiative.

[57] In late March 2004, both MOF and TNO, through internal e-mails, were engaged in review of tenure opportunities and were assessing take back volumes as one potential source of volume to use for tenure at the final agreement stage of the treaty process. MOF and TNO were seeking replaceable tenure opportunities and,

in some cases, area based tenures; however, HFN were neither advised nor included in such discussions.

[58] On April 7, 2004, the Minister responded by letter to the HFN and stated that the Ministry was constrained from offering the HFN a greater proportion than the amounts fixed under the FRA policy. The Minister, when requested to discuss an alternative revenue sharing or tenure initiative refused:

> …I am constrained within a fixed treasury board budget under the Forest Revitalization Plan. Giving the Huu-ay-aht a greater proportion of this fixed amount would mean giving other First Nations less, which I am not prepared to do.

[59] The Minister set out the factors that he had to consider regarding timber distribution and acknowledged that he was prepared to authorize discussions towards a revised, 5 year tenure opportunity. The Minister advised that "any timber volume for a new tenure opportunity would be acquired through the timber allocation process" and that "[a]s the timber reallocation process [was] ongoing, any invitation for a new tenure could not be extended until January 2006". The Minister confirmed that this time frame corresponded "with the anticipated completion of the harvesting of the initial 265,000 m3 tenure held by the HFN and Uchucklesaht." The Minister advised that, "[g]iven the constraints outlined above on the timber supply on southern Vancouver Island, [he] anticipated that any new tenure using volume from the reallocation process would be approximately 16,900 m3 annually for HFN." This process indicates that the HFN would have to apply for tenure like any other First Nation and still be within the constraints of the population-based criteria.

[60] On April 16, 2004, Sharon Hadway assumed the role of lead negotiator for MOF with respect to the negotiations with HFN. On April 19, 2004, Ms. Hadway sent an e-mail to Chief Dennis in order to set the agenda for an April 21, 2004 meeting. The purpose of the meeting was "to provide a forum for frank and open disclosure to set the stage for a new agreement." The parties were to explore ways to continue with workable aspects of the IMEA.

[61] On April 21, 2004, the HFN met with Ms. Morris from the MOF. At the meeting, the HFN again requested that any annual award should be based on the amount of harvesting from its territory. The MOF confirmed the population-based formula for revenue and tenure amounts under the FRA. Further, the MOF informed the HFN that any FRA could not be retroactive to the expiry of the IMEA, and that it would only come into effect in the quarter that the agreement was signed. This meant that the HFN were not covered by any agreement during the time that negotiations continued, and that forestry operations continued in the Hahoothlee, and continue presently with no accommodation of HFN title or rights.

[62] The HFN further requested that tenure offered as accommodation should also be replaceable, particularly given the fact that the TFL is a replaceable tenure. The HFN noted that under the stated objectives of the forestry revitalization reallocation process, 8% of AAC was to be re-allocated to First Nations, and 8% if applied to the approximately 1,000,000 m3 per year coming out of HFN territory would require an award in the range of 80,000 m3. The HFN proposed trying to reach agreement with the Province on harvesting activity within the Hahoothlee; however, the MOF was not prepared to discuss an award based upon the amount being logged. Further,

the HFN proposed that a draft FRA should explicitly state that it represented only partial accommodation of its interests. The MOF would not agree to "partial accommodation". The MOF proposed that the FRA would explicitly represent an interim accommodation on the basis that all FRAs are a response to the uncertainties regarding the strength of a First Nation's claim. There was no strength of claim analysis under the FRA process.

[63] On April 26, 2004, Ms. Hadway sent an e-mail to Greg McDade, counsel for the HFN. Ms. Hadway advised Mr. McDade that the MOF had reviewed HFN's position that the benefits offered to the HFN in the negotiation process represented only partial or limited accommodation. Ms. Hadway advised that, although the MOF agreed that this agreement was a bit different because it was to be negotiated as a continuation of an IMEA, the Ministry would still be seeking acknowledgement that the benefits provided (revenue sharing and an additional tenure opportunity) would constitute interim workable accommodation for the term of the agreement. She also advised that MOF would be seeking to "include the provisions regarding cancellation and suspension of the benefits if litigation regarding the adequacy of the consultation process and benefits was pursued." She stated that the Minister had "already made significant commitments beyond a standard FRA" for the benefit of the HFN and advised that if the HFN chose to pursue a replaceable tenure opportunity through the treaty process, MOF would support any discussions with TNO.

[64] On May 13, 2004, Ms. Hadway, Chief Dennis, Mr. McDade, and Len Mannix of MOF in Nanaimo, met to discuss the next draft FRA. MOF stated that the proposed FRA was intended by MOF to provide interim workable accommodation

and that MOF could not extend the IMEA. HFN once again stated that accommodation must have a connection to the amount of harvesting in traditional territory and the extent of the infringement. MOF said that it would not enter into an agreement based on the amount of logging in the territory.

[65] On May 27, 2004, Mr. McDade sent an e-mail to Ms. Hadway with an attached draft of an agreement and notes with respect to possible suggested language to be substituted, further to the May 13, 2004 discussions. Mr. McDade advised that the language proposed attempted to respect the Province's view that it had promised what money it currently had, and the HFN view that it not be necessarily required to accept that this was an acceptable amount.

[66] Another meeting was held on June 10, 2004, to further negotiate with respect to the draft FRA. On June 11, 2004, Ms. Hadway sent an e-mail to Mr. McDade and Chief Dennis attaching a further amended proposal, being draft 4, for a FRA. In the e-mail, Ms. Hadway stated that:

> The benefits are not based on an objective analysis of the value of the accommodation owing...MOF is also not prepared to accept language in the agreement that states or implies that these benefits only provide partial accommodation, and that further benefits would be negotiated through the consultation process. The benefits that are offered through the Agreement are all of the economic accommodation that the Province has available to put on the table.

[67] Regardless of the above stated position, the MOF has argued before this court that they retain the ability under the legislative scheme to address any alleged infringement of First Nation interests outside of the FRA initiative pursuant to ss. 43.51 and 47.3 of the ***Forest Act***. These sections enable the MOF to invite,

without competition, an application from a First Nation for a direct award, forest licence, woodlot licence, or timber sale licence in order to implement or further an agreement between the First Nation and the Province. The FRA initiative does not preclude First Nations from also participating in the competitive process for these opportunities. In addition, a First Nation may be issued, without competition, a timber sale licence for less than 2,000 m3 through s. 48(1)(g)(i) of the ***Forest Act*** or a small volume free use permit for traditional and cultural activities. However, according to the FRA policy, "[i]nvitations to First Nations under Section 43.51 and 47.3 of the ***Forest Act*** may only be made to implement or further a treaty-related measures, interim measures, or economic measures agreement". Thus, a First Nation must have entered into an agreement with the Province in order to take advantage of these sections. Further, these sections of the ***Forest Act*** appear to be the reference to which the FNFS proposal was referring to as "top up tenure from other sources". Therefore, if a First Nation has already reached the Province's upper "top up" rate of 54 m3/person, then these sections of the ***Forest Act*** would not apply. Thus, the MOF has never offered the HFN anything outside of its target rate.

[68] On June 22, 2004, MOF increased the tenure award offer from 30 m3 per person to an amount of 54 m3 per person due to an additional source of volume in undercut volume (the difference between the AAC under the licences and the annual amount which was actually cut) in TFL 44 that was uncommitted and could be used to increase the size of the tenure opportunity for First Nations negotiating FRAs in TFL 44. This additional volume allowed MOF to increase the tenure award to its

upper target rate of 54 m3/person. This was possible in the case of the HFN as well as several other First Nations in TFL 44, including the Tseshaht and Ditidaht. This amount still remains within the MOF's FNFS policy.

[69] On June 24, 2004, Ms. Hadway wrote a letter to Chief Dennis setting out the MOF's commitment regarding the forest tenure opportunity and a response to the two main options for concluding an agreement as presented by the HFN:

> (a) MOF offered an increased tenure opportunity which it intended to locate within the Sarita River Valley;
>
> (b) HFN wanted the agreement to explicitly represent "partial accommodation" of their claim. MOF was prepared to expressly commit to recognition that the FRA was an interim measure and that it was not intended to address full reconciliation of the HFN's claim and to agree that nothing in the FRA, including the fact that the parties had entered into the FRA, would be used to limit or prejudice the position that either party might take in litigation or negotiations as to the existence of any duty of consultation or accommodation owed by forest licensees or other third parties to the HFN; and
>
> (c) MOF committed to contacting Weyerhauser with respect to the HFN proposal for a management approach that involved the HFN in the Sarita River Valley.

[70] Chief Dennis responded by a letter dated June 24, 2004, stating that the population-based economic accommodation offered did not relate to the strength of title and rights claim and was not sufficient to address the infringement of aboriginal rights and title that resulted from forest development activities. Chief Dennis indicated that the HFN might consider the offer if it were a replaceable licence with a volume of 50,000 m3 annually.

[71] On July 5, 2004, Ms. Hadway sent an e-mail to Mr. McDade and Chief Dennis, in response to their June 24, 2004 letter, advising that the MOF could not meet this tenure request as it had already put forward its best offer of 152,500 m3 over 5 years in a non-replaceable tenure. She added that the HFN might be able to acquire a replaceable tenure in a final treaty through negotiation in the treaty process.

[72] On July 5, 2004, Chief Dennis responded to Ms. Hadway's July 5, 2004 e-mail, stating that the HFN viewed the MOF proposal as a "take it or leave it response" and that he found it unacceptable that the forestry negotiations could only be achieved by licensee approval. Chief Dennis also said that he found it very "disturbing that government and industry benefit from ongoing forestry activity in our asserted territory and neither party provides any accommodation to Huu-ay-aht."

[73] On July 5, 2004, Chief Dennis also sent an email to Premier Campbell providing notice "that our Interim Measure Extension Agreement/Forest Range Agreement negotiations are not producing positive results to enable both parties to achieve an agreement." Chief Dennis then requested a meeting with the Premier and the MOF "to iron out the wrinkles."

[74] On July 12, 2004, Chief Dennis sent a letter to Ferd Hamre, Acting District Manager, South Island Forest District, MOF, advising that "[f]orestry operations within our territory involve a huge amount of annual extraction of timber resources, an infringement which is currently happening without any accommodation." Further, Chief Dennis stated:

> The current Crown position precludes any possibility that we can recommend the approval of harvesting in cutblock 961420 to our membership, or agree to harvesting of any cutblock within our territory. The Crown is not meeting its legal duty of accommodation. On cutblock 961420 we need the information we have requested in our previous correspondence to embark upon any assessment of the impact of harvesting. We wish to make it clear through this letter that in addition to the need for this information, we will object to any approvals being issued on any cutblock, until such a time as MOF negotiates a fair agreement which provides for acceptable economic accommodation.

[75] On July 19, 2004, Ms. Hadway sent an e-mail to Mr. McDade and Chief Dennis advising that MOF's offer had not changed since its proposal of June 24, 2004. MOF was still prepared to offer revenue sharing of $281,000 annually and the tenure opportunity of 54 m3 per person (152,500 m3 over 5 years) with an operating area situated in the Sarita River Valley. Ms. Hadway stated that the MOF "had proposed alternative language regarding clauses dealing with accommodation in an attempt to address the HFN concerns about those clauses." She also stated that "[a]s requested by HFN, MOF is having some further discussions with Weyerhaeuser regarding [Chief Dennis'] proposal of increasing the HFN role in the management of the Sarita River Valley through a partnership with Weyerhaeuser."

[76] On July 19, 2004, Chief Dennis responded to Ms. Hadway's e-mail, advising that he would ask Mr. McDade to review the alternative language issue and that he felt that he had responded to MOF's June 24, 2004 proposal. Chief Dennis advised that he felt that the HFN's counter-proposal had been rejected and that the HFN had requested the Premier's intervention on the FRA negotiations to assist with a resolution. Chief Dennis said that further negotiations would depend on the Sarita River Valley proposal.

[77] On July 27, 2004, Chief Dennis requested an update with respect to the HFN proposal for an area-focused tenure in the Sarita Valley. Ms. Hadway responded to Chief Dennis' e-mail, advising that she had provided an updated FRA proposal in her e-mail dated July 19, 2004, and that she was waiting for the HFN to respond to the proposed language. She stated that the MOF had discussions with Tom Holmes of Weyerhaeuser with respect to partnerships in the Sarita River Valley and had scheduled a second meeting for later in August.

[78] On August 24, 2004, at a further meeting with MOF, the HFN was advised that there continued to be no room to negotiate any change in the revenue or tenure formulas. The HFN were provided with the Province's fifth draft of the FRA, which the HFN did not accept. The HFN indicated that based on the draft, they had no choice but to pursue litigation. A draft writ was tabled and the meeting ended.

[79] HFN served the petition with respect to this matter on September 20, 2004. Further negotiations ceased.

[80] From the time the IMEA expired in March 2004 until January 18, 2005, logging operations have continued within HFN territory. Cutting permits have been granted in at least 9 cutblocks and road permits have been granted in at least a further 11 cutblocks within the Hahoothlee during this period, representing a total volume of approximately 600,000 m3 of harvest.

[81] In the "consultation process" which took place between the MOF and the HFN from November 2003 to the present, no other options besides the FRA were

presented to the HFN. For instance, in Ms. Hadway's June 11, 2004 email addressed to Greg McDade and Chief Dennis, she stated that:

> The benefits that are offered through the Agreement [FRA] are all of the economic accommodation that the Province has available to put on the table...MOF is not prepared to approach the negotiation of the Agreement predicated on the assumption that the consultation process should be open-ended…

[82] Furthermore, at no time did the Ministry ever indicate that a more formal process was available, nor did they provide information as to how the HFN could enter into a more formal consultation process. In addition, considering section 16.9 of the fifth draft of the FRA, the Ministry is not limited by the agreement, i.e., they can still negotiate while litigation is taking place. The Ministry maintains that it has always been willing and able to enter into a formal consultation process with the HFN, yet to date they have taken no steps to do so.

[83] The Ministry has also argued that the formal consultation process is too long and that the HFN will have already entered into a treaty with the Government of British Columbia by the time that any formal consultation would ever be concluded. Yet, such an assertion has no substance because the MOF and the British Columbia Treaty Office have failed to communicate with each other in this regard.

[84] The Ministry put forward its FRA policy as the only form of economic accommodation available to a First Nation until a treaty is reached. In the FRA policy dated July 31, 2003, the Province recognizes that the FRA policy is in response to ***Haida***. Section 3 of the policy states:

> The courts have held that First Nations' aboriginal title and rights in respect of land and resource use are recognized and affirmed under Section 35 of the *Constitution Act, 1982.* Aboriginal title, where it exists, has been determined by the courts to have an economic aspect. Recent legal decisions (Haida, Skeena) have determined that an obligation of the Crown exists to seek to accommodate potential First Nation aboriginal rights and title interests when making forest management decisions.
>
> …In response, the government of British Columbia has developed a framework to ensure the appropriate, consistent, and fair application of accommodation measures…

[85] At section 4, the policy further states that:

> Court decisions have increased the requirements of the Ministry of Forests to consult with First Nations on a wide-range of forest and range management decisions.
>
> …
>
> The policy approach to implementing the accommodation strategy is to offer access to economic benefits (revenue sharing and access to timber) through negotiated agreements with individual First Nations. In exchange for the economic benefits, agreements will contain provisions that promote a stable operating environment for the forest and range section, including consultation procedures and terms indicating that the Province is providing workable accommodation of the First Nation's economic interests arising from forest and range decisions.

[86] The language in the FRA policy, i.e. that in response to ***Haida*** and other court decisions, the Province has developed the FRA process, leads to the logical conclusion that the FRA process is the consultation process regarding the economic aspects of aboriginal title and rights.

(f) Does the FRA Policy follow the Government's Formal Consultation Policy?

[87] There are two formal consultation policies for consultation with First Nations. The first is the "Provincial Policy for Consultation with First Nations", dated October 2002 ("Provincial Policy"); the second is the "Ministry [Ministry of Forests] Policy", dated May 14, 2003.

[88] The purpose of the Provincial Policy is to "describe the Provincial approach to consultation with First Nations on aboriginal rights and/or title that have been asserted but have not been proven through a Court process". According to this policy, the Province must follow the following steps:

> (1) Pre-consultation assessment: an initial assessment should evaluate whether a particular decision or activity will require consultation.
>
> (2) Stage 1: initiate consultation. Stage 1(a) requires decision makers to consider aboriginal interests identified or raised by potentially affected First Nations. The scope and depth of consultation required is proportional to the soundness of the aboriginal interests that are at issue. According to stage 1(b), more indepth consultation is required when a number of the following criteria are met: title to the land had been continuously held in the name of the Crown; land near or adjacent to a reserve or formal settlement or village sites; land in areas of traditional use or archaeological sites; land used for aboriginal activities; notice of an aboriginal interest/aboriginal rights and/or title from a First Nation, even where made to another Ministry or agency of the Crown; and land subject to a specific claim.
>
> (3) Stage 2: consider the impact of the decision on aboriginal interests. If the Province determines that there appears to be a likelihood that the decision may result in an infringement of those interests should they be proven subsequently to be existing aboriginal rights and/or title, the Province must go to stage 3.
>
> (4) Stage 3: consider whether any likely infringement of aboriginal interests could be justified in the event that those interests were proven

> subsequently to be existing aboriginal rights and/or title. The nature and scope of the duty to consult will vary with the nature of the right, the circumstances, and with the nature and extent of the infringing action. Aboriginal title embodies both cultural and economic aspects. Addressing both is part of the justification of infringement of aboriginal rights. If the Province finds that the likely infringement of aboriginal interests, should those interests be proven subsequently to be existing aboriginal rights and/or title, appears not to be justifiable, the Province must go to stage 4.
>
> (5) Stage 4: look for opportunities to accommodate aboriginal interests and/or negotiate resolution bearing in mind the potential for setting precedents that may impact other ministries or agencies. This step may involve the use of treaty related measures, interim measures, economic measures, programs, training, economic development opportunities, agreements or partnerships with industry or proponents, or other arrangements aimed at attempting to address and/or reach workable accommodations with respect to aboriginal interests, particularly where the scope of discretion to accommodate such interests under the statutory framework in question is limited. The range of activities that can be carried out in terms of coming to a negotiated resolution vary greatly from situation to situation, and according to agency statutory mandates, policies, programs, appropriations, and available statutory discretion.

[89] The MOF has not applied stage 1 to the negotiations with the HFN. According to stage 1(a) of the Provincial Policy, the Province must consult in proportion to the soundness of the aboriginal interests that are at issue. According to stage 1(b), more indepth consultation is required when a First Nation has met a number of criteria. The HFN has met all criteria listed, including having a specific claim on the land that does not overlap with other First Nations claims to parts of the Hahoothlee.

[90] The MOF has not applied stage 3 which states again that “the nature and scope of the duty to consult will vary with the nature of the right, the circumstances, and with the nature and extent of the infringing action”. Regardless of the HFNs

continual request to enter negotiations on the basis of the strength of their claim and the nature of the infringement, the MOF have followed the FRA policy, and in particular, the per-capita, population-based criteria, in order to determine the extent of negotiations.

[91] The second formal consultation policy is the Ministry Policy. According to the Ministry Policy, the consultation process is to "include considerations on the degree to which the forestry decision impacts the landbase, and the degree to which the First Nation likely has aboriginal interests within the area under decision." According to the Ministry Policy, the consultation process will:

> (1) identify First Nations potentially affected by proposed forest development decisions,
>
> (2) provide them with all relevant and reasonably available information regarding proposed forest development decisions,
>
> (3) request information from First Nations that will assist in the identification of, and provide the basis for claims of, aboriginal interests that may be impacted by proposed forest development decisions,
>
> (4) consider the degree to which the forestry decision impacts the landbase,
>
> (5) consider whether the aboriginal interests described by the First Nation will potentially be infringed by the proposed development activity or decision, and
>
> (6) consider the apparent strength of aboriginal interests in relation to forest development decisions, seeking to accommodate those interests where appropriate.

[92] The Ministry has met the first requirement in the consultation process; however, the other requirements do not appear to have been followed.

III. ANALYSIS

a) Can the Petitioner Proceed by Petition to Seek Declaratory Relief?

[93] This matter was commenced by petition under the ***JRPA***. The respondent has argued that negotiation under the FRA initiative is not the exercise of a statutory power and so not amenable to judicial review. Further, it was submitted that consultations under the FRA programme are advisory in nature so do not fall under the ***JRPA.*** Finally, the respondent said that the FRA initiative was a strategic policy to provide incentive to First Nations to participate in a voluntary initiative where options are available and so is not reviewable under the ***JRPA***. The petitioner says that the FRA initiative was created by statute, namely, the ***Forestry Revitalization Act*** and the ***Forest Act*** which called upon the province to make specific agreements with First Nations and that the vehicle for those agreements is the FRA. It is not a voluntary policy when no options are available.

[94] ***Haida Nation v. British Columbia (Minister of Forests)*** (2004), 245 D.L.R. (4th) 33, 2004 SCC 73 [***Haida***] and ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*** (2004), 245 D.L.R. (4th) 193, 2004 SCC 74 [***Taku***] established that the principle of the honour of the Crown requires the Crown to consult and, if necessary, accommodate Aboriginal peoples prior to proof of asserted Aboriginal rights and title. This is a corollary of s. 35 of the ***Constitution Act, 1982***, in which reconciliation of Aboriginal and Crown sovereignty implies a continuing process of negotiation which is different from the administrative duty of fairness that is triggered by an administrative decision that affects rights, privileges,

or interests (***Haida*** at paras. 28-32). The obligation is a free standing enforceable legal and equitable duty (***Haida Nation v. British Columbia (Minister of Forests)*** (2002), 99 B.C.L.R. (3d) 209 at para. 55, 2002 BCCA 147 [***Haida Nation*** (2002)]; ***Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*** (2004), 34 B.C.L.R. (4th) 280, 2004 BCSC 1320 at para. 73 [***Squamish Nation***]). The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution (***Haida*** at para. 60). In its review, the court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process (***Taku*** at para. 24). It is not a question, therefore, of review of a decision but whether a constitutional duty has been fulfilled (***Gitxsan Houses v. British Columbia (Minister of Forests)*** (2002), 10 B.C.L.R. (4th) 126 at para. 65, 2002 BCSC 1701 [***Gitxsan Houses***]).

[95] The appropriate standards of review were discussed in ***Haida*** at paras. 60-63. Briefly stated, the existence or extent of the duty to consult or accommodate is a legal question requiring correctness. Government misconception of the seriousness of the claim or impact of the infringement is a question of law to be judged by correctness. When infused with an assessment of facts, the standard is reasonableness. The process itself is to be judged on the reasonableness standard with the essential question being whether the government action viewed as a whole accommodates the collective aboriginal right in question. The government's process must be reasonable. Hall J.A. admonished in ***Musqueam Indian Band v. British Columbia (Minister of Sustainable Resources Management)***, 2005 BCCA 128 at

para. 96 [***Musqueam***] that there should be some deference when a court considers the adequacy of the government's efforts to consult with an aboriginal group, and that administrative law principles suggest a standard of reasonableness when the question is not purely a legal one.

[96] In ***Haida Nation v. British Columbia (Minister of Forests)*** (2004), 35 B.C.L.R. (4th) 189, 2004 BCSC 1243, the decision regarding the duty to consult stemmed from the original breach of the Crown's duty in issuing the forestry licence. Mr. Justice Kelleher said at paras. 36 and 37 that there did not have to be a discrete decision to trigger the duty to consult and relied upon ***Haida Nation*** (2002), to conclude that the obligation is not linked to ongoing decisions or breaches of the Crown. In ***Haida Nation*** (2002), Lambert J.A. commented at para. 34 that it was unnecessary on the facts of that case to consider whether a statutory power was being exercised when forests are managed and operations continue by third parties under a tree farm licence.

[97] A similar argument had been made by the Crown in ***Squamish Nation*** where it was argued that an application was premature where an interim agreement to change a shareholder and expand a ski area had been made pursuant to policy under the ***Land Act***, R.S.B.C. 1996, c. 245. The court (at para. 93) found that the duty to meaningfully consult arose in relation to the earliest decisions that affected whether the proposal would go ahead because the Crown knew of the First Nation assertion of claims.

[98] In ***Musqueam*** at paras. 16-23, Madam Justice Southin considered that the ***JRPA*** was inapt to the claim in the nature of prohibition to quash a decision to proceed with the sale of certain lands and for declaratory relief with respect to the duty of consultation because there was no assertion that the transaction in issue was authorized by statute. The correct way to proceed was by action. Nonetheless, the learned justice allowed the matter to proceed as if by action. Neither of the two other justices appeared to have shared this view as neither commented on Madam Justice Southin's conclusions. Most of the cases on this subject have been commenced by petition (***Haida, Squamish Nation, Musqueam,*** and ***Gwasslam v. British Columbia (Minister of Forests),*** 2004 BCSC 1734 [***Gwasslam***]. In most of these cases, the 'decision' that led to the duty to consult was the original breach of Crown duty in issuance of the forestry licence in the first place.

[99] It is apparent that the courts have not been pedantic or overly restrictive in the type of action which it regards as a 'decision' when it comes to declaratory relief following review of whether the Crown has discharged its obligation to consult with First Nations. This is consistent with the view expressed by the learned authors, DeSmith, Woold & Jowell, ***Judicial Review of Administrative Action***, 5th ed. (London: Sweet & Maxwell, 1995), at p.114:

> In summary, it can be said that where an application is for an order of certiorari, logic may require that there be some "decision" or "determination" capable of being quashed. The court should not, however, be pedantic or overly restrictive in the type of action which it regards as a "decision". Further, where the only relief sought is a declaration there is no need, at least in challenges to primary legislation, for any "decision" to be identified other than the legislative instrument itself.
>
> [Emphasis added]

[100] The Crown had also argued in ***Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*** (2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001 that advisory decisions do not fall within the jurisdiction of the ***JRPA***, citing the same cases that were sited before this court, ***Save Richmond Farmland Society v. Richmond (Township)*** (1988), 36 Admin. L.R. 45 (B.C.S.C.) [***Save Richmond***] and ***Benias v. Vancouver (City)*** (1983), 3 D.L.R. (4th) 511 (B.C.S.C.) [***Benais***]. Although the trial court refused to order declaratory relief because the Crown conduct was advisory in nature and so did not fall within the definition of the exercise of a statutory power, neither the Court of Appeal nor the Supreme Court of Canada followed the learned trial court justice on this point. Both ***Save Richmond*** and ***Benais*** are distinguishable as they discuss the issue of judicial review in light of decisions in the form of recommendations. The actions taken by the respondent in dealing with the HFN are not meant to be recommendations but are decisions regarding proposal for a formal contract regarding forestry operational and management decisions at present and into the future.

[101] In ***Operation Dismantle Inc. v. Canada***, [1985] 1 S.C.R. 441 at 459, 18 D.L.R. (4th) 481 [***Operation Dismantle*** cited to S.C.R.], the majority agreed that judicial review was available to scrutinize policy decisions of government for compatibility with the Constitution. A preventative declaratory judgment is available if a legal interest or right has been placed in jeopardy or uncertainty. The court said at p. 480:

> Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, suggests that declaratory relief in cases which are not susceptible of any other relief is distinctive in that:

> …no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant…

[102] There is authority that applications for declaratory relief under the ***Canadian Charter of Rights and Freedoms,*** Part I of the ***Constitution Act, 1982***, being Schedule B to the ***Canada Act 1982*** (U.K.) 1982, c. 11 [***Charter***] may be taken by petition when the constitutional rights of an individual are called into question (***R. v. S.B.*** (1982), 40 B.C.L.R. 273, 142 D.L.R. (3d) 339 (S.C.), rev'd on other grounds (1983) 43 B.C.L.R. 247, 146 D.L.R. (3d) 69 (C.A.)). Madam Justice Allan discussed whether an action or petition should be brought when a party seeks declaratory relief related to section 15 ***Charter*** rights in ***Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*** (1999), 32 C.P.C. (4th) 305 at paras. 23-32 and concluded that such matters could proceed either by petition or action. A petition was more appropriate to clarify the nature and extent of public duties due to the summary nature of the proceedings and the ability of the court under the ***Rules of Court***, B.C. Reg. 221/90 to order more generous pre-trial procedures if warranted.

[103] In ***Glacier View Lodge Society v. British Columbia (Ministry of Health)***, [1998] B.C.J. No. 852 (S.C.), aff'd (2000), 75 B.C.L.R. (3d) 373, 2000 BCCA 242, an issue arose as to whether the matter should proceed by action or judicial review when it concerned the exercise of statutory powers of amalgamation under the ***Health Authorities Act***, R.S.B.C. 1996, c. 180. Shabbits J. held at paras. 22-24:

> [22] Section 2 of the *Judicial Review Procedure Act* does provide that on an application for judicial review, the court may grant any relief that the applicant would be entitled to in any proceeding for a declaration or injunction or both in relation to the proposed exercise of a statutory power. That section is permissive. It does not require that declarations or injunctions relating to the proposed exercise of a statutory power be by way of a judicial review; it permits such relief in that kind of an application.
>
> [23] It is my finding that this matter is governed by s. 13 of the *Judicial Review Procedure Act*, which provides that on an application of a party to a proceeding for a declaration or injunction, the court may direct that any issue about the proposed exercise of a statutory power be disposed of summarily, as if it were an application for judicial review. The Act provides that such direction may be made whether or not the proceeding includes a claim for other relief, as is the case with this proceeding.
>
> [24] The matter then, is one entirely of discretion. In reaching this conclusion, I am mindful of the plaintiff's submission that it is not the manner in which the Minister may exercise a statutory power of decision that is in question, but rather the constitutionality of legislation. Notwithstanding that submission, it is the Minister's proposed exercise of a statutory power which has given rise to these proceedings, and that is a matter to which s. 13(1) of the *Judicial Review Procedure Act* relates.

[104] In conclusion, declaratory relief has been granted by this court in several cases involving First Nations disputes concerning the duty to consult. In regards to forestry decisions, declaratory relief stems from the initial decisions to issue timber licences. In this case, the FRA initiative is a creature of statute, the ***Forestry Revitalization Act*** and the ***Forest Act,*** which enable the province to make specific agreements with First Nations regarding forest tenure. The FRA is the vehicle that the Ministry chose to deliver those specific agreements. The concept of 'decision' should not be strictly applied when there is legislative enablement for a government initiative that directly affects the constitutional rights of First Nations. This approach has been approved by the Supreme Court of Canada in ***Haida*** when it spoke of

review of governmental action affecting the duty to consult. The petitioners are entitled to seek the declaratory relief under the ***JRPA*** that the FRA policy does not meet the Crown's constitutional obligation to consult the HFN.

b) Does the Duty to Consult and Accommodate the HFN Exist?

[105] The duty to consult 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" (***Haida*** at paras. 35 and 64). "Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate" (***Haida*** at para. 37). It is clear that this duty arises before an infringement occurs and is continuing (***Haida Nation*** (2002) at paras. 42-43). Once the government has knowledge of an asserted Aboriginal title or right, it must consult as to how exploitation of the land should proceed (***Haida*** at para. 74). In ***Taku***, the duty was engaged because the Crown was aware of the claim through the treaty negotiation process.

[106] The Crown has had knowledge of the HFN claim since at least 1994 when it entered the treat negotiation process as part of the Maa-nulth Treaty Group. The status of the HFN within the treaty negotiations is now at level 5 with a comprehensive agreement in principle that has been ratified by the HFN. Crown knowledge is obvious.

[107] The nature of infringement or exploitation sufficient to trigger the duty was considered in ***Haida*** when, in general terms, McLaughlin C.J.C. said that the Crown may continue to manage a resource subject to consultation with Aboriginal groups,

depending on the circumstances related to strength of claim. Unilateral exploitation is not honourable. In relation to tree farm licences, the court said at paras. 75-76:

> [75] The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence (T.F.L.), or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64)
>
> [76] I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut (A.A.C.) for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.
>
> [Emphasis added]

[108] In ***Taku***, the Crown knew that re-opening of a mine had the potential to adversely affect the First Nation claim so to trigger the duty to consult.

[109] The Crown has argued here that McLaughlin C.J.C. meant that consultation should take place at the point of decision to grant or renew a licence and that there is no specific impugned conduct here that might adversely affect Aboriginal interest

so that it is premature to consider any consultation. An allegation of general continuing forest operations is insufficient and too broad to trigger the duty according to the Crown. This cannot be so.

[110] Tysoe J. considered the nature of the infringement in ***Gitxsan Houses*** after the Crown had there argued that the petitioners had not established a *prima facie* infringement. While that case and ***Haida*** involved replacement and transfer of tree farm licences, the court found that a broader view of potential infringement was contemplated within the duty. Lambert J.A. said in ***Haida Nation v. British Columbia (Minister of Forests)*** (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462 at para. 91:

> The provincial Crown may infringe on the aboriginal title and aboriginal rights of the Haida people if it can justify the infringement. The infringement would consist in establishing a legislative and administrative scheme under the *Forest Act*, granting Weyerhaeuser an exclusive right to harvest timber in the area covered by T.F.L. 39, renewing the issuance of T.F.L. 39, transferring T.F.L. 39 to Weyerhaeuser, approving management plans, and issuing cutting permits, all in furtherance of the same legislative scheme, and all in violation of the aboriginal title and aboriginal rights of the Haida people. The provincial Crown may justify its actions by meeting the tests for justification. Among the tests is a requirement that the Haida people be consulted before the infringement actions are taken. In this case, the Crown provincial did not consult the Haida people in any effective way at any stage of the furtherance of the legislative and administrative scheme, and so is in breach of its obligation of consultation at every stage where a justification test would require effective consultation.

[111] In ***Gitxsan Houses*** at para. 81, the court said that the Crown must ensure that its continuing duty is fulfilled before the infringement is perpetuated by a further transaction or dealing with the licence.

[112] The FRA assumes HFN forbearance on a number of forestry decisions that would be made over the five year term of the agreement as listed in paragraph 28 above. In the meantime, absent agreement, these decisions are being made regularly and cutting continues on the land without meaningful consultation or a process for it. The question posed by the Crown is how specific the infringement has to be before the duty is triggered. With respect, that is not the question. The obligation arises upon knowledge of a claim and when infringement is contemplated. It is an ongoing obligation once the knowledge component is established. It is a process. How the Crown deals with the continuing obligation is another factor. In this case, the Crown attempted to deal with the requirement to consult with a five year plan for agreement based upon population. It was rejected by the HFN. The Crown's suggestion that a challenge should then be made on a cutblock by cutblock basis would render this process futile from the point of view of HFN and represents a practical take it or leave it attitude on the part on the Crown in the absence of continuing consultation. When a series of operational decisions is certainly contemplated, the duty to consult is triggered if accommodation has not been previously accepted.

[113] The first step in the process is to discuss the process itself (***Gwasslam*** at para. 8). The Crown is then obligated to design a process for consultation that meets the needs for discharge of this duty before operational decisions are made. While it is conceivable that a challenge could be made on a cutblock by cutblock basis, this is largely dependent on whether the Crown has fulfilled its duty in the meantime based on the content of the consultation that has or has not occurred.

c) What is the Scope of the Duty to Consult?

[114] The scope of the duty to consult is distinguished from knowledge sufficient to trigger a duty to consult. McLaughlin C.J.C. wrote at para. 37 of ***Haida***:

> [37] There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

[115] What the honour of the Crown requires "varies with the circumstances" (***Taku*** at para. 25). It must be understood generously (***Haida*** at para. 17). The scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (***Taku*** at para. 29; ***Haida*** at para. 39). The duty is conditioned and informed by the nature and strength of First Nation claims (***Musqueam*** at para. 92). This assessment will assist the Crown in determining the scope of the duty within the spectrum described by McLachlin C.J.C. at paras. 43-44 in ***Haida***:

> [43] Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where

> the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. '"[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
>
> [44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

[116] To substantially address First Nation concerns, communication must be unique to the group addressed and not the same as with all stakeholders (***Gitxsan Houses*** at para. 88). The individual nature of the consultation is apparent from the requirement to consult and seek accommodation that is “proportional to the potential soundness of the claim for Aboriginal title and rights” (***Haida Nation*** (2002) at para. 51). The requirement to approach each case individually is key here when the government has attempted to impose an overall policy upon all Aboriginal groups based upon population and seeks to justify this imposition by an assertion that this policy promotes equality and fairness to each Aboriginal person. This is not the criteria established by the courts and does not afford the individual consideration required to fulfill the duty as described by McLaughlin C.J.C. without more.

[117] The duty to consult may lead to a duty to accommodate by changing government plans or policy in response to Aboriginal concerns (***Haida*** at para. 46; ***Taku*** at para. 42). Meaningful, good faith consultation requires willingness on the Crown to make changes based upon information that emerges during the consultation process (***Taku*** at para. 29). Good faith on the part of the Crown means exhibition throughout consultation of a willingness to substantially address Aboriginal concerns as they are raised (***Haida*** at para. 42). Hard bargaining is one thing; sharp dealing is quite another. The former is not offensive, but the latter is. Accommodation begins when policy gives way to Aboriginal interests.

[118] Evidence of acceptance into the treaty negotiation process is sufficient to establish a *prima facie* case in support of Aboriginal rights and title. In ***Taku***, acceptance of the First Nation into the treaty negotiation process was sufficient to establish a strong *prima facie* case that placed the petitioners within the spectrum of the duty of consultation above minimum requirements of notice and disclosure of information and to a level of responsiveness to its concerns. In that case, traditional land usage by the First Nation was purposefully and expertly studied by the government as to the specific impact of a proposed mining road with many meetings, committees, hearings, preparation of written reports and extensions of time within the process provided by the ***Environmental Assessment Act***, R.S.B.C. 1996, c. 119 as rep. by S.B.C. 2002, c. 43, s. 58. The Supreme Court of Canada found this process adequate to satisfy the honour of the Crown.

[119] In ***Haida***, there was a *prima facie* case in support of Aboriginal title and a strong *prima facie* case for the Aboriginal right to harvest red cedar. Although there

had been consultation on forest development plans and cutting permits, there had been no specific consultation with respect to replacement of the tree farm licence. The ongoing consultation on operational planning did not substitute for consultation on replacement of the tree farm licence. In that case, the court found that there had been no consultation at all.

[120] In this case, the duty of consultation falls on the higher end of the spectrum. The HFN and the Crown are near the end of treaty negotiations with an agreement in principle that acknowledges rights related to forest resources and title to certain lands without legally recognizing HFN's rights or title. There have been two previous accommodation agreements (the IMA and IMEA) that, for six years, had provided a process for continuing consultation that had been honoured by both parties. On this basis alone, the HFN have shown a strong *prima facie* claim to title and rights related to forestry resources such that consultation with respect to ongoing operations is warranted. In addition, the Crown holds title to the land in question with the HFN claim based upon occupation of the lands before Crown sovereignty. Although there are overlapping claims over part of the Hahoothlee, a part is exclusively claimed by the HFN. The issue of exclusive possession is challenging but not insurmountable (see ***Musqueam*** at paras. 87-88). It certainly does not mean that no consultation should occur. The level of potential infringement of rights to timber resources is severe given the harvest rate contemplated by third parties over the next five years.

d) Has the Crown Fulfilled its Duty to Consult and Accommodate the HFN?

[121] Any consultation must be meaningful, although there is no duty to reach agreement (***Haida*** at para. 10). To be meaningful, consideration must be given to the strength of claim and to the degree of potential infringement. In the earlier case of ***R. v. Nikal***, [1996] 1 S.C.R. 1013 at para. 110, 133 D.L.R. (4th) 658, Cory J. said that every reasonable effort must be made to inform and consult in relation to resources to which Aboriginal claim has been made. It is a question of law whether the government misconceived the seriousness of the claim or impact of the infringement. The government must, therefore, be correct on these matters and act on the appropriate standard (***Haida*** at para. 63). The process itself is to be examined on the standard of reasonableness (***Haida*** at para. 62).

[122] A strong *prima facie* claim was said by Hall J.A. in ***Musqueam*** at para. 95 to give rise to deep consultation possibly entailing an opportunity to make submissions, formally participate in any decision making processes, and receive written submissions to demonstrate that Aboriginal concerns were addressed.

[123] To drop the processes established in the IMA and IMEA without consultation or notice and engage in an ad hoc series of meetings and correspondence fails to accomplish the first step in a consultation process. This is so, regardless that the term of these agreements was set to expire. The Crown had an obligation to introduce a new consultation process before the agreements expired. To suggest to this court that it should have been apparent to the HFN that negotiation of the FRA was not a formal consultation, but some sort of preliminary business discussion,

cannot withstand scrutiny in face of the Crown obligation for continuing, meaningful consultation. This is especially so when the Crown failed to follow its own process for consultation as set out in the Provincial Policy for Consultation with First Nations and the Ministry Policy, and when it was apparent early on that the HFN were not prepared to accept the business premise of the FRA. In my view, this was not reasonable. The Crown is obliged to establish a reasonable consultation process for future consultation with respect to economic accommodation for ongoing forest activity within the Hahoothlee. If this involves inclusion of other First Nations, so be it.

[124] Was the Crown's position here just hard bargaining? Or did it infringe on the honour of the Crown's duty of good faith? A good idea of bargaining can be gleaned from labour relations cases where, although not analogous, there is discussion of good and bad faith bargaining. For example, in ***Iberia Airlines of Spain***, CLRB Decision No. 796 (Can.Lab.Rel.Bd.), "surface bargaining" was distinguished from hard bargaining. The employer had engaged in surface bargaining when its position of active bargaining at first glance seemed above reproach. However, on closer examination as revealed by the fact that the employer had never actually assessed the employees' demands, an intransigent position through passive resistant negotiation was revealed. Of course, labour negotiations assume an obligation to agree which is not the case here. However, the nature of good faith bargaining is instructive to the consultation process in which the Crown and the HFN were supposed to be engaged.

[125] This court considered the FRA initiative in ***Gwasslam***. There, the ongoing degree of infringement of the claim of a right to timber resources was not significant (para. 21). Tysoe J. was clear that the scope of the duty to consult was proportionate to a preliminary assessment of the claim for Aboriginal rights or title and the seriousness of the potentially adverse effect upon the rights or title as claimed (paras. 45 and 50). He acknowledged that it might be commercially expedient for the government to fulfill the duty to consult and accommodate through a five-year FRA rather than each time it had a dealing with the tree farm licence. He also said that both the government and the First Nation had a business decision to make as to whether the offer contained in the FRA was sufficient accommodation for a five-year period. He did not, however, decide whether the Crown had fulfilled its duty to consult in the offering of the FRA. While he observed that the Crown's approach in the FRA was not unreasonable because there was no attempt to force the FRA upon the First Nation, he agreed that economic compensation would more logically be based upon the volume of trees harvested in the claimed territory rather than a population base (para. 57). In the end, the learned justice said that the parties should resume negotiations in relation to the FRA based upon the guidance provided in ***Haida*** and ***Taku***.

[126] To fail to consider at all the strength of claim or degree of infringement represents a complete failure of consultation based on the criteria that are constitutionally required for meaningful consultation. While a population-based approach may be a quick and easy response to the duty to accommodate, it fails to take into account the individual nature of the HFN claim. In ***Musqueam*** at para. 91,

a practical interim compromise failed to meet the tests enunciated by the Supreme Court of Canada when it was not informed or conditioned by the strength of claim and degree of intervention analysis. In this case, the government did not misconceive the seriousness of the claim or impact of the infringement. It failed to consider them at all. The government acted incorrectly and must begin anew a proper consultation process based upon consideration of appropriate criteria.

[127] A proper consultation process considering appropriate criteria must involve active consideration of the specific interests of HFN. The conduct of the Crown from February 2004 through to the end of negotiations was intransigent. Although the government gave the appearance of willingness to consider HFN's responses, it fundamentally failed to do so. This is particularly apparent in correspondence of February 25, April 7, April 19, and April 26 and in the immediate aftermath of those correspondences. The government never wavered from its position as expressed in the FRA policy. The policy was always intended to be a form of IMA so changing the name on the HFN's FRA was within the policy. The amounts offered in revenue and tenure were always within the policy guidelines with the government starting at the lowest offer available. No effort was made to work with other ministries, particularly the Ministry of Sustainable Resources, to consider what options might be available throughout government to accommodate HFN concerns. No alternative was offered to the HFN despite repeated requests by the HFN for consideration of their specific situation. No formal consultation process was ever suggested. No continuing consultation occurred when the HFN did not accept the FRA. Logging continues. The government has failed to accord the HFN the status that a treaty

level 5 First Nation should receive. Presumably, this conduct would be considered in determining whether the infringement of HFN title and rights was justified.

[128] This is not to comment at all on the appropriateness or adequacy of the accommodation that might be achieved at the end of the consultation process. It may be that the substance of the offer of accommodation contained in the FRA may be sufficient accommodation. However, that would have to be determined not by a population based criteria, but by a strength of claim and degree of infringement assessment. That question is deferred until proper consultation has taken place. The fact that some First Nations have accepted the FRA offer indicates only that those groups made a business decision to accept the offer in a practical sense. It is not reflective of the sufficiency either of the consultation process or of the accommodation offered.

IV. CONCLUSION

[129] The petitioners shall have declaratory relief as set out in the petition. The petitioners are entitled to costs on the scale of 4.

"J. Dillon, J."
The Honourable Madam Justice J. Dillon