Forest Appeals Commission

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DECISION NO. 2008-FOR-010(a)

In the matter of an appeal under section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

BETWEEN:	Jack Sebastian and the Suskwa Chiefs Economic Corporation	**APPELLANTS**
AND:	Government of British Columbia	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission Alan Andison, Panel Chair	
DATE:	September 9-11, 2009	
PLACE:	Vancouver, British Columbia	
APPEARING:	For the Appellants:	David Bursey, Counsel Jana McLean, Counsel Margaret Mackie, Articled Student
	For the Respondent:	Glen R. Thompson, Counsel Joel Oliphant, Counsel

APPEAL

[1] This appeal is brought by Jack Sebastian and the Suskwa Chiefs Economic Corporation (the "Corporation") against a November 10, 2008 determination made by Barry Smith, RPF, District Manager for the Skeena Stikine Forest District (the "District Manager"), Ministry of Forests and Range (the "Ministry")[1]. The Government of British Columbia ("the Government") is the Respondent in these proceedings.

[2] The determination was issued to the Appellants, Jack Sebastian and the Corporation, pursuant to section 71 of the *Forest and Range Practices Act* ("*FRPA*").

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[1] The responsibilities of the Ministry of Forests and Range in relation to the investigation and determination process have now been transferred to the Ministry of Forests, Lands and Natural Resource Operations.

In it, the District Manager concluded that the Appellants had contravened section 52(1) of the FRPA by harvesting timber from Crown land without authorization. Specifically, the District Manager found that Jack Sebastian and the Corporation harvested 1,238 cubic metres of timber from areas beyond the harvest boundaries identified in three forestry licenses: one license was held by Jack Sebastian, and two licenses were held by the Corporation. The District Manager assessed a penalty of $500 against Jack Sebastian and two penalties of $1,500 and $500 against the Corporation for contraventions of each of its licenses.

[3] The Appellants do not dispute that the contraventions occurred. Rather, they submit that the District Manager erred by failing to discharge his duty to consult with the Gitxsan on the potential impact that the Ministry's investigation and the administrative penalty proceedings might have on the Gitxsan's aboriginal title to the land. All of the harvesting (both authorized and unauthorized under the licenses) took place within a territory of land over which the Gitxsan claim title. The territory covered by the licenses is described by the Appellants as the Madii Lii, which is part of the Lax Yip [territory] held by the Wilp [House] Luutkudziiwus.

[4] On an appeal, section 84(1) of the *FRPA* states that the Commission may:

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> (c) consider the findings of the person who made the determination or decision, and
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> (d) either
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> (i) confirm, vary or rescind the determination or decision, or
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> (ii) with or without directions, refer the matter back to the person who made the determination, for reconsideration.

[5] The Appellants ask the Commission to reverse the contraventions and the penalties. The Appellants also sought an order for costs, however, they withdrew that application during the course of the hearing.

[6] This appeal was conducted by way of an oral hearing. However, by agreement of the parties all of the relevant evidence was provided to the Commission by way of affidavits. The affidavits in support of the Appellants' case are as follows [note: the affiant's Gitxsan name is identified first]:

Affidavit 1 of Luutkudziiwus (Gordon Sebastian), sworn August 27, 2008

Affidavit 1 of Tenimgyet (Art Mathews), sworn August 27, 2008

Affidavit 1 of Yoobx (Elmer Derrick), sworn August 27, 2008

Affidavit 1 of Gwaans (Beverly Clifton Percival), sworn August 25, 2008

Affidavit 1 of Wiya Muuxw (Jack Sebastian), sworn September 4, 2008

Affidavit 2 of Wiya Muuxw (Jack Sebastian), sworn August 27, 2009

[7] Except for Affidavit 2 of Jack Sebastian, all of the Appellants' affidavits were tendered in the proceedings before the District Manager.

[8] The affidavits in support of the Respondent's position are as follows:

Affidavit of the District Manager, Barry Smith, sworn June 3, 2009

Affidavit of Dean Sutton, sworn August 27, 2009

BACKGROUND

[9] The background to this case is relatively straightforward and uncontested.

[10] The Corporation is a company incorporated in 2006 under the laws of British Columbia. It was formed by six Gitxsan Houses [Huwilp] for the purposes of furthering their collective interests in the land and resources, and in providing some economic and/or employment opportunities for their people. [Note: Huwilp is the plural of Wilp. A Wilp is a House; a Huwilp is a House Group]. The Corporation undertakes small scale economic development activity targeted at improving the socio-economic status of Huwilp members.

[11] Jack Sebastian is the Chief Executive Officer of the Corporation. He is also a Wing Simogyat [Wing Chief] in the Wilp Luutkudziiwus, which holds the territory of Madii Lii where the harvesting took place. As Wing Chief, Jack Sebastian has stewardship responsibilities over his Wilp's Lax Yip [territory] and its resources.

[12] As part of its economic development strategy, the Corporation wanted to perform salvage logging of dead and damaged timber alongside the Suskwa forest service roads located within the territory of the Wilp Luutkudziiwus. On behalf of the Corporation, the Suskwa Chiefs applied to the Ministry for two licenses that would allow them to do so. Jack Sebastian also applied for a single license, with the intent that the work would be performed by the Corporation.

[13] In 2006, the Ministry issued three forestry licenses to cut ("FLTC"). It issued FLTC A80083 to "Jack Sebastian DBA Suskwa Chiefs Economic Development Corporation", and FLTCs A79652 and A80092 to the Corporation.

[14] Each of these licenses identified the harvest boundaries.

[15] Each of the licenses contained a clause that limited harvesting to timber "within 50 m of the road centerline".

[16] The Exhibit A map boundaries, which forms part of the Corporation's FLTC A79652 allowed harvesting of timber between the 16 km and 38 km boundaries of the Suskwa Forest Road.

[17] The Corporation's employees or contractors harvested under the licenses from June through August 2006. Ministry inspectors reviewed the Corporation's activities from time to time during this period.

[18] In mid-August 2006, Ministry officials notified Jack Sebastian that the Corporation had engaged in potentially unauthorized harvesting activities and that the wood would be seized. Specifically, in respect to Jack Sebastian's license,

timber had been cut and removed from beyond the 50 metre boundary as measured from the road centerline. With respect to the Corporation's licenses, timber was harvested beyond the 38 kilometre mark, as well as beyond the 50 metre road centerline boundary.

[19] It should be noted that, in or about April of 2006, Jack Sebastian applied for a fourth license, which was resubmitted on June 24, 2006, that would permit additional harvesting past the 38 kilometre mark on the Suskwa Forest Road. Harvesting up to the 38 kilometre mark was covered by the Corporation's license A79652 and the new license would have allowed harvesting up to the 42 kilometre mark. However, the fourth license, FLTC 80083 was never issued or approved.

[20] In response to the Ministry's allegations of unauthorized harvesting, Jack Sebastian told Ministry officials that the Appellants had applied for authorization "covering the area between 38 and 42 kilometres on the Suskwa road". He also advised them that "all our harvesting was an exercise of our aboriginal rights as owners and stewards of the Lax Yip." In his September 4, 2008, affidavit, Jack Sebastian states:

> In all my dealings with (the) Minister, I have maintained my position as Wiya Muukw from the Wilp Luutkudziiwus that the Wilp Luutkudziiwus owns this Lax Yip. During the investigations by the Compliance and Enforcement Branch of the Minister in relation to this proceeding, I continually asserted the ownership rights of Wilp Luutkudziiwus.

[21] However, upon the Ministry's notification of unauthorized harvesting the Appellants halted operations and were cooperative during the Ministry's investigation.

[22] The Ministry subsequently commenced enforcement proceedings against Jack Sebastian and the Corporation. These proceedings were conducted by the District Manager, who concluded that the Appellants had contravened section 52(1) of the *FRPA* by cutting and removing timber from areas not authorized by the three licenses; specifically, they failed to comply with the license boundary conditions. Section 52(1) of the *FRPA* states:

Unauthorized timber harvesting

52 (1) A person must not cut, damage or destroy Crown timber unless authorized to do so

(a) under this Act, the *Forest Act*, an agreement under the *Forest Act*,

...

[Emphasis added]

[23] The District Manager determined that a total of 1,238 cubic metres of timber had been cut without authority. [Note: A 10% allowance or tolerance had been applied to the boundaries before calculating this unauthorized volume.] For this contravention, the District Manager levied a penalty of $500 against Jack Sebastian

and two penalties of $1,500 and $500 against the Corporation, with the question of stumpage payments left to be assessed.

[24] At no time did Ministry staff engage in any consultation with Gitxsan representatives about what their asserted aboriginal title or rights might entail, or how the Ministry's enforcement actions in relation to the licensed operations might impair those rights. This is not in dispute. The question on this appeal is whether there should have been such consultation in the circumstances. Although the District Manager accepted written submissions from the Appellants in support of a defence based on aboriginal title and an asserted right to decide on the use of the land and the resources (which included the five affidavits referenced above and a binder containing legal authorities), the District Manager concluded that he did not have the jurisdiction to decide these questions of law.

[25] In his determination, the District Manager states that, at the Opportunity To Be Heard hearing, there was also discussion about an aboriginal rights defence. However, he notes that the wood obtained from the unauthorized harvest was sold for commercial purposes to local sawmills. He therefore concluded that no aboriginal right to the trees could succeed in light of the decisions of the Supreme Court of Canada in *R. v. Sappier; R v. Gray* [2006] 2 S.C.R. 686.

[26] In his affidavit evidence, Jack Sebastian clarifies that some of the wood from the salvage operation was sold to third parties to generate revenue for the Corporation, but some of the wood was also distributed among the members of the Huwilp (which formed the Corporation) for traditional and domestic purposes.[2]

The Parties' Positions on the Appeal

The Appellants

[27] The Appellants agree that the question of whether there is a duty to consult in an enforcement proceeding is novel. However, they submit that there was a duty to consult during the investigation and enforcement proceedings and that the failure to consult violated section 35 of the *Constitution Act, 1982*, as amended, and makes the enforcement proceeding a nullity. Section 35 reads in part as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[28] The Appellants submit that the following facts, established by the affidavit evidence, are relevant to this appeal:

- The Ministry had direct knowledge of the Gitxsan's good *prima facie* claim to aboriginal title based on a previous judgment of the BC Supreme Court (*Gitxsan and other First Nations v. BC (Minister of Forests)*, 2002 BCSC 1701, at paras 72 and 86) [*Gitxsan*], as well as from agreements between

[2] Paragraph 24 of the affidavit of Jack Sebastian, sworn on September 4, 2008.

the Province and the Gitxsan (e.g., the 2003 (Interim) Agreement Regarding Forest Development and a 2006 Short Term Forestry Agreement).

- Based on the Ministry's clear knowledge of the Gitxsan's good *prima facie* claim to aboriginal title, and of the fact that Jack Sebastian asserted Gitxsan ownership of the particular area at issue in these proceedings, it follows that the Minister had a duty to consult and accommodate the Gitxsan on decisions that might affect Gitxan rights, in order to reconcile those rights in an honourable way with the contemplated Crown action.
- In *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 [*Delgamuukw*], the Supreme Court of Canada explained the concept of aboriginal title and set out three tenets of aboriginal title:
    - The right to exclusive use and occupation of land;
    - The right to choose to what uses the land can be put; and
    - The land held pursuant to aboriginal title has an inescapable economic component.
- In other words, aboriginal title includes control of the land, including the ability to make decisions about that land. Any application of the legislation must be reconciled with this paramount aboriginal right. Since the Gitxsan have not yet established title to the lands in a court of law, the Appellants accept that the Crown retains managerial authority over the lands for now. However, the Crown's authority must be exercised honourably and cognizant of the Gitxsan's claims.
- The Gitxsan's aboriginal title rights were adversely affected by:
    - the actions of the Compliance and Enforcement Branch of the Ministry;
    - the Ministry's decision to subject the Appellants to the enforcement proceedings; and
    - the District Manager's decision.
- The Ministry's failure to consult ignores the Gitxsan's governance structures, by restricting the Gitxsan's ability to operate on their own Lax Yip by applying Crown laws and policies exclusively, without any acknowledgement of Gitxsan laws and governance structures. They state:

    > By treating the Gitxsan like any other persons under the Act, the Ministry's compliance and enforcement actions effectively rendered the Gitxsan's aboriginal rights (including title) valueless. The Gitxsan's aboriginal title includes the embedded right to govern and use their resources. The Ministry's actions demonstrate no attempt to reconcile the rights of the Crown and the Gitxsan to govern and use the resources. The duty to consult is based on the simple legal proposition that we do not yet have a final judicial determination of whether the lands on which Mr. (Jack) Sebastian and the SCEC [the Corporation] carried out their forestry activities are owned by the Crown, or by the Gitxsan. In the interim, however, the Gitxsan do have a good *prima facie* claim. With

> this legal cloud over the Crown's title, it cannot be honourable for the Minister's agents to blindly assume that it is they, and not the Gitxsan, who get to decide exclusively whether Mr. (Jack) Sebastian and the SCEC [the Corporation] can harvest salvage wood.

- The imposition of the compliance and enforcement regime has a deleterious impact on the Gitxsan's ability to manage their land without being subject to onerous fines (and potentially jail sentences). Just as it is not honourable for the Crown to permit the exploitation of natural resources that are the subject of a *prima facie* aboriginal rights claim without taking steps to ensure aboriginal input (and, where appropriate, accommodation), it is not honourable for the Crown to use the laws that it makes to erect barriers to the legitimate exercise of aboriginal rights, in the absence of meaningful consultation. They argue, "… the Minister's position in this case is not only that Mr. (Jack) Sebastian should be *stopped* from exercising the Gitxsan rights, but that he can and should be *punished* for exercising those rights."

  [Emphasis in original]

[29] The Appellants submit that had consultation taken place, it would have consisted of:

- notice;
- providing information;
- listening to asserted rights;
- consideration in good faith of the affect on those rights; and
- accommodation (e.g., compensate for the impact).

[30] The Appellants concluded by stating that the Minister's officials treated compliance and enforcement as something separate from the management of the relationship between the Ministry and the Gitxsan. That was a legal error. They state:

> The case law is clear that the Crown must act honourably in all its dealings. Enforcement actions - from the seizure of the wood to any administrative hearing and penalty that may eventually be imposed – come at the expense of the Gitxsan's rights, and thus the Crown must consult and accommodate.

They further maintain that the Crown's failure to consult "reduce the explicit recognition of Gitxsan traditional governance in the Interim Agreement and the Short-Term Forestry Agreement to empty words on paper. This is not honourable."

The Respondent

[31] The Respondent submits that this is a case involving corporate malfeasance which does not engage aboriginal rights at all. The Appellants are a corporate entity and a director/officer of that entity. Both were engaged in a commercial forestry operation outside of the scope of any possible aboriginal right. The Respondent submits that this alone should be dispositive of the appeal.

[32] In reply to the Appellants claim that they were "exercising aboriginal title" and that the determination denied the aboriginal title of Wilp Luutkudziiwus and ignores the Gitxsan's right to govern and use their resources, the Respondent submits that the duty to consult only arises in three contexts, none of which apply in this case:

1. When an aboriginal right (including aboriginal title) is asserted and the Crown contemplates conduct that might adversely affect that aboriginal right.
2. Where the Crown purports to "take up" land pursuant to a treaty.
3. When a proven aboriginal or treaty right is infringed and the Crown is required to justify such infringement.

[33] The Respondent submits that the District Manager acted within his jurisdiction and did not owe any duty of consultation to the Appellants in this case for the following reasons:

- The District Manager had no jurisdiction to consider aboriginal title claims in enforcement proceedings (*Paul v. British Columbia (Forest Appeals Commission)* [1999] BCJ No 2129 (BCSC).) The Appellants "advanced an argument requiring the District Manager to consider the existence of aboriginal title which would require the District Manager to exceed his jurisdiction."
- A duty of consultation does not arise where the Appellants voluntarily applied for and accepted the FLTCs, inclusive of terms and conditions.
- A duty of consultation does not arise as the purpose of consultation is to prevent or minimize the exploitation of resources that might deprive aboriginal claimants of some or all of the benefits of a resource, and the actions of the Respondent were consistent with that purpose.

[34] Further, the Respondent submits that the specific claims based on title fail because:

- Although the Gitxsan have aboriginal rights and can properly hold title, at law, the Gitxsan's rights cannot be claimed by either Appellant in the context of this case: Jack Sebastian is an individual and the law supports a finding that a duty of consultation is not owed to an individual. Regarding the Corporation, the Respondent argues that a corporation, even if it is an aboriginal corporation, does not *itself* have aboriginal rights nor can it possess aboriginal title. In addition, the aboriginal Corporation in this case, along with its directors and officers, were engaged in a commercial forestry operation outside the scope of any possible aboriginal right.
- With respect to the Gitxsan, some of the rights they claim only attach to "proven" title. A declaration of *prima facie* title does not provide the Gitxsan with a right to govern and use the resource unilaterally. Because aboriginal title remains unproven, the claim that the rights that accompany proven aboriginal title have been impacted is erroneous. The Respondent submits that there is no impact and, therefore, no duty to consult.

- Any duty of consultation that might be owed to the Gitxsan would arise at the point of issuance of the FLTCs (which authorized the harvest of trees), not at the point of compliance and enforcement. Further, if there was a duty of consultation owed to the Gitxsan on the issuance of the licenses, it was met because the representatives of the Gitxsan sought and obtained the licenses and agreed to their terms.

[35] The Respondent also argues that the Appellants' position implies that the Appellants could "exercise aboriginal title" and unilaterally breach the terms of the FLTCs through that exercise, which constitutes an impermissible collateral attack on the Province's regulatory scheme for the management of forestry resources.

The Appellants' Reply

[36] The Appellants maintain that the Gitxsan have not waived their aboriginal rights, including the right to be consulted, simply because the Appellants agreed to participate in a licensing scheme set up by the Province. They submit that this participation merely reflects their attempts to work cooperatively with the Crown to reconcile the Gitxsan title interests with that of the Crown's while still continuing to assert the Gitxsan aboriginal title claim.

[37] In response to the Respondent's statement that the point of consultation "is at the point of the issuances of the license or permit", the Appellants point out that even when the licenses were issued, there was no consultation. In any event, they submit that it is inappropriate to limit the point of consultation to the stage when a license is issued. They state that the duty to consult is an ongoing duty once adverse effects have been shown.

The Applicable Law

[38] Both parties cite the Supreme Court of Canada's decision in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*] as the leading authority on the duty to consult.

[39] In *Haida*, the Court summarized the historical foundation for the duty to consult:

> 25. Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[40] In this appeal, the parties disagree on whether the requirement to consult was triggered. The Court in *Haida* confirmed that 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" (para. 35). [Emphasis added]

[41] In *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, the Court summarized the scope and content of this duty as follows:

> 8. .... The scope of the duty to consult and accommodate is proportionate to a preliminary assessment of the strength of the case for the existence of the rights or title, and the seriousness of the potentially adverse effect upon those rights or title. Exactly what the honour of the Crown may require falls within a spectrum defined by that assessment. Where the potential claims to aboriginal rights and title have not yet been proven, the honour of the Crown nevertheless requires it to respect these interests and, depending on the circumstances, to consult and reasonably accommodate them pending resolution of the claim. Each case must be approached individually and flexibly, with the focal question being what is required to maintain the honour of the Crown and to effect reconciliation with respect to the interests at stake (*Haida,* at paras. 35, 38-39, 43-45).
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> 9. Good faith on both sides is required. There is no duty to agree. The process does not give aboriginal groups a veto over what can be done with the land pending final proof of their claim. The Crown may continue to manage the resource in question pending claims resolution, but within the bounds of maintaining the honour of the Crown. The commitment is to a meaningful and reasonable process of consultation (*Haida*, at paras. 27, 42, and 48).
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> 10. Meaningful consultation may reveal a duty to accommodate aboriginal interests through an amendment to Crown policy or practice, in an attempt to resolve conflicting interests and move toward the ultimate goal of reconciliation. Where the aboriginal claim is strong and the potential adverse consequences of government action are significant to the claimed right or title, the honour of the Crown may require accommodation to avoid irreparable harm or to minimize the infringement, pending final resolution of the claims. Inherent in this process is a need to reasonably balance aboriginal concerns over the potential impact of the decision with other societal interests (*Haida*, at paras. 47, 49-50). Responsiveness is a key requirement of both consultation and accommodation (*Taku*, at para. 25).

[42] The Court in *Haida* also stated that, "Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate." (para. 37)

[43] The purpose of the duty to consult was also addressed in *Haida*:

38. I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interests pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation.

ISSUES

[44] Although at its most basic level this case is characterized as a duty to consult case, the underlying issue is more complex. The Appellants are asking the Commission to determine whether they, Jack Sebastian and the Corporation, can rely upon any title rights held by the Gitxsan to the subject land and, if so, whether they can rely upon the Crown's failure to consult with the Gitxsan as a defence to enforcement actions taken against them for breaching the terms of their forestry licenses.

[45] The Panel has broken down the issues in dispute as follows:

1. Can the licensees, Jack Sebastian and the Corporation, rely upon any rights that may be claimed by the Gitxsan, a non party to the licenses, as a defence to enforcement action by the Ministry in relation to a breach of a term or condition of their licenses?
2. If Jack Sebastian and the Corporation can rely on the duty to consult with the Gitxsan, was the duty to consult triggered by the investigation or enforcement proceedings undertaken by the Respondent?
3. Does the Appellants' claim to be consulted in this case amount to a collateral attack on the Province's validly enacted regulatory scheme?
4. What is the appropriate remedy in this case?

DISCUSSION AND ANALYSIS

1. Can the licensees, Jack Sebastian and the Corporation, rely upon any rights that may be claimed by the Gitxsan, a non party to the licenses, as a defence to enforcement action by the Ministry in relation to a breach of a term or condition of their licenses?

Appellants' submissions

[46] The Appellants maintain that the Gitxsan's title to its traditional lands has been established and accepted by the Government on various occasions. They submit that Gitxsan rights are held communally, so consultation must be with the community, i.e., the Gitxsan. The Corporation operated with the authority of the Hereditary Chiefs. The Appellants submit that by signing the licenses, the Gitxsan did not waive their aboriginal title claims. It has *prima facie* title and this fact is known to the Crown. The land covered by the licenses was part of Gitxsan territory. Therefore, there was a duty to consult with the Gitxsan.

[47] The Appellants also submit that, in undertaking the salvage operations, Jack Sebastian and the Corporation were "attempting to reconcile their [Gitxsan] aboriginal ownership and governance interests in the territory with those of the Crown – to the extent reasonable." Going through the licensing process and paying the required fees to the Ministry simply reflects the Gitxsan's attempt to work cooperatively with the Crown to reconcile Gitxsan title interests with that of the Crown. The Appellants note that even the District Manager acknowledged in his determination that the Appellants' salvage tenure was providing much needed employment and securing the recovery of wood that would otherwise be lost.

[48] The Appellants argue that the Gitxsan cannot and have not waived their aboriginal rights, including the right to be consulted when the Ministry's action adversely affects their aboriginal interests, simply because they agreed to participate in the licensing scheme set up by the Province.

[49] Regarding the Respondent's claims that Jack Sebastian and the Corporation are not owed a duty of consultation, the Appellants reply as follows:

> Contrary to the Ministry's submissions, this case is not about a duty to consult Mr. Sebastian or the SCEC … Instead, that duty is owed to the Gitxsan, as aboriginal title claimants. It may be that in some cases a duty owed to the Gitxsan can be discharged by consulting specific Gitxsan members (like Mr. Sebastian), or by consulting an organization or society affiliated with the Gitxsan (like the SCEC [the Corporation]). Since the Minister did not attempt to consult any of the relevant Gitxsan representatives, that issue is not before the Commission today.
>
> It should be uncontroversial at this point in the development of the jurisprudence that individuals and corporations may take advantage of the constitutional duty owed not to them, but to a First Nation. *R. v. NTC Smokehouse* [1996] 2 SCR 672 [*NTC Smokehouse*] is authority for the proposition that corporate entities may rely on aboriginal rights as a defence to a statutory charge.

Respondent's submissions

[50] The Respondent argues that the Gitxsan are not owed a duty of consultation in this case. The Gitxsan are described as the communal or collective entity to which Jack Sebastian is affiliated, but the Gitxsan are not parties to this matter: the Gitxsan were not signatories to the licenses, the determination was not issued against the Gitxsan, the penalties were not levied against the Gitxsan, and the Gitxsan is not a party to this appeal. The Respondent submits that only Jack Sebastian and the Corporation are affected by the enforcement decision, not the Gitxsan Nation. It reiterates its position that any duty of consultation owed to the Gitxsan arose at the point of issuance of the licenses – not at the point of compliance and enforcement.

The Panel's Findings

[51] In this case, the Appellants sought and obtained three forest licenses. There is no suggestion that this amounted to a waiver of any claims to aboriginal rights or title, or a waiver of any right to consultation where such a right is triggered.

[52] As is evident from the Appellants' submissions, neither the Corporation nor Jack Sebastian are claiming, in their individual or personal capacities, aboriginal title to the land or a duty of consultation.

[53] The difficulty with the Appellants' argument was pointed out by the Respondent: the Gitxsan are not a party to the licenses, are not named in the determination, are not liable for the penalties and are not a party to these appeal proceedings. In response, the Appellants cite *NTC Smokehouse*. They submit that this case provides authority for the proposition that the Appellants can rely on the Gitxsan's rights and title as a defence to the enforcement actions against them.

[54] In *NTC Smokehouse*, the appellant was a non-aboriginal food processor who purchased large quantities of salmon from first nations people who had caught the salmon under an Indian food fishing license. The *BC Fishery (General) Regulation* prohibited the selling or bartering of fish caught under such a license.

[55] The appellant food processor was charged under the federal *Fisheries Act* with selling and purchasing fish not caught under the authority of a commercial fishing license, contrary to the *BC Fishery (General) Regulation*, and with selling and purchasing fish caught under the authority of an Indian food fish license, contrary to section 27(5) of the Regulations. It was convicted, and on appeal to the BC Court of Appeal was dismissed. On appeal to the Supreme Court of Canada, the constitutional questions were whether sections 4(5) and 27(5) of the Regulation were of no force or effect with respect to the appellant by operation of section 52 of the *Constitution Act*, by reason of the aboriginal rights within the meaning of section 35.

[56] In that case, the majority of the Court noted that, "although the aboriginal right asserted was not one held by the appellant itself, but rather held by native bands originally selling the fish, the appellant was entitled to raise the defence given that a conviction hinged on the natives' sale of the fish being illegal."

[57] The *NTC Smokehouse* case stands for the broad proposition that corporate entities or individuals may rely on a First Nation's claim to aboriginal title or its right to consultation as a defence to a regulatory proceeding. In *NTC Smokehouse*, if the First Nation had a right to sell the fish, there could be no offence. In the present appeal, the contravention "hinges on" the Gitxsan's claims to title or rights. The contravention hinges upon the terms of a contract between the Appellants' and the Crown. The question in this case is not whether the licenses are invalid on the grounds that the Gitxsan have title to the land and rights to the timber.

[58] Instead, this case is about the breach of the terms of an agreement and the consequences that flow from that breach. The evidence is that the Appellants had the authority to obtain the licenses under both traditional law and the provincial law, and there is no claim that the issuance of the licenses infringed the Gitxsan's aboriginal rights or title. The question is whether the Appellants maintained their aboriginal rights when they harvested timber beyond the limits of the FLTC's.

[59] The Panel finds that *NTC Smokehouse* applies and that both Jack Sebastian and the Corporation are owed the same rights as the Gitxsan otherwise no individual member or corporate representative of the First Nation would ever be able to assert these rights.

[60] It is clear from the outset that Jack Sebastian in his individual capacity and in his capacity as the Chief Executive Officer for the Corporation spoke for both Appellants when negotiating with the Ministry. In that capacity he also spoke for the Gitxsan who authorized all of those actions on their behalf as is set out in the August 27, 2008, affidavit of Gordon Sebastian, Simogyat (Hereditary Chief) at paragraph 24 through 28.

> 24. When Jack Sebastian and the SCEC were operating on the Madii Lii territory, they were acting with my knowledge and approval, as Simogyat. I was aware of the salvage operations being undertaken.
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> 25. In operating on the Madii Lii territory, Jack Sebastian and the SCEC were acting in the interests of the Wilp Luutkudziiwus and other Huwilp Gitxsan, all of which is in accordance with Ayookim Gitxsan. Sustainable Gitxsan development of our resources is critical to our future prosperity and well-being. The Gitxsan make decisions on the resources collectively as is explained in the affidavit of Chief Art Mathews, dated August 27, 2008 (at paras. 10 – 24), which I have read and agree with.
>
> 26. In the Short-Term Forestry Agreement dated August 4, 2006 with the Gitxsan Hereditary Chiefs and the Gitxsan Treaty Society on behalf of the Hereditary Chiefs, the Province "recognise[d] that the historic and contemporary use of the stewardship of land and resources by the Gitxsan wilp are integral to the maintenance of Gitxsan society, governance and economy within the Traditional Territory" (para 1.3). A copy of that Agreement appears as an Exhibit to the affidavit of Elmer Derrick (Yoobx) sworn August 27, 2008 in this matter.
>
> 27. The actions of the MOF to enforce administrative penalties against Jack Sebastian and the SCEC for his actions between May and August 2006 denies the aboriginal rights that Jack Sebastian and the SCEC were exercising.
>
> 28. Treating Jack Sebastian and the SCEC in this way also denies my rights as Simogyat for Wilp Luutkudziiwus, as well as all the rights of the members of the Wilp Luutkudziiwus generally. I was not consulted before the MOF took these actions. In seeking to penalize Jack and the SCEC, without consulting both these individuals and the Wilp Luutkudziiwus as a whole, the MOF has ignored our collective approach to governance and our aboriginal rights, including title to this land.

[61] In addition the Panel finds that Jack Sebastian reported back to Gordon Sebastian (Luutkudziiwus) on these activities as is set out in Jack Sebastian's September 4, 2008 affidavit at paragraphs 16 through 18:

> 16. By reason of my hereditary Chief rank as Wiya Muukw and my role as steward of the Lax Yip for Wilp Luutkudziiwus, I have authority to undertake forestry activities on the Lax Yip for Wilp Luutkudziiwus, including the forestry activities of the type that give rise to this proceeding. This authority has been recognized regularly at Li'ilgit (feasting) of our Wilp.

> 17. Luutkudziiwus was aware of my forestry activities (and those of the SCEC), because I told him that the SCED and I would be conducting such activities within the Wilp Luutkudziiwus' Lax Yip. I regularly updated Luutkudziiwus on our activities. Luutkudziiwus always gave me his consent.
>
> 18. SCED and I were engaged in salvage logging operations on the Lax Yip owned by Wilp Luutkudziiwus. In brief, the salvage logging consisted of the removal of dead, damaged, or dangerous trees from areas of the forest adjacent to forest service roads. This salvage work was consistent with improving the health of the forest and the safety of those who use the forest.

[62] Finally, the Panel finds that Jack Sebastian advised the Ministry by letter dated May 8, 2006 and during the time that the Appellants were applying for the licenses that the Appellants objected to paying the deposit on FLTC A80083 "as every tree and all the lands within the Suskwa Watershed is owned by the Suskwa Chiefs". The text of that letter is reproduced in its entirety:

> Upon reviewing the attached cover letter we have been advised to convey to you that the "Suskwa Chiefs Economic Development Corporation" do realize the cost of doing business in the forest sector, and will comply with the requirement of the deposit. The "Suskwa Chiefs Economic Development Corporation" request the ministry of forest" to defer the matter until the "Suskwa Chiefs Ec. Dev. Corporation" are able to cover the cost. Additionally, to seek the provisions of new contractors requirements, as we understand that new and up and coming contractors are exempt from having to cover the costs?:
>
> The "Suskwa Chiefs Economic Development Corporation" would remind the ministry of forest that in accordance with decisions of the supreme court of Canada. We have strong prima facie rights, and strong prima facie title to the lands and resources, and emphasized by our manager as every tree and all the lands within the Suskwa watershed is owned by the Suskwa Chiefs. Based on these facts, we strongly disagree to paying for our own resource base. However, the "Suskwa Chiefs Economic Development Corporation" are willing to pay the deposit in order to move forward as soon as possible. Please reply as soon as possible in order to get these important matters operational. Thank you and we look forward to a position reply.

[63] Based on all the above, the Panel finds that the Appellants were acting on behalf of and with the full authority of the Gitxsan and that they made the Ministry aware of that fact. Under these circumstances the Panel finds that the Appellants are entitled to rely upon the same rights that the Gitxsan are entitled to as a defence to any enforcement actions carried out by the District Manager. The right that is being asserted is held by the group (Gitxsan) but has been carried out by its representatives Jack Sebastian and the Corporation. Accordingly as noted in *NTC Smokehouse* at paragraph 15:

> As a preliminary matter, it should be noted that the aboriginal right asserted in this case is not one held by the appellant itself, but rather one argued to be held by the Sheshaht and Opetchesaht peoples. Given, however, that in order to convict the appellant it is necessary that the sale of the fish by the

> Sheshaht and the Opetchesaht have been illegal, and appellant is entitled to raise as a defence to the charges against it the existence of an aboriginal right, held by the Sheshaht and Opetchesaht, and recognized and affirmed by s. 35(1) of the *Constitutional Act, 1982*, which would negate the illegality of the sale of salmon by members of the Sheshaht and Opetchesaht bands.

[64] Here the relationship between the Gitxsan and Jack Sebastian and the Corporation are much closer that the one that existed between the First Nations and the appellant in *NTC Smokehouse*. Accordingly, the Panel finds that Jack Sebastian and the Corporation are entitled to raise as a defence to the enforcement action brought against them by the Ministry the existence of an aboriginal right, held by the Gitxsan.

2. If Jack Sebastian and the Corporation can rely on the duty to consult with the Gitxsan, was the duty to consult triggered by the investigation or enforcement proceedings undertaken by the Respondent?

[65] According to *Haida*, a duty to consult is triggered "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." There are two main components to this test:

1. A knowledge component: real or constructive knowledge of the potential existence of an Aboriginal right or title.
2. An impact component: Crown conduct that might adversely affect the Aboriginal right or title.

Knowledge of the potential existence of an aboriginal right or title

Appellants' Submissions

[66] According to the affidavits of Gordon Sebastian, Art Mathews and Elmer Derrick, the Gitxsan people, through the Gitxsan Huwilp, have historically and continue to exercise aboriginal rights, title and governance over approximately 33,000 km^2 of territories, located in nine watershed units in north-western BC, including the land at issue in this appeal. The land at issue is referred to as the Madii Lii territory. These individuals state that the Gitxsan have continuously occupied these territories exclusively as Gitxsan Huwilp, and according to the traditional laws, "since time immemorial".

[67] The Appellants submit that the Crown was aware of the Gitxsan's *prima facie* claim to title of these lands, and that knowledge gives rise to the duty to consult and accommodate. According to the affidavit evidence of Elmer Derrick, the Ministry had knowledge of the potential existence of the Gitxsan's aboriginal title from at least three sources:

- The Ministry had knowledge that the Gitxsan had a good *prima facie* claim to title to these lands as a result of the BC Supreme Court decision in *Gitxsan*. In that case, the Gitxsan challenged the Minister's decision to approve a change in corporate control over certain forestry licenses on the

grounds of aboriginal rights and title to the lands covered by the licenses, and a failure to consult and accommodate. The court found that the Gitxsan possess a good *prima facie* claim of aboriginal title over the land at issue in that case and a strong *prima facie* claim of aboriginal rights for at least some of the land claimed. The Appellants say that this is binding on the provincial Crown and all its emanations.

- The provincial Crown has real knowledge of the Gitxsan's claims of rights and title as a result of its negotiations and agreements with the Gitxsan:
    - In 1998, the Province and the Gitxsan Hereditary Chiefs signed a bilateral Reconciliation Agreement which established a framework for discussions on certain bilateral matters with the aim of seeking mutually acceptable ways of reconciling Gitxsan rights to control their traditional lands and resources with the rights asserted by the Crown.
    - In 2001, the Gitxsan re-engaged in tripartite treaty negotiations with the Province and Canada with the same aim.
    - On June 1, 2003, an Interim Agreement Regarding Forest Development was signed as a result of the negotiations following the Court's decision in *Gitxsan*.
    - In 2006, the Province and the Gitxsan entered into a Short-Term Forestry Agreement ("STFA"), which "seeks to establish an interim consultation protocol and accommodation while work continues on a long-term forestry agreement." This agreement expressly refers to the Court's recognition in *Gitxsan* of the good *prima facie* claim of aboriginal title and the strong *prima facie* claim to aboriginal rights in at least part of the areas of their traditional territory.
- The Appellants state that the evidentiary record of aboriginal title, set out in the Appellants' affidavits, was before the District Manager and now the Commission. Further, in the investigation and enforcement proceedings Jack Sebastian "repeatedly asserted to the Ministry the ownership rights of the Gitxsan to the area being logged and told Ministry officials that he had a right to log in this area as a consequence of the Gitxsan's aboriginal title …."

Respondent's Submissions

[68] The Respondent accepts that the Gitxsan may have a *prima facie* claim to aboriginal title and rights to the lands at issue. However, it also points out that a declaration of *prima facie* title, such as the one made in the *Gitxsan* case, does not provide the Gitxsan with a right to govern and use the resource unilaterally. This only comes with proven title, and the Gitxsan's title is not proven.

The Panel's findings

[69] The Panel finds that the evidence provided establishes that the Crown, as represented in this case by the Ministry, had knowledge of the existence of the Gitxsan's claims of aboriginal rights, including title to the lands which were being harvested by the Appellants.

The Crown contemplates conduct that might adversely affect aboriginal right or title

Appellants' Submissions

[70] The Appellants submit that the contemplated conduct of concern in this case is the Ministry's attempt to apply the *FRPA* in a manner that would adversely affect the Gitxsan's aboriginal title rights, including their right to govern the use of the resources on their lands. The Appellants submit that, according to *Delgamuukw*, aboriginal title encompasses three elements: the right to exclusive use and occupation of the land; the right to choose to what uses the land can be put; and that the land held pursuant to aboriginal title has an inescapable economic component. They submit that each of these three elements is relevant to this case because the Ministry's decision to pursue investigation and enforcement proceedings against Jack Sebastian and the Corporation adversely affected each element.

[71] The Appellants submit that being subjected to fines and penalties impacts the way the Gitxsan manage their land and that this process ignores their rights and title. Further, the Ministry requires compliance only with Crown laws and policies without acknowledging Gitxsan laws and governance structures. Had the Ministry consulted with the appropriate Gitxsan representatives, it would have found that the investigation and enforcement proceedings adversely affects the Gitxsan by ignoring and denying the Gitxsan's governance which is an inherent aspect of their aboriginal title claim. They submit that any application of the Act must be reconciled with this paramount Gitxsan right.

[72] The Appellants further submit that the Ministry's failure to consult the Gitxsan minimized the special status of their rights and title and was not an honourable way of dealing with them. The Appellants also submit that the actions of the Ministry deny the interests and rights of the Huwilp, as represented through the Corporation.

[73] The following evidence was tendered by the Appellants in support of their adverse effect claim.

[74] In his affidavit sworn on August 22, 2008, Art Mathews explains the social structure of the Gitxsan. The Gitxsan are organized communally; each Gitxsan belongs to one of four clans. Each clan has several Huwilp [Houses] which are extended family or house groups based on matrilineal blood-lines and rank.

[75] The primary loyalty of the Gitxsan lies with the Wilp [House]. Each Gitxsan Wilp has exclusive ownership rights to its property which include its Lax Yip [territories]. The Lax Yip of a Wilp is intrinsic to Gitxsan culture and identity.

[76] Mr. Mathews also explains that a fundamental underpinning of Gitxsan society and culture is Ayookim Gitxsan, which are ancient laws that dictate the conduct of the Gitxsan Huwilp.

[77] The Simogyat (Hereditary Chief), such as Gordon Sebastian (the brother of the Appellant Jack Sebastian), is the highest ranking person in the Wilp, and is responsible for providing for all members of the Wilp and for ensuring the proper use and management of their territories. The evidence of Gordon Sebastian, Art

Mathews and Jack Sebastian is that, under the traditional laws, a Wilp's traditions and property must be managed for future generations.

[78] Each Wilp usually has a number of Wing Chiefs, who are given responsibilities by the Simogyat to carry out on behalf of all Wilp members. The authority of the Wilp originates from its members.

[79] The Appellant Jack Sebastian is the Wing Chief in Wilp Luutkudziiwus and is charged with the stewardship responsibilities over his Wilp's Lax Yip and its resources. His duties as steward include "monitoring the condition and health of the Lax Yip, ensuring the sustainable development of its resources, and providing both sustenance and livelihood to Wilp members and other Gitxsan from resources on the Lax Yip." As Wing Chief and steward of the Wilp's resources, Jack Sebastian is to exercise his duties and obligations in accordance with traditional laws.

[80] Regarding the licenses, Jack Sebastian states in his September 4, 2008 Affidavit that the territory described in the licenses, and at issue in this appeal, is entirely within the Madii Lii territory held by the Wilp Luutkudziiwus. He states, "the Wilp Luutkudziiwus owns the land in question and has the right to choose the uses to which our lands may be put. We have the right to use the resources on our Lax Yip and to govern activities related to those resources."

[81] Jack Sebastian also states that the Suskwa Chiefs applied for the licenses on behalf of the Corporation. He was the applicant for one of those licenses which "was to cover work up to the 42 kilometre mark". All of the work done under the licenses was to be done by the Corporation.

[82] When the licenses were issued, they did not extend past the 38 kilometre mark. Jack Sebastian states that this was not explained to him when the licenses were issued. It was only when enforcement steps were taken that he learned that the licenses were not for the full area.

[83] Because of his position in the Gitxsan system of governance, Jack Sebastian states that he has authority to undertake forestry activities, including the activities that give rise to this proceeding. He states that the Hereditary Chief, Gordon Sebastian, was aware of his activities and those of the Corporation and provided his consent.

[84] During the course of the harvesting, Jack Sebastian states that he was involved in the overall supervision of the work, but someone else directly supervised the employees and contractors. He states that both he and the Corporation were acting in accordance with the traditional laws of the Gitxsan.

[85] Regarding the Corporation, Jack Sebastian states that, because of the ownership structure of the Corporation, the Huwilp that participate will benefit from the forestry activity through equity ownership. The Corporation also provides employment to Gitxsan members.

[86] In terms of interaction with the Ministry, Jack Sebastian's evidence is as follows. In August 2006, the Ministry notified Jack Sebastian of potential unauthorized harvesting activities. In his Affidavit dated August 27, 2009, Jack Sebastian states that he took steps to remind Ministry officials of the Gitxsan's

aboriginal title claim, and inform the Ministry that the Corporation's activities were taking place on Gitxsan title lands.

[87] On August 18, 2006, he met with Ministry officials and discussed their allegation that the Corporation was cutting outside of its licensed area – specifically, cutting between 38 to 42 kilometres on the Suskwa Forest Service Road. Jack Sebastian states that he told the Ministry officials that he could cut in this area because the Gitxsan traditional territory goes up to the 42 kilometre mark.

[88] On August 21, 2006, Jack Sebastian had another exchange with Ministry officials about the same issue. He again told the officials that he had a right to take any trees, because "we owned the land up to the 42 km mark". Jack Sebastian states that he continued to tell Ministry staff that the Gitxsan had aboriginal title to the trees located within the 38 kilometre to 42 kilometre mark. However, he states that no one from the Ministry consulted with him, as Wing Chief, or with Gordon Sebastian, the Hereditary Chief for Wilp Luutkudziiwus, about what the Gitxsan's ownership rights might entail or how the Ministry's enforcement actions to try to stop the Corporation's operations, and enforce the Crown's forestry laws, might impair Gitxsan aboriginal title and rights.

[89] In terms of impairing or affecting the Gitxsan's rights, Jack Sebastian advises that the enforcement actions punish the Gitxsan for doing no more than exercising their rights in accordance with their laws. At paragraphs 29-32 of his September 4, 2008 Affidavit, Jack Sebastian describes the adverse affects of the Crown's actions:

> 29. … The actions by the Minister and his officials, including the decision to subject me and the SCEC (the Corporation) to administrative proceedings at which the SCEC and I may be ordered to pay penalties and fines, deny my rights as a Wing Simogyet for the Wilp Luutkudziiwus, and more importantly deny the aboriginal title of Wilp Luutkudziiwus which affects all members of Wilp Luutkudziiwus. The actions of the Minister and his officials also deny the interests and rights of the Huwilp represented through the SCEC.
>
> 30. By ignoring our right to govern and use our resource, the Minister has reduced our status as Gitxsan to that of any ordinary citizen in British Columbia who is subject to the Act, rather than acknowledging our status as land and resource owners. Our ability to operate on the Lax Yip is then limited to Crown laws and policies. As Gitxsan, we cannot accept a denial of our laws and policies. Our connection to our Lax Yip, which is at the core of being Gitxsan, would be lost.
>
> 31. The Minister's actions against SCEC and me frustrate our efforts to develop economic opportunity to improve the economic and social conditions of the Gitxsan. Because of the Minister's actions, the SCEC has been forced to lay off the workers that it had employed for these salvage operations. Once we lose our work crews, it is difficult to replace them.

> 32. The Minister's actions also affect the SCEC's reputation and ability to function in the market since the Gitxsan's access to their own resources is constrained. After the Minister began to take enforcement steps directed at the SCEC, it became more difficult to sell the wood SCEC harvested at a good price to mills. Our good reputation in the market is important in order to grow our economic base for the benefit of our community.

[90] In summary, Jack Sebastian states that the Government's actions:

- ignores the rights to govern and use the resources;
- reduces their status as Gitxsan to that of an ordinary citizen of the Province;
- denies their connection to the Lax Yip;
- frustrates their efforts to develop economic opportunity to improve the economic and social conditions of the Gitxsan; and
- affects the Corporation's reputation and ability to function in the market place.

[91] In his affidavit, Gordon Sebastian states that the Lax yip of the Wilp Luutkudziiwus has lived in, occupied and controlled the Madii Lii territory "since time immemorial." He described the boundaries of the territory as had been told to him by his predecessors. Gordon Sebastian describes the impact of the Ministry's actions on the Gitxsan's title rights at paras. 23 and 28 - 30 of his affidavit:

> 23. The Wilp Luutkudziiwus owns the land in question and has the right to choose the uses to which our lands may be put. We have the right to use the resources on our Lax Yip and to govern activities related to those resources.
>
> …
>
> 28. Treating Jack Sebastian and the SCEC in this way also denies my rights as Simogyat for Wilp Luutkudziiwus, as well as all the rights of the members of the Wilp Luutkudziiwus generally. I was not consulted before the MOF (the Ministry) took these actions. In seeking to penalize Jack and the SCEC, without consulting both these individuals and the Wilp Luutkudziiwus as a whole, the MOF has ignored our collective approach to governance and our aboriginal rights, including title to this land.
>
> 29. The MOF is not respecting our right to govern and use our own resources in accordance with Ayookim Gitxsan (Gitxsan traditional laws). By ignoring our right to govern and use our resource, the MOF reduces our status as Gitxsan to that of any ordinary citizen in British Columbia who is subject to the Act. That is not reconciliation of our constitutionally-protected rights.
>
> 30. Gitxsan efforts to develop economic opportunity are part of our overall efforts to improve the economic and social conditions of the Gitxsan in accordance with Ayookim Gitxsan. These efforts are part of the Gitxsan's attempt to reconcile our ownership and governance

> interests in the Lax Yip with those of the Crown. The MOF's actions against Jack Sebastian and SCEC frustrate our efforts.
>
> ...

[92] The Appellants summarize the adverse affects as follows at paragraph 39 of their Statement of Points:

> The Gitxsan have a governance system for their traditional territories that was not acknowledged or respected by the Ministry in initiating its investigation and subsequent quasi-prosecution of Mr. Sebastian and the SCEC [the corporation]. By ignoring the Gitxsan's right to govern and use their resources, the Minister has reduced their status as Gitxsan to that of any ordinary citizen in British Columbia who is subject to the *Act*, rather than acknowledging their status as land and resource owners. The Minister's approach to enforcement restricts the Gitxsan's ability to operate on their own Lax Yip to Crown laws and policies exclusively, without any acknowledgement of Gitxsan laws and governance structures. By treating the Gitxsan like any other persons under the *Act*, the officials charged with compliance and enforcement duties effectively rendered the Gitxsan's aboriginal rights (including title) valueless."

Respondent's submissions

[93] The Respondent notes that the Appellants' defence of inadequate consultation is founded on the premise that the Wilp Luutkudziiwus are "owners" of the land and that the Gitxsan have a "right to govern and use their resource" and, more generally, that the Gitxsan and the Wilp hold "aboriginal title" which encompasses three components, each of which they claim has been adversely affected:

(a) the right to exclusive use and occupation of the land;

(b) the right to choose to what uses the land can be put; and

(c) the land held pursuant to aboriginal title has an inescapable economic component.

[94] The Respondent submits that this underlying premise is flawed because it is a statement of proven aboriginal title, not *prima facie* aboriginal title. Although the Gitxsan's title may be proven at some time in the future, the Appellants' cannot claim that the determination affected or impacted rights not yet established. As proven title is not yet a right enjoyed by the Gitxsan, the impact of the Crown conduct does not arise. In particular, the Respondent states:

(a) "exclusive use and occupation" - there is no evidence of sufficiently regular and exclusive use of the cutting sites at the time of sovereignty to meet the test for aboriginal title.

(b) "right to choose uses of the land" - this component of proven title is only conferred when "a definitive finding of title has been made." The Respondent notes that the Appellants' claims to a "right to govern" and "use their resource" is an aspect of aboriginal self-government which, with respect to the Gitxsan and its Wilps, has not yet been established.

(c) "economic component" - the Supreme Court of Canada has held that lands held pursuant to aboriginal title have an inescapable economic component" (*Delgamuukw*). However, the Respondent submits that "The SCC's comments are directed at compensation for Crown infringements of proven aboriginal title claims and not at compensation in a pre-proof environment. It is correct that economic accommodation can arise prior to proof of claims but on the facts of this appeal, the Appellants received an economic benefit through the FLTCs that were solicited by them."

[95] The Respondent states:

> The Courts have determined that the Gitxsan have *prima facie* claims for aboriginal title and aboriginal rights to "at least part of the area claimed by them" but a declaration of *prima facie* aboriginal title does not confer "ownership" or provide the Gitxsan with the components of proven title. It does not cloak the Gitxsan with the full range of rights that accompany declarations of proven aboriginal title and rights.

[96] The Respondent also points out that *prima facie* title does not confer a right to carry out a commercial forestry operation.

[97] With a *prima facie* claim to title, the Respondent argues that the time when a duty to consult might have been owed to the Gitxsan was at the point of issuance of the FLTCs, not at the point of compliance and enforcement. However, the Respondent submits that, if there was a duty to consult at that stage, that duty was met for the following reasons:

- The applications for the FLTCs were voluntary and unsolicited by the Crown.
- They were made by Jack Sebastian, Wing Chief, and the Corporation.
- The Gitxsan expressed no concern for the effects of the salvage removal of timber.

[98] The Respondent submits that it would be anomalous to suggest that consultation would be required where the Gitxsan – through their representative – approached the Ministry to obtain FLTCs and agreed to accept those FLTCs when offered.

[99] The Respondent also submits that the very fact that the Respondent issued the FLTCs to the Appellants fulfills any alleged duty of consultation. The full scope of the subject matter of the licenses, the salvaging of the dead timber, was provided entirely to the Appellants, and the Appellants received the economic benefit of the scale of the salvaged timber under the FLTCs. Nothing more can be owed to the Appellants or the Gitxsan by way of consultation.

[100] The Respondent further points out that, according to *Haida*, the underlying purpose of the duty of consultation and accommodation is to account for aboriginal interests by preventing or minimizing the diminishment of resources that allow for the exercise of aboriginal rights. In other words, accounting for aboriginal interests may require the conservation and preservation of resources. In the present case, the FLTCs limited the amount of timber that could be harvested. The Appellants'

exceeded those limits. The Respondent sought to enforce the limitations on the FLTCs which was consistent with the principles in *Haida*.

[101] The Respondent notes that, in *Haida*, the Court confirmed that the Crown is entitled to manage the resource pending the resolution of claims but it may not do so in a manner that could deprive the aboriginal claimants of the benefits of the resource. In the circumstances, the Respondent took steps to prevent the continued harvesting outside of the boundaries of the FLTCs which action can only be viewed as consistent with the honour of the Crown.

[102] The Respondent states, "Given that the Gitxsan hold only a prima facie claim to aboriginal title, enforcement of limitations on harvesting does not attract a duty of consultation." There is no adverse affect to the *prima facie* claim, therefore no duty to consult arises.

[103] The Respondent submits that the Appellants' assertion that consultation and accommodation is required is effectively a statement that the Appellants do not consider themselves bound by the compliance and enforcement provisions. If the Crown is required to consult with the Appellants (or the Gitxsan) and accommodate them for enforcing the restrictions agreed to in the licenses, enforcement of the terms of the FLTCs "is meaningless". The Respondent submits:

> It is not credible for the Appellants to argue that they could apply for the FLTCs and thereby receive the benefit of the FLTCs and then argue that they were not bound by the restrictions on the FLTCs, thereby avoiding the burdens of the FLTCs. Acceptance of the benefit connotes acceptance of the burden.

[104] Finally, the Respondent states:

> The purpose of reconciliation is not served by unilaterally breaching the terms of the FLTCs and then claiming that the breaches were justifiable because they were committed as an exercise of aboriginal title.

[105] The Respondent submits that consultation is only triggered by an affirmative discretionary decision to affect the resource. In this case, there was a conscious decision not to consult, because in the Government's view, the duty was not triggered.

The Panel's Findings

[106] The Respondent argues that the duty to consult is triggered by an affirmative decision by the Crown to affect the forest resources in the area that is the subject of the aboriginal claims in this case. However, the Panel finds that *Haida* indicates that the duty to consult is triggered when the two elements described above occur. The Panel has already found that the first element of the *Haida* test has been satisfied. That is that the Crown had knowledge of the potential existence of an Aboriginal right or title. The question at this stage is whether the conduct contemplated by the Crown might adversely affect the aboriginal rights claims of the Gitxsan, of which the Crown had knowledge.

[107] The Panel also finds that the time when the duty to consult was owed was not limited to the time of issuance of the FLTCs. The duty to consult is triggered at

any time when the Crown contemplates conduct that may adversely effect a claimed aboriginal right that the Crown knows may exist.

[108] In this case, the first action contemplated and then undertaken by the Respondent, on behalf of the Crown, was the investigation of breaches of the terms of FLTC A80083, FLTC A79652 and A80092, held by the Appellants. The second action contemplated and then undertaken was subjecting the Appellants to the Opportunity To Be Heard process, determining that they had contravened section 52(1) of the *FRPA*, and issuing penalties against them for harvesting beyond the boundaries of the licenses. The Crown's conduct was undertaken as a consequence of the activities of the Appellants under the terms of their FLTCs.

[109] The fact that harvesting occurred beyond the license boundaries is not disputed. The Appellants rely on the Gitxsan's claim of title to the land. They submit that it is the right to the land itself and governance of the Gitxsan's resources that is the subject of the consultation claim, and that accommodation should be what is appropriate in the circumstance.

[110] The Panel has already found that the appellants were acting on behalf of the Gitxsan when they harvested both within and beyond the license boundaries. The Panel further finds that, although the appealed decision did not adversely affect the forest resources in the area over which the Gitxsan claim title, it did adversely affect the aboriginal title rights claimed by the Gitxsan and by the Appellants, who are a Gitxsan person and a corporation that is operated for the benefit of the Gitxsan people. In particular, the adverse effect was to penalize the Appellants, and consequentially the Gitxsan, for harvesting timber that they claim to own and claim to have a right to manage, as asserted holders of aboriginal title to the land where the timber was standing. The Crown's enforcement action has a direct effect on the Appellants, but it also sends a clear message to all Gitxsan that they will face penalties for harvesting timber in the area of their asserted title unless they seek and receive authorization from the Crown.

[111] Although *Haida* indicates that the Crown is entitled to manage resources pending the resolution of aboriginal rights claims, the Crown may not do so in a manner that deprives the aboriginal claimants of the benefits of the resources. The enforcement action in this case, in the absence of any consultation, has the effect of depriving the Appellants and the Gitxsan from the benefits of the timber resources they claim to have a right to use and manage, unless they comply with the *FRPA* scheme. In other words, the Crown's approach to enforcement in this case has the effect of restricting the Gitxsan's ability to obtain the benefits of the forest resources, because it forces them to harvest only in accordance with the *FRPA* scheme, regardless of their assertion of title to the area.

[112] The Panel also finds that the effect of penalizing the Appellants for contravening section 52(1) of the *FRPA* in this case is the same as if the Appellants had proceeded to harvest in the area without ever holding any licenses in the area. The penalties are for unauthorized harvesting of Crown timber, not for violating the licenses *per se*. The fact that the Appellants sought licenses for some of the areas they harvested is irrelevant when considering the effect of the enforcement actions on the asserted aboriginal rights. The Panel finds that the enforcement actions in this case proceeded without consideration of the effects of the penalties on the

Gitxsan's claim of title to the area, which, if proven, would include the right to use and manage the forest resources.

[113] For these reasons the Panel finds that the conduct contemplated and carried out by the District Manager adversely affected the Aboriginal title and rights claims of the Gitxsan. The Panel further finds that the duty to consult was triggered by the investigation and enforcement proceedings undertaken by the District Manager. The question that arises from these findings is what level of consultation was required or should have been required.

[114] In *Haida*, the Court characterized the varying levels of consultation that may be required in different circumstances as a spectrum. The Court also stated that the level of consultation required in a given case may change as new information comes forward during the process. At paragraphs 43 to 45 of *Haida*, the Court discusses the different levels of consultation that may be required:

> In this respect, the concept of a spectrum may be helpful… 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.
>
> …
>
> 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…
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake…

[115] The court in *Gitxsan* has previously found that the Gitxsan have a "good prima facia claim of aboriginal title and a strong prima facia claim of aboriginal rights with respect to at least part of the areas claimed by them". Under these circumstances the District Manager should have entered into consultation with the Gitxsan and its representatives. The Panel finds that the level of consultation should have been, at the very least, in the middle of

the spectrum described in *Haida*. However, the District Manager chose to ignore that responsibility and provided the Gitxsan with no consultation whatsoever. Unfortunately, the issuance of penalties and findings of contravention of the FRPA in this circumstance has had a chilling effect on the relationship between the Ministry and the Gitxsan, and reflects poorly on the honour of the Crown. Such a result can be avoided in the future by allowing the consultation process to proceed before similar decisions are made.

3. Does the Appellants' claim to be consulted in this case amount to a collateral attack on the Province's validly enacted regulatory scheme?

Respondent's Submissions

[116] The Respondent submits that the Appellants claim that the Gitxsan were owed a duty of consultation before any enforcement action was taken against them for breaching the terms of the FLTCs that they entered into is an impermissable collateral attack on Part 6 of the FRPA and the entirety of the Provincial forestry legislation. The Respondent submits that the Ministry and the District Director were carrying out their statutory responsibilities to regulate the forest industry under validly enacted legislation as provided for under section 92 of the *Constitution Act, 1867*.

[117] The Respondent asserts that "the Province is entitled to regulate the resource and impose sanctions against unauthorized harvesting. Allowing collateral attack on the regulatory scheme undermines regulatory intervention and encourages individuals to ignore the regulatory scheme. It is not a responsible way to manage forest resources to allow individuals to log as they choose and then to defend their actions by collaterally attacking the regulations put in place in good faith by the government to manage those very forest resources. This is not management, but the complete absence of management."

[118] The Respondent relies on a decision of the Alberta Court of Appeal (*R.v. Lefthand, [2007]A.J. No. 681*) [*Lefthand*] at paragraphs 19 – 21, for this proposition.

Appellant's Submissions

[119] The Appellants submit that they have followed the correct process and should expect to be consulted before any proceedings occur that may impact their title and rights. The Appellants also note that the majority in *Lefthand* do not adopt the reasons cited above by the Respondent. Instead, an alternate and opposite expression of the law is proposed at paragraphs 183-184 of *Lefthand*:

> I agree with Watson J.A. that the issue of collateral attack does not need to be decided in this case. In fact, for the reasons discussed above, I find that the issue should not be decided given that the parties did not make submissions on this point. Since the subject of collateral attack has been raised by Slatter J.A., however, I do wish to make a few brief comments on the topic.

> In my view, it is incorrect to characterize the invocation of an aboriginal or treaty right as a "collateral attack". Rather, it is a possible defence against prosecution, and, like all other defences in criminal proceedings, it is appropriately raised after a charge has been laid. This is, in some ways, analogous to an accused raising a *Charter* argument, and in both situations it is unreasonable to expect that an individual, prior to being charged, would have the interest or resources to challenge the impugned legislation.

[120] In conclusion the Appellants submit that they are not using the wrong forum to attack the District Manager's decision and it is not a collateral attack on the legislation or the regulatory scheme.

The Panel's Findings

[121] The Panel finds that the regulatory regime regarding the management of forest resources in this province has recognized for more than the past decade that asserted aboriginal title and rights must be considered when making decisions that impact both the resource and the social and economic impact that such decisions might have on affected First Nations. A fundamental aspect of that consideration is to carry out appropriate consultation where necessary before making decisions that may impact any such title or rights.

[122] As the Panel has already found that this is a case where a duty to consult was owed to the Gitxsan and through the Gitxsan to the Appellants before any enforcement action took place the Panel finds that this is not a collateral attack on Part 6 of the FRPA and the entirety of the Provincial forestry legislation. Rather it is a proper defence to a finding of a contravention and the issuance of penalties under FRPA. The Panel agrees with the *obiter* findings of the court in *Lefthand* at paragraph 184 that this is not a collateral attack on the legislation, but rather a proper defense arising from constitutionally recognized rights.

4. What is the appropriate remedy in this case?

[123] The Panel notes that the Appellants have requested that, if successful in the appeal, the District Manager's decision should be reversed and declared a nullity. The Panel's jurisdiction respecting remedy is set out in section 84 (1) of FRPA which is set out at page 2 of these reasons. The Commission's, and therefore this Panel's jurisdiction to issue a remedy is limited to what the statute has provided. Accordingly, the Panel is not prepared to, nor has it the jurisdiction to declare the District Manager's determination a nullity.

[124] However, the Panel does find that the November 10, 2008 determination of the District Manager, including the findings of contravention and the associated penalties, should be rescinded. This is particularly appropriate given that no consultation was offered, given or considered necessary before the determination was made.

DECISION

[125] In making this decision, the Panel has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

[126] For the reasons provided above, the Panel orders that the District Manager's November 10, 2008 determination, including the findings of contravention and the associated penalties, is rescinded.

Accordingly, the appeal is allowed.

"Alan Andison"

Alan Andison, Chair
Forest Appeals Commission

September 2, 2011