IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Yahey v. Her Majesty the Queen,*
2015 BCSC 1302

Date: 20150727
Docket: S151727
Registry: Vancouver

Between:

Marvin Yahey on his own behalf and on behalf of all other Blueberry River First Nations beneficiaries of Treaty No. 8 and the Blueberry River First Nations

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia

Defendant

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiffs:	M.M. Giltrow P.J. Millerd
Counsel for the Defendant:	P.G. Foy, Q.C. R.L. Williams
Place and Date of Trial/Hearing:	Vancouver, B.C. July 14, 2015
Place and Date of Judgment:	Vancouver, B.C. July 27, 2015

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I. INTRODUCTION

1. The Blueberry River First Nations ("BRFN") seeks an interlocutory injunction that would prevent the British Columbia government from proceeding with a planned auction of 15 Timber Sale Licences ("TSLs"). The licenses would permit logging of specified areas, or "cut blocks," totalling 1,690 hectares (16.9 sq. km) of merchantable timber within BRFN's traditional territory in northeastern British Columbia.

2. BRFN members have treaty rights to use their traditional territory for hunting, fishing and other traditional activities, but BRFN says the cumulative effect of industrial development has made or will soon make it impossible to meaningfully exercise those rights. It has commenced an action seeking declarations that the Crown has breached treaty obligations as well as interim and permanent injunctions to prohibit the Province from doing or permitting any activities that amount to a further breach. In addition to forestry, BRFN's Notice of Civil Claim refers to oil and gas, mining, hydroelectric infrastructure, roads, agriculture and other development.

3. The Notice of Civil Claim does not specifically refer to the cut blocks that are the subject of this injunction application, but BRFN says the planned logging will contribute to the cumulative effect that it complains of and should not proceed before trial of the main action. The Crown says that BRFN has long known of the proposed logging, was consulted about it and did not object until recently, after a new chief and council took office.

4. This application was heard on July 14, 2015 and the sale of TSLs is scheduled to proceed in August, or in any event no later than September 1. That has required these reasons to be prepared with some urgency.

II. BLUEBERRY RIVER FIRST NATIONS AND TREATY 8

5. BRFN has approximately 475 members and two reserves near Fort St. John B.C. Its traditional territory covers some 38,000 square kilometres in the upper

Peace River Region. Of that territory, it has identified a 10,267 sq. km portion as a "critical area."

6. Unlike most British Columbia First Nations, BRFN is subject to a treaty — specifically, Treaty 8, which covers northern Alberta, northwestern Saskatchewan and northeastern B.C. The treaty was made in 1899 and BRFN's ancestors adhered to it the following year. Under the treaty, First Nations surrendered title to their traditional territories, but were guaranteed the right to continue using those territories to maintain their traditional way of life. The treaty says:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.
>
> [Emphasis added.]

7. In *R v. Badger*, [1996] 1 S.C.R. 771 the Supreme Court of Canada said at para. 55 that Treaty 8 must be interpreted with reference to oral promises made on behalf of the Crown and recorded in reports of the Treaty Commissioners and other sources at that time. The *Report of the Commissioners for Treaty No. 8,* dated September 22, 1899, included a statement that First Nations had been assured that:

> …they would be as free to hunt and fish after the treaty as they would be if they never entered into it.
>
> We assured them that the treaty would not lead to any forced interference with their mode of life…

8. Significantly, the Court in *Badger* at para. 39 found that this assurance was an essential element of the treaty:

> it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties.

9. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 the Supreme Court held that although Treaty 8 allows the Crown to "take

up" land for other purposes, that right is subject to the First Nations being able to meaningfully exercise their rights. The Court said at para. 48:

> The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.
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> [Underlining added.]

10. The Court's reference to "*Sparrow* justification" refers to *R. v. Sparrow*, [1990] 1 S.C.R. 1075, which set out the test for determining whether government infringement of an aboriginal right is justified. Such an analysis is not necessarily appropriate to a case involving Treaty 8 because, as the Court in *Mikisew* stated at para. 31:

> I agree with Rothstein J.A. that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow.* In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added.). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.
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> [Emphasis in original.]

III. THE ISSUE

11. This is not a case like *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, where First Nations claimed and were found to have aboriginal title to the land and resources along with a right to decide how they are to be used. Nor is it a case like *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, where the Crown was found to have a duty to consult with First Nations and accommodate their interests while claims to aboriginal title are being pursued but not yet proven.

12. In this case, BRFN's ancestors, by accepting the treaty, surrendered ownership of the land and several of its resources and gave the Crown a *prima facie* right to take up tracts of land for lumbering purposes, which is what it proposes to do. The question in the underlying action is whether the Crown's conduct over a period of many years has effectively deprived BRFN of the rights it retained under the treaty to use at least part of the land.

13. BRFN says that the time when treaty rights can no longer be meaningfully exercised, as contemplated by the Supreme Court in *Mikisew*, has been reached in BRFN's traditional territory. Whether or not that is the case is a question of fact that can only be decided at a future trial of the underlying action. The question on this application is whether BRFN has satisfied the criteria for obtaining an interim injunction, as set out in in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*]:

> a) whether the applicant has demonstrated that there is a serious question to be tried;
>
> (b) whether the applicant will suffer irreparable harm if an injunction is not granted; and
>
> (c) whether the balance of convenience favours granting the injunction.

IV. THE FOREST OPERATIONS SCHEDULE AND BRFN'S RESPONSE

14. The BRFN traditional territory at issue in this case is located within the Fort St. John Timber Supply Area ("TSA"). The proposed timber harvesting is to be done pursuant to TSLs sold by a Crown agency, B.C. Timber Sales ("BCTS"). BCTS develops Crown timber for auction. In addition to producing revenue, the amounts obtained from successful bidders are used in setting stumpage rates payable to the Crown from logging in long-term forestry tenures held by private companies.

15. On April 10, 2015, BRFN received notice of BCTS's proposed schedule of sales for the period from July 1, 2015 to March 31, 2016. The locations of the proposed cut blocks were identified on accompanying maps.

16. Timber harvesting in the Fort St. John TSA is governed by the *Fort St. John Pilot Project Regulation,* B.C. Reg. 278/2001 [the "*Regulation*"]. The participants in the pilot project currently include BCTS and five forest companies. The regulation requires creation of Sustainable Forest Management Plans ("SFMPs") and associated Forest Operations Schedules ("FOSes"). Each FOS identifies all harvesting and road development contemplated in an SFMP for a six year period.

17. The current SFMP was approved by the Ministry of Forest and Range and the Ministry of Environment on November 1, 2010 ("SFMP #2"). The current FOS was finalized on January 25, 2011 and details proposed harvesting and road construction activities until March 31, 2017 ("FOS #2").

18. The Crown says that both SFMP #2 and FOS #2 were subject to extensive consultation with First Nations, including BRFN, as well as review by a public advisory group. It says BRFN was invited to provide specifics regarding potential impacts on their ability to exercise their treaty rights and that in December 2010, eight cut blocks totaling 354 hectares were removed from the proposed FOS in response to BRFN's concerns about hunting, trapping and culturally important sites.

19. In late 2013, BRFN members elected a new chief and council. The new leadership has raised issues that apparently were not raised by their predecessors. On April 22, 2014, BCTS wrote to BRFN Chief Marvin Yahey enclosing the sales schedule for 2014-2015. The letter included a statement that BCTS considered the formal consultation process to be complete but,

> …we are prepared to consider any significant new site-specific information…that may material[ly] influence the decision to proceed with harvest of a cut block …

20. On June 2, 2014, Chief Yahey wrote to the Ministry of Forests, Lands and Natural Resource Operations, saying that BRFN was concerned about the impact of forestry on its constitutionally protected rights and that previous consultation and accommodation had not been adequate. He said there was a need to develop a new consultation mechanism that would include referring to BRFN for "every single

authorization related to forestry activities" in its traditional territory. He also said it was necessary to discuss the protection of specific areas critical to the exercise of BRFN's treaty rights.

21. In a further letter to the Ministry of Forests, Lands and Natural Resource Operations dated September 19, 2014, BRFN said:

> In recent months it has become increasingly apparent that the cumulative impacts of industrial activity have infringed Blueberry River treaty rights and threaten to cause irreversible harm to Blueberry River culture and way of life.

22. The letter referred to "certain areas that are critical to the viability of treaty rights" and requested a meeting to "establish a protocol to identify these areas and provide them with immediate protection from forestry activities and other disturbances." In the interim, it requested immediate cessation of logging activities in a number of specified areas.

23. Stephanie Smith, a forester with BCTS, says the letter of June 2, 2014 was the first reference to "critical areas" in correspondence between BRFN and BCTS, and the September 19, 2014 letter was the first to specifically identify any such areas.

24. BRFN says that the government did not respond to the September 19, 2014 letter. Ms. Smith says in her affidavit that there were a number of attempts to arrange a meeting with BRFN, including three occasions when BRFN representatives either cancelled or failed to attend a scheduled meeting. I make no attempt to resolve that factual issue on this application.

25. The Notice of Civil Claim in this action was filed March 3, 2015. As said above BRFN was notified by letter dated April 10, 2015 of the 2015-2016 schedule for sale of TSLs. Like the similar letter a year earlier, it invited to BRFN to provide any new "site-specific information that may materially influence a decision to proceed with harvest of a cut block."

26. In a letter dated May 11, 2015, Chief Yahey said proceeding with the TSL sales would infringe treaty rights and, in a further letter dated May 25, 2015, he requested confirmation that the sales would not proceed. Ms. Smith responded with an email on June 5, 2015 that BCTS was unable to respond to the request due to the ongoing litigation.

27. Although the Crown says BRFN has been fully consulted, BRFN says that it was only invited to comment about specific sites, that it did not have the resources to deal with all them individually and that there is no mechanism to consider the cumulative impact of industrial development.

V. THE ALLEGED TREATY VIOLATION

28. BRFN says the Peace River region has been affected by a wide range of industrial and agricultural activity, including pipelines, roads, petroleum and natural gas wells, coal mines, forestry and farms. Chief Yahey says in an affidavit that this has "transformed the physical landscape of our territory."

29. A 2012 environmental study commissioned by BRFN said that approximately two thirds of the traditional territory has either been used for industry or is within 250 metres of an industrial location. It said this industrial-use area had been increasing by an average of 136 sq. km per year and:

> At this rate, by the year 2060, there will be no land left in the BRFN study area that is farther than 250 m from any industrial feature.

30. Dr. Rachel Holt, a biologist, says there are 20 watersheds that have at least a 50 percent overlap with BRFN traditional territory. Her affidavit does not give a total area for these watersheds, but from a graph attached to her affidavit this would appear to be in the range of about 3.6 million hectares, or 36,000 sq. km.

31. In 18 of these watersheds, Dr. Holt says the percentage of old growth forest (forest of more than 140 years old) is below 20 percent. By contrast, she says the trees that would be cut under the TSLs at issue in this application are almost 50% "old forest" and more than 90% are older than 100 years.

32. Chief Yahey says forestry has destroyed wildlife habitats, which reduces the game available for hunting and trapping. Further, through use of herbicides, forestry has contaminated traditional foods and medicines. In his affidavit, he describes the areas in which the proposed TSLs are located and their significance. His descriptions are as follows:

- Three TSLs, including five cut blocks with a total "merchantable area" of 227.3 hectares are in the area of Inga Lake. That area is the location of mineral licks, elk habitat, prime calving grounds for moose and important berry-picking sites.

- Three TSLs, including 10 cut blocks with a total merchantable area of 285.5 hectares, also include important elk and moose habitat and are approximately 15 km south of an important cultural and spiritual site known as the Dancing Grounds.

- Six TSLs with 7 cut blocks and a total merchantable area of 602.66 hectares are within or partially within established trap lines. Two more TSLs with 8 blocks and a total merchantable area of 252.7 hectares are just north of the trap lines in an area known as Black Creek. These blocks include important moose habitat and BRFN members rely heavily on the land in the vicinity for hunting, trapping and camping.

- One TSL includes 5 cut blocks with a total merchantable area of 322.2 hectares located approximately 8 km south of Pink Mountain. This is an area that has seen somewhat less industrial development than other parts of the territory and is heavily relied on "to support the continued existence of our treaty rights to the extent possible." The area includes prime elk and moose habitat and important berry picking sites. The upper reaches of the Halfway River just south of Pink Mountain are an important fishing ground for BRFN members.

33. Chief Yahey also states:

> With the exception of the Pink Mountain and Lily Lake areas, the Critical Areas have been so heavily impacted by the Industrial Developments that some areas are beyond being able to support the meaningful exercise of our Treaty Rights. In order to preserve and protect Blueberry way of life, urgent steps must be taken to prevent further degradation of these areas and to restore them to a state where they can once again support the meaningful practice of Blueberry Treaty Rights and sustain our culture and way of life.
>
> The Pink Mountain and Lily Lake areas have seen somewhat less industrial development to-date than the other Critical Areas. As a result, we heavily rely on these areas to support the continued exercise of our Treaty Rights to the extent possible. Nevertheless, even these areas have been significantly impacted by the Industrial Developments in the Upper Peace. For example, in recent years large game such as moose has been scarce in these areas, even compared with a few years ago. These areas and their surroundings must.be protected from any further incursions to ensure that our members continue to have some ability to practice our rights and culture.
>
> Blueberry is of the view that, in order to ensure the long-term protection of Blueberry Treaty Rights in the Territory, a planning framework must be developed and implemented to assess the cumulative impacts on Blueberry Treaty Rights, restore Blueberry Treaty Rights, and ensure that future development is planned and managed in a manner consistent with Blueberry Treaty Rights. No such framework has been applied to the existing impacts of the Industrial Developments or to the proposed 2015 sales of timber sale licences described below.

34. Contrary to BRFN's assertions about the impact of forestry on wildlife populations, the Crown says that populations, including those of moose and a number of furbearing animals, have been stable or increasing. That is, of course, a factual dispute that will undoubtedly be the subject of conflicting expert and other evidence at trial.

35. The Crown also says that steps are being taken to protect portions of what BRFN calls the critical area. This includes a proposal to protect almost 65,000 hectares of old growth forest from logging under the next SFMP. The Province also says it has identified 3,554 hectares of Crown land that it will not dispose of until the parties resolve an outstanding Treaty Land Entitlement Claim that BRFN has against the federal government. This includes 2,171 hectares in the Pink Mountain area and 202 hectares in the vicinity of the Dancing Grounds.

VI. THE TEST FOR AN INTERLOCUTORY INJUNCTION

A. Serious Question to be Tried

36. In determining whether there is a serious question to be tried, a court does not undertake an extensive review of the merits. The Supreme Court of Canada in *RJR-MacDonald* said at 337-338:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

37. The question raised by the main action is whether the cumulative effect of all industrial development in BRFN's traditional territory has become so extensive that it amounts to a breach of treaty rights. The possibility of such a claim, notwithstanding the Crown's right under Treaty 8 to "take up" land for development, was clearly contemplated by the Court in *Mikisew*.

38. BRFN has pointed to evidence that may be relied on at trial to support that claim, including calculations and measurements by experts and observations and experience of its members. The logging operations that are at issue in this action are alleged to be a part, albeit perhaps a small part, of that ongoing process amounting to the alleged treaty violation.

39. I have no hesitation in concluding that BRFN has satisfied the first branch of the *RJR-MacDonald* test and has shown a serious question to be tried.

B. Irreparable Harm

40. The term "irreparable harm" was defined in *RJR-MacDonald* at 341 as referring to the nature of the harm suffered by the applicant, rather than its magnitude. It is harm which either cannot be quantified in monetary terms or cannot be cured because one of the parties cannot collect damages from the other.

41. Irreparable harm would clearly be the result if cumulative industrial development effectively eliminated any opportunity for BRFN to meaningfully

exercise its traditional way of life and its rights to hunt, trap and fish. These proposed logging operations are not alleged to be the cause of the harm in and of themselves, but as this court said in *Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675 at para 65 [*Taseko*]:

> Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last.

42. In that sense, any portion of the overall loss in this case, if it is found to exist, should be characterized as irreparable harm.

43. In any event, the Court in *RJR-MacDonald* referred to the difficulty of assessing irreparable harm in the case of an application to restrain an alleged breach of a right under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [the *Charter*]. The Court said at 342 that in many cases it will be appropriate to assume that the loss to be suffered by the applicant constitutes irreparable harm.

44. This case is comparable in that, while not a *Charter* case, it involves an alleged infringement of a constitutionally protected right. Existing aboriginal and treaty rights are recognized and confirmed by s. 35 of the *Constitution Act, 1982*. As with a *Charter* case, damages are not the primary remedy in such case and, in fact, BRFN's Notice of Civil Claim does not include a claim for damages.

45. I find this to be at the very least a case where harm must be assumed, for purposes of the application, to be irreparable.

C. Balance of Convenience

46. In *RJR-MacDonald* at 342 the Supreme Court, referring to the third branch of the test, said:

> …In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

> The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case.

47. The Court went on to say that consideration of the balance of convenience includes consideration of public interest, particularly when the application seeks to enjoin conduct by a public body (at 343–347).

48. BRFN argues that it has brought this application before any third party has acquired rights to log the areas at issue. This is significant because, as the Supreme Court of Canada said in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43 at para. 47:

> …a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. …

49. The Crown says private rights are being affected. It says an injunction would cause delay, uncertainty and business disruption not only to BCTS, but to the participants in the Fort St. John pilot project who rely on the availability of this timber to conduct their operations. The Crown relies in part on an affidavit from Darrell Regimbald, a planning co-coordinator for Canfor. Canfor is one of the participants in the pilot project. It owns one mill in Fort St. John and, pursuant to a management contract, supplies raw material to another. Those two mills have a total of almost 400 employees.

50. Mr. Regimbald says Canfor has relied on the 2015 TSLs being put up for auction sometime this year in order to sustain its sawmill operations and its employees in Fort St. John. BRFN points out that, even if the TSLs are put up for auction, there is no guarantee that Canfor will be the successful bidder and Mr. Regimbald's affidavit does not go so far as to say jobs will be lost if the injunction is granted. It says timber purchases from BCTS account for only a small part of Canfor's total wood consumption, most of which comes from its own timber harvesting.

51. The TSLs at issue would produce 424,513 square metres of timber, which is most of BCTS's allowable annual cut from the Fort St. John TSA for conifer-leading stands. Because of the material that must be prepared for the sale of a TSL, and because only cut blocks identified in the current FOS can be sold, Ms. Smith says this volume cannot be replaced in this year's sales schedule. Therefore, she says, revenue that would be lost as a result of the injunction can never be made up unless the Province increases the amount of timber BCTS can sell, which would have an adverse impact on the sustainability of the resource.

52. The Crown also says the injunction would interfere with the ability of BCTS to perform its functions as a public body, which include providing price and cost data that is used throughout the province to set stumpage rates. Another function is to maximize use of wood impacted by the mountain pine beetle before it becomes unusable and a large portion of the TSLs in this case involve infected trees.

53. Perhaps most significantly the Crown relies on the public interest in maintaining the certainty and predictability of forest management and operations that is a principle goal of the Fort St. John pilot project. It says BRFN has had input into the development of these plans since 2010 and it did not raise its current issues until recently. Meanwhile, the Crown says, BCTS and the other participants in the pilot project have relied on the consultations and accommodations that have taken place.

54. I appreciate BRFN's position that the consultations that took place did not expressly include a mechanism for evaluating cumulative, as opposed to site-specific, effects. However, I see no reason why a concern about cumulative effects could not have been raised when plans that included these specific cut blocks were under discussion or at any point since that time. At least one of studies BRFN puts forward in support of its current position was published as early as 2008 and two others date from 2012.

55. It is certainly possible that the situation has changed, deteriorated or become more apparent since the current FOS was being developed. The newly elected BRFN leadership had the right to reconsider the matter and decide that the issue of

cumulative effects was more serious or urgent than its predecessors may have seen it to be. However, at the same time, BCTS and others reasonably relied on the lack of objection from BRFN and had a legitimate expectation that this logging would proceed.

56. None of these considerations can outweigh a substantial risk that constitutionally protected treaty rights will be breached or that the public interest in upholding the honour of the Crown will be harmed. However, it must be remembered that the irreparable harm alleged by BRFN is a *cumulative* negative effect that infringes on its treaty rights. Since BRFN seeks an injunction against conduct that is only *one part* of that cumulative effect, I must consider the relationship between the alleged treaty breach and the specific activity that BRFN seeks to enjoin. It would be unjust to weigh the full inconvenience to the Crown and the public against the full inconvenience to BRFN because BRFN alleges that the irreparable harm stems from a number of sources, many of which would not be affected by this injunction. Accordingly, the strength or weakness of the connection between the conduct that BRFN seeks to enjoin and the cumulative negative effect that poses a risk of irreparable harm affects the balance of convenience.

57. The breach relied upon by BRFN is "the continued unchecked development of the lands in its traditional territory". BRFN says that it is in the public interest to preserve some of these lands pending trial. As quoted above, Chief Yahey talks about the need for urgent steps to prevent further degradation.

58. The total area to be logged in these cut blocks represents less than a tenth of one percent of BRFN's traditional territory and less than two-tenths of one percent of the area BRFN defines as critical. If, as stated in one of the studies BRFN relies on, the amount of the traditional territory lost or affected by industrial development has been increasing by 136 sq. km. a year, the work at issue on this application amounts to only about 12 percent of that annual loss. Put another way, almost 90 percent of the ongoing industrial development BRFN complains of would be unaffected by this injunction.

59. For the reason stated in *Taseko*, the size of the project affected by the injunction is not necessarily determinative. Indeed, it may be possible to show that a single project, although small, is occurring at such a critical time or place that it amounts to a "tipping point" beyond which the right to meaningfully exercise treaty rights is lost. That is not the evidence in this case. Although Chief Yahey deposes to the significance of the areas involved, I am not satisfied that these TSLs will materially increase the cumulative effect on treaty rights that BRFN complains of or that stopping the TSLs will amount to a significant slowing of that overall process.

60. That leads to a further factor that must be considered in relation to the balance of convenience — the question of whether this injunction will in fact identify the status quo that can and should be preserved until trial. Neither the Crown nor the court should have to deal with a "moving target", meaning an alleged need to preserve a status quo that is being constantly redefined.

61. Most of the evidence BRFN relies on to show the cumulative effect on treaty rights is not specific to the cut blocks at issue. There is therefore nothing to prevent much of the same evidence being used in support of further injunction applications. The current FOS has one more year to run, so next year there will be another sales schedule with potential impact on BRFN territory. It would be inconsistent with BRFN's position in the underlying action if it failed to seek a further injunction at that time.

62. The evidence relied on to show erosion of treaty rights is also not limited to forestry. It would seem to have potential application to any development that may be proposed in the years (potentially many years) between now and the trial of the underlying action. The Notice of Civil Claim specifically raises the possibility of an injunction application whenever an activity is believed to contribute to the cumulative effect on treaty rights. The relief sought includes:

> An interim injunction restraining the Defendant from undertaking, causing and/or permitting activities that:
>
> a) breach the Defendant's obligations to the Plaintiffs under the Treaty;

b) infringe the Plaintiff's Treaty Rights; or

c) breach the Defendant's fiduciary obligations to the Plaintiffs.

63. There is a high probability of a series of applications, each requiring a separate hearing and each order, if granted, becoming authority in support of the next. The eventual result would be a general moratorium on all or most new industrial activity in the BRFN traditional territory or the area BRFN defines as critical. The Notice of Civil Claim and the affidavit material in support of this application at least imply that is what is needed.

64. BRFN may be able to persuade the court that a more general and wide-ranging hold on industrial activity is needed to protect its treaty rights until trial. However, if the court is to consider such a far-reaching order, it should be on an application that frankly seeks that result and allows the court to fully appreciate the implications and effects of what it is being asked to do. The public interest will not be served by dealing with the matter on a piecemeal, project-by-project basis.

VII. CONCLUSION

65. For those reasons, I find that the balance of convenience does not support granting of the injunction sought and the application is dismissed. Costs will be in the cause.

"N. Smith, J."