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BC Supreme Court Orders Aboriginal Consultations in Skeena Cellulose Restructuring

On December 10, 2002, the B.C. Supreme Court released a decision requiring the Crown to consult with First Nations when the B.C. Minister of Forests approves the change of control of a tree farm licence ("TFL"). *Gitxsan and other First Nations v. British Columbia (Minister of Forests)*, 2002 BCSC 1701, is the first decision to consider consultation obligations related to forest tenure transfers since the B.C. Court of Appeal's controversial decision in *Haida Nation v. BC and Weyerhaeuser*.

Skeena Cellulose operates a pulp mill in Prince Rupert and sawmills in other locations. It holds several licences under the B.C. *Forest Act*, including a tree farm licence. Due to financial difficulties, Skeena sought protection under the *Companies' Creditors Arrangement Act (CCAA)*. Ultimately, a proposal was made to transfer control of Skeena Cellulose to NWBC Timber & Pulp Ltd. Under the *Forest Act*, the Minister of Forests must consent to any change in control of the holder of a TFL.

Three aboriginal groups challenged the Minister's decision to consent to the change in control. They argued that the Minister was required to consult with them prior to making a decision. Since no consultation had taken place, they argued that the Minister's decision should be quashed.

Tysoe J. found that each of the aboriginal groups had a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights within the TFL area. He interpreted the Court of Appeal's decision in *Weyerhaeuser* to mean that a transfer of a TFL constitutes a *prima facie* infringement of aboriginal rights and title. As that decision is binding on lower courts, Tysoe J. held that the change in control over Skeena's TFL was a *prima facie* infringement of the three aboriginal groups' aboriginal rights and title. He then found that there was no meaningful consultation by the Crown and no attempt whatsoever to accommodate their concerns. Tysoe J. held that the very tight timelines for the Minister's decision, in light of the *CCAA* process, did not obviate the need for adequate consultation. As a result, the Crown had not discharged its consultation obligations.

The aboriginal groups argued that, because consultation was inadequate, the court should quash the Minister's decision. Although Tysoe J. noted that this was open to the court, he refused to do so. He noted the potentially drastic economic consequences of quashing the decision and, based on the Court of Appeal's approach in *Weyerhaeuser*, decided the appropriate remedy was to require further consultations with the aboriginal groups. Tysoe J. granted a declaration that the Crown has a legally enforceable duty to consult

with the three aboriginal groups in good faith to seek workable accommodations that balanced their concerns on the one hand and the public interest on the other. He adjourned the aboriginal groups' petition generally to allow time for these consultations to occur. He noted that if the Province failed to consult, the aboriginal groups could continue the proceedings, and it remained open to the Court to then grant an order quashing the Minister's decision.

The aboriginal groups argued, based on *Weyerhaeuser*, that Skeena and NWBC should also be ordered to consult, as the Court of Appeal did with Weyerhaeuser. Tysoe J. noted that it was possible that Skeena's licences suffered the same legal defects as Weyerhaeuser's due to the Province's breach of its consultation obligations. However, he did not consider it necessary to impose a formal obligation on Skeena to participate in the consultation process. He noted that Skeena would have a practical incentive to participate in the process to facilitate removal of the defect. As a result, he exercised his discretion not to include Skeena in the declaration of the duty to consult and accommodate.

The decision is significant in at least three ways. First, it shows that aboriginal groups may only need to meet a very low standard for demonstrating *prima facie* infringements of rights and title. Here, there was no change contemplated to the licences involved, but the court held that the mere change in identity of the holder of the licences could *prima facie* infringe aboriginal rights or title, triggering the obligation to consult and to attempt to accommodate First Nations' interests. If the change in control was truly neutral, as the Crown argued, there would be no need for the Minister's consent to the change.

Second, the court recognized that the Minister must be able to balance aboriginal interests with broader public interests in deciding whether to consent to the change in control. However, consultation with affected aboriginal groups must occur before the Minister makes that decision.

Third, as *Weyerhaeuser* was binding on the court, there was no debate about the merits of the decision. However, the court did not feel bound to grant the same remedy against Skeena as the Court of Appeal had against Weyerhaeuser. Thus, the duty to consult was not extended to the third party licensee whose TFL was at issue.

For more information about this decision, and the potential implications for the transfer of other provincial tenures and authorizations, please contact any member of our Aboriginal Law Practice Group:

Vancouver		
S. Bradley Armstrong	604.631.9126	barmstrong@lawsonlundell.com
Keith B. Bergner	604.631.9199	kbergner@lawsonlundell.com
J. Martin Kyle	604.631.9125	mkyle@lawsonlundell.com
Jana McLean	604.631.6790	jmclean@lawsonlundell.com
Clifford G. Proudfoot	604.631.9217	cproudfoot@lawsonlundell.com
Lynda Stokes	604.631.9269	lstokes@lawsonlundell.com
Marko Vesely	604.631.9260	mvesely@lawsonlundell.com
Calgary		
Karl J. Bomhof	403.781.9471	kbomhof@lawsonlundell.com
A.W. (Sandy) Carpenter	403.781.9458	scarpenter@lawsonlundell.com
Peter D. Feldberg	403.781.9457	pfeldberg@lawsonlundell.com
John M. Olynyk	403.781.9472	jolynyk@lawsonlundell.com
Yellowknife		
Michael G. Himmelman	867.669.5528	mhimmelman@lawsonlundell.com
Geoffrey P. Wiest	867.669.5544	gwiest@lawsonlundell.com