



**Forest
Practices
Board**

First Nations Consultation on the Maiyoo Keyoh

Complaint Investigation 080820

FPB/IRC/146

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The Investigation

Introduction

In February 2007, Canadian Forest Products Ltd. (the licensee) informed the Nak'azdli Indian Band (the Band) that it planned to salvage forest stands killed by the mountain pine beetle in part of the Fort St. James Forest District. The Ministry of Forests and Range (MFR) asked to consult with the Band about the potential effects of the licensee's harvesting, road construction and other forest practices. MFR would try to resolve any potential impacts to aboriginal interests and, if necessary, accommodate potential infringement.

However, the Band and members¹ of a First Nations extended family that use part of the area explained that the Band, as a whole, has almost no authority to consult about resources on the family-used area, even though family members are registered band members. The message from both the band and the family was that the family should be consulted about using resources in this area, and that the Band would only be involved if members other than those in the extended family have interests there.

The head of the family in question asked MFR to fully assess, explain and justify what she perceived as potential infringement of the proposed forest practices on the family's aboriginal interests in the area. She also wanted MFR to compensate the family for any infringement.

Over the next 10 months, the dispute intensified. In December 2007, cutting permits were issued for two cutblocks in the area where aboriginal interests had been declared by the family. In February 2008, family members set up a blockade, but harvesting continued when the blockade ended.

The family maintained that the approved forest practices would unjustifiably infringe upon their aboriginal interests. They asked the Minister of Forests and Range to intervene, as provided for in section 77.1 of the *Forest and Range Practices Act* (FRPA). However, the minister declined to do so.

In March 2008, the family complained to the Board. The complainant asked the Board to investigate the adequacy of MFR consultation, the process leading to the issuance of the cutting permits and the reasonableness of the minister's refusal to intervene. The complainant also asked that the Board investigate whether the licensee had violated an agreement with the family.

¹ The family has 23 adult members, 56 members in total.

Historical Context

Forest harvesting, primarily by clearcutting,² is spreading westward from Prince George as forest companies salvage pine stands affected by mountain pine beetle. Forest harvesting and road building are encroaching on areas where Carrier-Sekani First Nations have lived for centuries, areas where they are likely to have aboriginal rights to use forest resources including wildlife, fish and edible and medicinal plants.

Carrier First Nations call themselves Dakelh; Carrier was the name the neighbouring Sekani First Nation used for the Dakelh. The Dakelh near Fort St. James are divided into four clans, each made up of a number of extended families. The family groups are associated with specific territories called keyohs where members can utilize resources. These localized family groups have titles of nobility that are usually inherited matrilineally.³ Although family members can use their respective keyohs for resource gathering, ownership, management and protection of the keyohs was traditionally done by the clans, not the families. Each clan controlled and administered the keyohs through discussion, decisions and recognition at bahlats (potlatches or feasts). This allowed decisions to be witnessed by other clans and representatives of neighbouring keyohs. Each clan had a nobleman or noblewoman who was the clan spokesperson. The clan, as a group, determined who held the title of ts'ekeza (a noblewoman) or deneza (a nobleman), a person who speaks for each keyoh. Each ts'ekeza or deneza passed property, rights and responsibilities over the keyoh to a successor, duly witnessed by the clans and others in a bahlat.

The maiyoo keyoh consists of a forested 22,000-hectare area north of the west end of Great Beaver Lake, east of Fort St. James. An extended family group of the Beaver Clan has long used the maiyoo keyoh, including a village called Sook'uz. It is clear that, as of 1840, the traditional governance system was fully functional. At that time, the deneza for the maiyoo keyoh was Hwatsot'en.

Around 1860, Dakelh communities, governance and cultural structures began to be severely disrupted. The colonial government outlawed the bahlats and encouraged First Nations people to move to Indian reserves. Smallpox, typhoid, influenza and alcoholism killed many, including elders who carry the oral histories and traditions forward. Children were taken from their communities to residential schools.

This disruption, augmented by government demands to modify traditional resource use activities, inevitably impaired the cooperative sustenance-oriented resource use and management on the keyohs. Concurrently, railways and highways increased access to these traditional lands during the 1900s. That access brought agricultural settlement, mining, logging

² Overall, an average of 84 percent of the trees in every stand is being harvested in the area (16 percent retained for other forest values such as protection of streams and wildlife).

³ Traditionally, the title was passed from a deceased noble to his sister's son, thereby ensuring that the title was held by a member of the clan. See J.C. Steward and R.F. Murphy, eds, 1977. *Evolution and Ecology: Essays on Social Transformation* by Julian H. Steward, Univ. Illinois Press, at 192.

and sawmilling, along with a network of industrial roads and competition for resource use. Further, the wage economy disrupted the Dakelh's management and protection of the keyohs.

A snapshot in time of the extent of the disruption was provided in 1913, when the McKenna-McBride Commission visited Fort St. James. The Commissioners heard from Chief Jimmy of the Nak'azdli Band regarding the state of the Dakelh people at that time. The Chief noted that the circumstances of the Band were poor: members depended on hunting and, with difficulty, they were attempting fishing and agriculture; they lacked paid employment, medical attention, and schooling for their children; and they were in need of food for themselves and hay for their horses and cattle.⁴ Nevertheless, the traditional keyoh-based resource use system continued to some extent. This continuation is indicated by the fact that the use of titles continued; Koomdiel was declared to be the deneza for the maiyoo keyoh in about 1870, and he passed the title to his adopted grandson Pius in 1918.

In the 1920s, the Provincial Game Commission asked the Dakelh to describe where they traditionally trapped. The denezas and ts'ekezas described their respective keyohs, which were then registered by the province as traplines (notwithstanding that keyohs were used for more than trapping).

In 1953, the federal government imposed an elected band council rather than recognizing the traditional hereditary governance, holding an election for a chief and council of the newly-created Nak'azdli Indian Band to administer reserve lands. Most of the family group that used the maiyoo keyoh were assigned to that Band.

The 1890 law banning potlatches was repealed in 1951, so bahlats began to be held again from time to time. In 1956, Pius, the deneza of maiyoo keyoh, told his daughter that she would be the next head of the family, allowed to use the family name Hahul. However, since Hahul is not a Dakelh or Beaver Clan title, use of the name Hahul does not necessarily carry the title of ts'ekeza or the right to speak for the keyoh, particularly since the title of ts'ekeza is traditionally passed through the mother's lineage, not the father's. In addition, ts'ekeza designation should be witnessed in a bahlat held by the Beaver Clan. These factors suggest that Hahul may not have the authority of a ts'ekeza to speak for the keyoh. On the other hand, the complainant maintains that the title can be passed patrilineally, similar to how registered traplines can be transferred, but that view contradicts anthropological sources (see footnote 3) and opinions of other interviewees. Therefore, until the clan decides the matter, it appears to be an open question whether Hahul is also the ts'ekeza and therefore authorized to speak for the maiyoo keyoh.

⁴ Minutes of Proceedings, June 15, 1913, Royal Commission on Indian Affairs for the Province of British Columbia (the "McKenna-McBride Commission"), Indian Claims Commission Documents, pp. 106-11.

Background

The previously-described history of development of north-central BC and its effects on the Dakelh support a strong concern about their ability to continue to exercise aboriginal rights in their traditional areas. Therefore, in July 2002, Hahul declared “to all key federal and provincial Crown ministries and third parties” that her family had aboriginal rights and aboriginal title⁵ (ownership) of the maiyoo keyoh, as depicted on a map of its registered trapline #725T008. According to Hahul, all uses and authorizations to use the keyoh territory or resources would henceforth require the family’s consent.⁶ The declaration was sent to other keyoh holders, the Band, local forest licensees and MFR.

The band council confirmed, in a letter to the MFR district manager and copied to the licensee, that it had no mandate to consult on management or timber harvesting plans on band members’ keyohs. The elected band council is responsible only for administration of reserve lands, services and government programs. They held that the province would have to consult with the keyoh holders about forest practices on the keyohs.⁷ Such division of responsibility between the keyoh holders and the Band is somewhat confusing to government because the Band has been involved in the BC treaty negotiation process since 1993, representing all band members, including the maiyoo keyoh family. These negotiations, through the Carrier-Sekani Tribal Council, inevitably concern aboriginal interests in traditional territory outside existing reserves.

In 2002, members of the family blockaded the licensee’s forest practices on the maiyoo keyoh, causing the licensee to withdraw and operate in other areas for the next five years.

In 2003, the maiyoo keyoh family members incorporated the Maiyoo Keyoh Society (the Society) so that it could enter into contracts. The purpose of the Society is to represent Hahul by protecting aboriginal title, by negotiating accommodation for infringements of that aboriginal title and by participating in resource development on the maiyoo keyoh.

The Society completed a land use and occupancy study for the maiyoo keyoh in 2004. The licensee worked with the Society to help to compile information about the family’s use and occupation of the keyoh. The licensee planned to share its plans for forest development with the Society, identify the family’s block-specific concerns and values, and look for factors in the licensee’s control. It would then, at the early planning stage, be able to implement “operational accommodation,” minimizing infringement of resource uses and values that were important to the Society. This would support MFR’s efforts at consultation and accommodation.

Through 2004, the Society worked to clarify its working relationship with the Band and the treaty negotiation office. The Band was involved with timber harvesting through a non-renewable forest licence, a Forest and Range Agreement (for revenue-sharing and forest tenure

⁵ For more detail on aboriginal rights generally and of the attributes of the strong aboriginal right called aboriginal title, see Appendix 1.

⁶ Notice of Aboriginal Title for the Meyoo Keyoh, July 5, 2002.

⁷ Letter from Nak’azdli Band Chief, July 16, 2002.

opportunities) and a band sawmill. The Society was therefore concerned that the band council's interests might not match those of the Society. Nevertheless, it proposed a framework agreement to lay out respective roles and responsibilities. This agreement was expected to give the Band a mandate to act on behalf of the traditional holders of the land—the keyoh families. The Band did not respond, other than to suggest that the Society should attend meetings along with other keyoh holders.

In March 2005, the Society wrote to the provincial Minister of Forests, the federal Minister of Aboriginal Affairs and Northern Development, the Nak'azdli Band Council and a band-owned logging company to protest the provincial government's issuance of forest licences, and the Band's own use of forest resources in the maiyoo keyoh. The Society asserted that it had aboriginal title to the entire maiyoo keyoh. The Society again stated that no resource development could take place on the keyoh without the Society's consent.⁸ In response, the Council and the logging company agreed to not harvest in the maiyoo keyoh under the forest licence.

The deputy minister of forests did not agree to stop issuing forest licences in the maiyoo keyoh. He noted that Society members were registered Nak'azdli Band members. He pointed out that the Band had been recognized, by the federal and provincial governments in the BC treaty process, as representing all its members for negotiation and consultation about aboriginal interests. Until the Society was recognized as a distinct First Nation in the treaty process, or by federal government recognition as a distinct First Nation, the ministry encouraged the Society to work closely with the Band and council. The deputy minister asked that the collective aboriginal interests of Society members be coordinated through consultation with the band chief and council.⁹

The Society soon took steps to be recognized as a distinct entity in the treaty process, asking the BC Treaty Commission to recognize it as a separate group. The Treaty Commission did not do so. Instead, it listed criteria that the Society would have to meet before the Commission would accept a statement of intent to break away from the Nak'azdli Treaty Office.¹⁰

In the meantime, the Society had negotiated an information sharing agreement with the licensee to communicate information and concerns, and to establish a process to resolve disputes about the licensee's plans in the maiyoo keyoh. The licensee was to provide the Society with operational plans, impact assessments and similar documents, and the Society would provide information pertaining to the keyoh, including information from the land use and occupancy study. Each party would keep the information confidential from others, including government.

The Society continued, through 2005 and early 2006, to try to clarify its working relationship with the Band, but in July 2006, the band council passed a resolution not to sign any agreement with the Society. The band council said that clans, not the families, were the holders of the

⁸ Letter from the Society's lawyer, March 21, 2005.

⁹ Letter from Deputy Minister, April 14, 2005.

¹⁰ Letter from Treaty Process Manager, July 25, 2005.

keyohs and that signing such a protocol would create conflict in the community. The clans should deal with such matters in traditional ways through bahlats.¹¹

In 2005, as forest stewardship plans began to be approved under FRPA, MFR district staff developed a business plan for consultation with First Nations, taking care to develop a process that would suit local First Nations. First Nations representatives wanted a higher level of detail than was presented in the forest stewardship plans and MFR agreed that this was an appropriate request. In 2006, MFR met with licensees to refine the approach. MFR was clear that the duty to consult was the government's, not the licensees,' therefore it asked licensees to provide all their plans to the ministry so that MFR could formally invite First Nations to consult. MFR reasoning was that rather than try to consult only on high-risk issues and risk-manage the rest, it would be more effective to consult on all forestry activities.

MFR also asked all licensees to work directly with First Nations groups, sharing operational details, as they were best situated to implement operational accommodation by modifying site-specific forest practices to mitigate or avoid infringement on identified aboriginal rights. However, MFR intended to remain involved, specifying that it should be invited to every meeting, and that it was ready to intervene if consultation between any licensee and First Nation appeared to be ineffective.

In terms of consultation, MFR noted that of 80 to 85 keyohs in the Fort St. James Forest District, 40 were used by Nak'azdli Band members. Deciding that consulting with each of these 40 keyoh holders individually was impractical, the district chose instead to consult with them in conjunction with the Band. The band council was not asked to consult individually with keyoh holders; but was asked to invite affected keyoh holders to join and speak about forestry issues and concerns. The result was a mixed consultation, with both the Band and representatives of the individually affected keyohs contributing to the consultation process.

The consultation process was initiated for the maiyoo keyoh area in January 2007, when the licensee amended its forest stewardship plan to include 46 new declared areas (containing proposed cutblocks and roads). Three of those proposed cutblocks were on, or adjacent to, the maiyoo keyoh. The plan amendment only identified general locations of planned harvesting and road construction, so the licensee proposed an open house session for Band members to discuss forestry activities in the Nak'azdli traditional territory in more detail.¹² Concurrently, staff of the MFR district office contacted the Band offering to consult on potential effects of road construction, harvesting and associated practices. MFR proposed to keep information confidential, but use it to determine the potential for infringement of aboriginal interests.¹³

The licensee advised MFR that the licensee was meeting with the Society to review design of the cutblocks that were within, and adjacent to, the boundaries of the maiyoo keyoh. MFR followed up with an e-mail to the Society to check how effectively they were communicating with the

¹¹ Letter from Nak'azdli Band Chief, July 7, 2006.

¹² Letter from licensee's Forestry Supervisor, February 12, 2007.

¹³ Letter from MFR Tenures Forester, February 16, 2007.

licensee, and to determine whether the Society was going to provide comments to the licensee about those blocks.

The proposal for widespread salvage harvesting brought the question of who speaks for the maiyoo keyoh family to the fore again. The Society wrote to the BC Treaty Commission and unilaterally withdrew from the Carrier-Sekani Tribal Council's treaty negotiations, seeking again to be recognized as a distinct breakaway group that could do its own negotiating.¹⁴ In response, the Band stated that the Society did not speak for the Band in terms of treaty negotiations. Further, they indicated that the entire Nak'azdli First Nation community had decided to pursue settlements in affiliation with the tribal council, and that the Band had no intention of withdrawing from the Carrier Sekani Tribal Council treaty table. The band council believed that unilateral withdrawal by the Society risked conflict and animosity; the council preferred that all should work together without written protocols or internal agreements.¹⁵

In April 2007, the Society expressed its concerns to MFR about all the cutblocks proposed by the licensee (not just the ones in the keyoh). The Society anticipated that logging adjacent to tributary streams would alter water flows and increase the temperature of the Salmon River, resulting in harm to fish and fish habitat. The Society recommended that logging be limited, removing only dead or dying pine trees from stands in watersheds that were tributary to the Salmon River. The Society also expressed appreciation for the consultation efforts of the ministry.¹⁶

The licensee responded to the Society's concerns in a letter to MFR, which basically summarized the riparian management practices that it would have to follow as set out in the *Forest Planning and Practices Regulation*—namely, leaving buffers in riparian management areas and controlling sediment at stream crossings. The licensee also stated that it would propose cutblocks only in stands with at least a 50 percent pine component. Current management practices would, in the licensee's view, protect fish, fish habitat and forest health.¹⁷

In late May 2007, MFR asked the band council to invite affected keyoh groups in the Great Beaver Lake area to a meeting of band council members, MFR and the licensee. The Band maintains that it sent out invitations to seven Beaver Lake keyoh holders, including the Society, although the Society is equally adamant that it was not invited. In any event, the Society did not attend, although representatives of four other Beaver Lake keyohs did so.

At the meeting, MFR explained that it wanted greater involvement of keyoh families in forest planning to achieve meaningful consultation. The representatives of the attending keyoh families agreed that greater involvement was needed, but stressed that consultation should involve more than just providing input, input that had sometimes been disregarded in the past. The keyoh representatives hoped that the keyoh families, industry and government could work

¹⁴ Registered letter from the Society, March 13, 2007.

¹⁵ Letter from Nak'azdli Band Council, March 29, 2007.

¹⁶ Letter from the Society, April 13, 2007.

¹⁷ Letter from the licensee's Forestry Supervisor, May 4, 2007.

toward cooperating as co-managers and stewards of the land and resources. They asked the licensee to not harvest within one kilometre of Salmon River and Great Beaver Lake.

After the meeting, MFR strongly encouraged the Society to participate in consultation along with other affected keyohs:¹⁸

The Fort St. James Forest District is striving to fully understand everyone's rights and interests in the Salmon River and Great Beaver Lake areas in order to ensure that permit issuance does not unjustly impact those affected. This is a process of balancing all rights and interests over the land and resources. Finding a harvesting balance that reflects the various rights and interests is difficult, and relies on everyone concerned fully communicating, preferably through collaborative discussion. To this end, and in respect of the local aboriginal culture, we have been engaging with the licensee, other keyoh families and the Nak'azdli First Nation representatives to seek workable solutions for the benefit of all... We hereby ask that the Maiyoo Keyoh Society recognize this fair process, and we encourage you to actively participate in working towards a balanced solution.

The Society was not convinced. It chastised MFR for failing to ensure that the Society had been invited to the May meeting, stating that the sudden exclusion from the meeting and discussions indicated a callous indifference by MFR to Society concerns. The Society said that a one-kilometre buffer along Salmon River and Great Beaver Lake was unacceptable. The Society also objected to MFR discussing timber harvesting in the maiyoo keyoh with the Band, as the Society reiterated that the Band had no authority or jurisdiction over that portion of the territory.¹⁹

The Society began to develop a very preliminary draft memorandum of understanding (MOU) to set out a relationship with MFR. It included some guiding principles, such as open, respectful recognition of each others' circumstances and values. The MOU proposed government-to-government negotiation, information sharing and confidentiality provisions, suggesting that the parties negotiate and attempt to reach agreement on issuance of forest and range tenures. Although the district manager's initial reaction was that the draft was as good a place to start as any,²⁰ the MOU was never finalized or signed. MFR told the investigator that this was because the draft document had been far more formal than anything staff had envisioned. In particular, the government-to-government focus was not something with which a district office of a provincial resource agency could agree. That concern had been raised by the district manager from the beginning, when she suggested that an agreement be between the district and the Society and that it be kept simple.²¹

¹⁸ Letter from MFR Tenures Forester, June 29, 2007.

¹⁹ Letter from the Society, June 29, 2007.

²⁰ E-mail from the district manager, August 17, 2007.

²¹ E-mail from the district manager, August 17, 2007.

Meanwhile, the parties continued to cooperate in other areas. In late August, both MFR and the licensee offered labour and funding for a Society project to assess the feasibility of converting complex mapping of cultural heritage resources, originally developed for information sharing into a user-friendly internet mapping system format. As well, in 2007, the licensee and the Society met and corresponded six times about operational aspects of planned practices in the maiyoo keyoh.

In August, at a meeting about another licensee's planned operations, MFR expressed concern about limited progress with the Society on accommodation of aboriginal interests. MFR asked the Society to clarify its interests—should there be continued efforts toward operational accommodation with the licensee, or was the Society's main interest government recognition of aboriginal title? If the latter, MFR considered that these operational meetings were not an effective forum. The Society replied that it wanted government recognition of its aboriginal title, with timber volume-based financial compensation for infringement.

By October 2007, the licensee reduced the area proposed for harvest by half. Portions with non-pine and immature pine were retained, and some areas with ground lichen were retained as caribou habitat. No changes were proposed for the cutblocks in the maiyoo keyoh, however, except that the three originally-proposed cutblocks were now reduced to two.

That fall, the licensee's working relationship with the Society began to deteriorate. The Society had provided maps from their land use and occupancy study to the licensee, information that the licensee had promised to keep confidential. The Society had not provided that information to MFR because MFR had not signed an information sharing agreement with a confidentiality condition. When MFR asked the licensee how it was dealing with Society concerns, the licensee responded that the Society's maps had showed no significant features near either of the two cutblocks on and near the maiyoo keyoh.²² MFR advised the Society of the licensee's response and asked if there were still unresolved issues. The Society considered the licensee's statement about the maps as breaching the information sharing agreement.

In early October 2007, the Society stated its "legal position" to MFR. The Society said that it had aboriginal title, which gave it the right to decide how land and resources in the maiyoo keyoh were to be used. Any infringement of those title rights had to be justified by government, and government had to fully compensate the Society for the value of access to the keyoh, any land used and any resources removed.²³ This narrowing focus on aboriginal title, rather than on a range of aboriginal rights, limited options to deal with infringement (see Appendix 1).

In the meantime, the licensee was beginning to press for the issuance of cutting permits. In an e-mail to MFR, the licensee noted that it had tried to set up another meeting with Beaver Lake keyoh holders, but that the keyoh holders seemed uninterested. The licensee therefore considered consultation complete.²⁴ MFR did not agree. MFR said that blocks outside the

²² E-mail from the licensee's forestry supervisor, October 1, 2007.

²³ Letter from the Society, October 12, 2007.

²⁴ E-mail from the licensee's Forestry Supervisor, October 4, 2007.

requested one-kilometre buffer along the Salmon River and Great Beaver Lake could safely be laid out, but consultation was not complete on blocks inside the buffer. MFR suggested another meeting, “given the magnitude of past and future harvesting ... in this part of the Nak’azdli territory, and the willingness of the Beaver Lake keyoh holders to come to the table and work toward solutions.”²⁵

A band councillor proposed that the Society, another keyoh holder and the licensee meet again on October 22, 2007. In response, the Society sent a letter to MFR²⁶ to reiterate that it was government’s obligation to justify any infringement of aboriginal title, and also government’s obligation to compensate for the value of any land used or resources removed. The Society denounced the October 22 meeting and refused to participate. The Society would not discuss future timber harvesting proposed by any licensee until MFR explained its process for justifying continued infringement of aboriginal title in the maiyoo keyoh.

Meanwhile, MFR was still at the stage of assessing whether there would be any infringement on aboriginal rights or aboriginal title. Justification would not be considered until after the degree of infringement was determined. Therefore, MFR explained that it would attend the October 22 meeting, regardless of whether or not the Society attended. The Society responded that any discussion of future timber harvesting was meaningless and offensive to the Society until MFR explained how it planned to justify the continued infringement of title.²⁷ The deneza (recognized speaker) for the adjacent daiya-mattess keyoh also declined unless MFR was prepared to discuss how it proposed to justify the continued infringement of aboriginal title and how it would pay for the full value of the trees that were cut; for the affected fish, animals and birds and for the affected land and water.²⁸ No keyoh holders attended the October 22 meeting.

Over the next month, the licensee made repeated inquiries of MFR about progress on issuance of the cutting permits. It sent a letter to the Society in early November announcing the start of road building and timber harvesting, although without specifics of where or when. The Society wrote to MFR with its interpretation of the law:²⁹

The Supreme Court of Canada has found that the Ministry is required by law to justify any infringement of our title to Maiyoo Keyoh by identifying some compelling need of the larger society. The Court has also found that the Ministry is required by law to compensate use for the value of any land used, resources removed, or resources impacted.

In the meantime, MFR had decided that enough consultation had now taken place. The Society’s consultation was increasingly focused on demanding justification and compensation for infringement of aboriginal title, but MFR concluded that, beyond a flat assertion of full

²⁵ E-mail from MFR Tenures Forester, October 5, 2007.

²⁶ Letter from the Society, October 16, 2007.

²⁷ Letter from the Society, October 17, 2007.

²⁸ Letter, October 18, 2007.

²⁹ Letter from the Society, November 14, 2007.

aboriginal title, the Society was not providing any specific information on aboriginal rights and interests that would allow operational accommodation to reduce whatever infringement might result. Accordingly, staff gathered the accumulated information for the district manager.

MFR issued the cutting permit to the licensee on December 17, 2007, and informed the Society the next day. In a lengthy rationale, the district manager concluded that there was no infringement on asserted aboriginal rights in what she referred to as the “Nak’azdli First Nation Maiyoo Keyoh.” Alteration of the cutblock or road design was therefore not required. Other than general declarations of rights by the Society, the district manager concluded that there had been no information provided to allow evaluation of the scope or extent of aboriginal rights asserted by the Society in the keyoh. The district manager was also uncertain whether the Society represented the collective interest of all of the Nak’azdli members that were connected to the keyoh. Given no resolution among MFR, the Society and the Band, the district manager decided that MFR would continue to determine the use of timber resources in the keyoh while giving “full consideration... to the asserted aboriginal rights of the affected aboriginal people.”

As part of her rationale, the district manager considered balancing societal values, costs, and the licensee’s biodiversity and riparian strategies to maintain fish, wildlife, biological diversity and water values. In addition, a traditional use study had shown no features that would be impacted by the proposed harvesting, while benefits of harvesting would include renewing the dead and dying pine forests, creating local employment and providing stumpage revenue to the Crown. The district manager considered that the decision to issue the cutting permit was balanced and fair.

The district manager went on to express disappointment that the Society had not participated in meetings with other keyoh holders and the Band. She reiterated that finding a harvesting balance that reflected everyone’s rights and interests was difficult, and required that everyone communicate, preferably through collaborative discussion. MFR continued to welcome a future meeting with the Society concerning the Nak’azdli First Nation’s Maiyoo Keyoh.³⁰

The Society responded by thanking the district manager for the detailed rationale. However, it said important information had been overlooked, information that made the infringement of aboriginal title unjustifiable; although the Society did not provide or identify that information. The Society planned to ask the minister to intervene and suspend the cutting permit. The Society asked that MFR ask the licensee to defer forest practices in the keyoh until that intervention request had been concluded.³¹

On January 16, 2008, MFR replied that it would not ask the licensee to defer forest practices. MFR said it was not aware of any new information that had not been considered in the issuance. If there was such information, MFR asked the Society to forward it as soon as possible.³² The

³⁰ Letter from District Manager, December 17, 2007.

³¹ Letter from the Society, January 9, 2008.

³² Letter from District Manager, January 16, 2008.

Society responded positively, and a meeting was scheduled for the end of January to discuss it further.

However, by the end of the month the dispute began to escalate. The Society sent a letter to MFR, urgently asking for intervention and suspension of the cutting permit.³³ The same day, the Society revoked the information sharing agreement with the licensee. The licensee expressed its disappointment, hoping to have further discussions, but accepted termination of the agreement. In addition, the licensee advised that, although it had been able to delay harvesting, it would now have to commence.³⁴

In early February, the Society replied that it also wanted continued communication with the licensee, but further discussions depended on immediate suspension of the logging.³⁵ The licensee responded that its commitments to customers, contractors and employees meant that it would have to proceed with logging,³⁶ which started on February 3, 2008.

On February 9, 2008, several members of the Society blockaded the licensee's contractor at the cutblock. The protest lasted for almost two weeks; MFR monitored daily. During that time, the Minister of Forests and Range wrote to the Society declining the request to intervene. The minister said that the Society should have provided information on aboriginal values to the forest district prior to cutting permit approval. Just as the Crown had to consult meaningfully with First Nations, there was a requirement for First Nations to participate. The minister reiterated the MFR position from 2005—that members of the Society were members of the Band, the Band was representing all members in treaty negotiations and, therefore, the Society should coordinate consultation with MFR through the Band.³⁷

Logging resumed soon after the blockade ended on February 20, 2008.

In mid-March, the district manager proposed resumption of cooperative discussions with the Society. However, MFR would not discuss aboriginal title with the Society in isolation of other band members, so it encouraged the Society to engage in joint discussions with it and the Band.³⁸ The Society continued to deny that the Band had any authority in the maiyoo keyoh, but said that need not interfere with discussions between MFR and the Society about forest practices in the keyoh.³⁹ Meanwhile, the Society negotiated a protocol with several other Beaver Lake keyohs to collaborate on matters related to the lands and resources in their respective keyohs.⁴⁰ The protocol intent was to reach mutual agreement on actions and communications concerning environmental, economic and cultural impacts on the keyoh lands and resources.

³³ Letter from the Society, January 25, 2008.

³⁴ Letter from the licensee's Planning Manager, January 28, 2008.

³⁵ Letter from the Society, February 5, 2008.

³⁶ Letter from the licensee's Planning Manager, February 7, 2008.

³⁷ Letter from Minister of Forests and Range, February 13, 2008.

³⁸ Letter from District Manager, March 18, 2008.

³⁹ Letter from the Society, April 27, 2008.

⁴⁰ By mid-June 2008, representatives of the maiyoo, diaya-matess and layat keyohs had signed the protocol.

Discussion

The complainant asserted that:

1. the licensee breached the information sharing agreement with the Society;
2. the Ministry of Forests and Range did not engage in meaningful, good faith consultation; and
3. the minister's refusal to intervene was unreasonable.

The Board's jurisdiction to investigate and report is restricted by the *Forest Practices Board Regulation*, which lets the Board investigate complaints that deal with government or a licensee's compliance with Parts 2-5 and 11 of FRPA and the appropriateness of government enforcement of Parts 6 and 11 of FRPA. The information sharing agreement was a private contract between the Society and the licensee, with no basis in FRPA. Therefore, the Board could not examine this issue. In regard to meaningful consultation, the Board can investigate complaints about practices and planning under FRPA, including whether requirements for consultation have been appropriately addressed. Although aboriginal rights are based in other legislation such as the *Constitution Act*, the Board can examine consultation by government in the context of aboriginal rights affected by forest and range practices. Thus, the Board examined whether the consultation between the Society and MFR was meaningful and in good faith.

Under section 77.1 of FRPA, the minister can suspend a cutting permit if the minister concludes, on the basis of information not known to the person who granted the approval, that a forest practice or range practice will result in a potential unjustifiable infringement of an aboriginal right or title. This is a form of government enforcement, so the Board can also investigate that issue.

Therefore, the Board examined two of the three questions raised by the Society:

1. Did MFR and the Society engage in meaningful, good faith consultation?
2. Was the minister's refusal to intervene unreasonable?

Did MFR and the Society engage in meaningful, good faith consultation?

Aboriginal rights are communal rights. Meaningful consultation must occur, directly or indirectly, with representatives of the group that holds such rights. In the circumstances of this complaint, there was uncertainty about who has the authority to speak for those who are likely to have aboriginal rights in the maiyoo keyoh.

The Society's view is clear. It maintains that its members, as a family, hold the aboriginal rights in the maiyoo keyoh, and that no other First Nations organization has ever been granted any authority in the keyoh. The Society maintains that Hahul is also the ts'ekeza and speaks for the maiyoo keyoh, and that this will be formalized in a potlatch in the near future. The Society

maintains that Hahul is the single representative of all who can exercise communal aboriginal rights in the maiyoo keyoh. The Society says that MFR must consult with Hahul, via the Society, before MFR can authorize forest practices in the keyoh.

The Band agrees that it does not speak for the group that exercises aboriginal rights in the maiyoo keyoh. However, the Band wants to be involved in consultation with MFR on behalf of all its potentially-affected band members and also (if asked to do so) to help keyoh holders in the consultation process. The Band wants MFR to consult concurrently with the Band and with the representatives of affected keyohs. The Band has recognized representatives for other keyohs near the maiyoo keyoh, but still questions whether Hahul is the ts'ekeza and can speak on behalf of the maiyoo keyoh. Dakelh tradition is that clans own, manage and protect the keyohs, not the members of a particular extended family. Therefore, the Beaver Clan or, alternatively, Dakelh elders through the Elders Society, should select a ts'ekeza or deneza for the maiyoo keyoh.

MFR's provincial policy is to establish mutually acceptable and efficient processes of consultation with First Nations.⁴¹ In the context of this complaint, the deputy minister noted that the Band has been recognized (presumably by the BC Treaty Commission) as, "representative of all their members for negotiation and consultation in respect of aboriginal interests."⁴² This implies that consultation should occur only with the band chief and council, and that the Society should coordinate its consultation through the band council.

However, the MFR's policy also encourages the development of locally-suitable consultation processes, so MFR district staff designed a consultation policy to meet the requirements of local First Nations. The district first attempted to determine who had aboriginal rights, but ultimately accepted that keyoh representatives should be consulted in conjunction with the Band, making its consultation policy similar to that promoted by the Band. However, the district is still uncertain whether Hahul is the authorized speaker for the maiyoo keyoh, but it is willing to consult with Hahul (via the Society) nonetheless.

Overall, the MFR district manager prefers to consult simultaneously with the Band and groups of affected keyoh holders (e.g., a representative of each of the seven Beaver Lake keyohs). However, regardless of who it is appropriate to consult about forest practices, such consultation must be workable, and it must be within the capacity of both MFR and the Dakelh to participate. MFR says that it does not have the capacity to deal with each keyoh holder individually, and that it needs some funnelling of consultation. To mitigate this, MFR sought to consult with the Band and holders of affected keyohs, and the Band seems to agree that this model was a workable forum. The Board agrees that the district approach of 'consult with both Band and keyohs' was more appropriate in the local circumstances than the 'consult through the Band' approach advocated by the deputy minister in 2005.

⁴¹ Ministry of Forests Consultation Guidelines 2003, December 6, 2003.

⁴² Letter from Deputy Minister of Forests, April 14 2005; Letter from Minister of Forests and Range, February, 13, 2008.

In summary, the Board found that uncertainty about whom to consult complicated consultation with the Society. Clan-recognized representatives of keyohs potentially affected by forest practices clearly need to be consulted, but there appears to be value in the elected band government being involved as well. MFR district's approach appears to be appropriate—MFR should consult concurrently with both the Band and with representatives of affected keyohs.

Was the consultation meaningful?

While acknowledging government's primary duty to consult, MFR encouraged licensees to be active in consultation as well, recognizing that the licensees are better able to answer site-specific questions and make operational changes to mitigate potential impacts on First Nations interests.

"Meaningful" is synonymous with "significant." Meaningful or significant consultation would be characterized by sincere effort to communicate. It was recently described by Madam Justice Neilson as consultation where the parties made genuine efforts to understand each others' positions and to attempt to address them, with the ultimate goal of reconciliation in mind.⁴³ Meaningful consultation involves open communication about concerns and issues, with some prospect of resolution of issues. On the other hand, consultation can be meaningful and may involve genuine efforts to consult, but that does not mean it is always effective in resolving issues.

District MFR actively promoted and requested greater involvement of keyoh families in forest planning. When representatives of four Beaver Lake keyohs asked that forest practices be kept more than one kilometre from the Salmon River and Great Beaver Lake, MFR supported that request and the licensee was able to modify its plans accordingly. The Board found that MFR district staff sincerely tried, through collaborative discussion, to fully understand everyone's rights and interests to ensure that cutting permit issuance did not result in unjustifiable impacts on asserted aboriginal rights. Those efforts began as soon as the licensee amended its forest stewardship plan to include cutblocks in the maiyoo keyoh area, and assumed that aboriginal rights existed in the keyoh.

MFR requested information from the Society to help it determine the nature of asserted aboriginal rights, a logical precursor both to assessing the extent of likely infringement and to balancing potential infringement against benefits during the justification process. The Board found that MFR, in good faith, made protracted and persistent attempts to engage in meaningful communication.

For its part, the Society worked diligently to identify its aboriginal interests for the licensee. It also tried to develop a working relationship for consultation with the Band; to clarify its authority to consult by attempting to "break away" for independent treaty negotiations; and to maintain regular contact with MFR by telephone, e-mail and letters. However, communication gradually lost sincerity and openness as the Society increasingly focused on aboriginal title. The

⁴³ See *Wii'litswx v. British Columbia*, 2008 BCSC 1139, paragraphs 145 and 178.

Society unilaterally insisted that it had aboriginal title to the entire keyoh and insisted that its aboriginal title be recognized by the district manager. The Society further insisted that MFR justify the infringement of its aboriginal title without any communication about the extent to which forest practices might infringe on the asserted aboriginal title. As the dispute intensified, the Society became increasingly strident, accusing the district of callous indifference and denouncing consultation efforts. Ultimately, on October 17, 2007, the Society refused to discuss forest practices until those matters were resolved. There have subsequently been some attempts by the Society, the licensee and MFR to re-establish consultation.

Initially, MFR and the Society engaged in good faith, meaningful consultation. However, the consultation lost the meaningful element when the Society insisted that its aboriginal title be recognized and that the still-unspecified infringement of that title be justified.

Was the consultation effective?

The Society anticipated that approved forest practices would create significant infringement and expropriation of its aboriginal title rights to timber, the entire forest ecosystem, all fish and wildlife and their habitats.⁴⁴ The district manager, on the other hand, was not informed of any specific factors concerning the maiyoo keyoh, and the proposed harvesting of two cutblocks, that indicated an unacceptable infringement of resource values that were subject to aboriginal rights.

In balancing the aboriginal rights with societal needs, the district manager described socio-economic benefits to the larger society from forest practices on the maiyoo keyoh. However, she considered costs and the potential for infringement quite narrowly. She focused on only the two new cutblocks in the maiyoo keyoh. This focus disregarded cumulative impacts; almost a quarter of the maiyoo keyoh had already been harvested for roads and cutblocks. It also disregarded the fact that more extensive salvage operations are almost certain in the future, so additional cumulative impacts are very likely. The Society says its concerns were captured by Justice Vickers in the *Tsilhqot'in Nation* case:⁴⁵

... I conclude that forest harvesting activities, which include logging and all other silviculture practices, reduce the number of different wildlife species (diversity) and the number of individuals within each species (abundance) in a landscape. Forest Harvesting depletes species diversity and abundance through: 1) direct mortality; 2) the imposition of roads; and 3) destruction of habitat.

More specifically, the practices could expedite access to the area for hunters and make them more effective by increasing sight distances. One effect would likely be that the moose population, considered by the Society to already be at perhaps ten percent of historical levels, would be further reduced.

⁴⁴ Letter from the Society, October 17, 2007.

⁴⁵ *Tsilhqot'in Nation v. British Columbia*, [2007] B.C.J. No. 2465, paragraphs 1276.

In terms of benefits, the district manager considered future timber supply from “renewing the dead and dying pine dominated forest with a new productive forest.” However, the concurrent reduction in coarse woody debris and increased stem density of the regeneration is unlikely to suit many plant and animal communities, which are used in the exercise of aboriginal rights. As noted by the Society, the *Tsilhqot’in Nation* judgement expressed a concern about a narrow focus on timber values:⁴⁶

... a legislative regime that manages solely for timber with all other values as a constraint on that objective can be expected to raise severe challenges when called upon to strike a balance between aboriginal rights and the economic interests of the larger society.

In fairness, the decision to issue a cutting permit is not a reasonable context for addressing cumulative impacts over a large keyoh area. Such impacts should be considered at the operational plan approval stage. Nevertheless, forest stewardship plans and their limited content do not lend themselves to a comprehensive analysis of such effects.

In any event, consultation between the Society and MFR was not effective. The Board believes that it was rendered ineffective as a result of the Society’s assertion that its members have aboriginal title. This assertion did not, of course, affect the requirement to consider other aboriginal rights; however, the assertion of such in this situation would have severely complicated consultation. As explained in Appendix 1, aboriginal title is like ownership. Shared resource does not fit well into consultation based on the exclusive ownership of all of the land and resources.

The Board found that MFR and the Society did not consult effectively with each other because MFR was seeking to identify and accommodate aboriginal rights to use resources, whereas the Society was seeking compensation for resources it claimed under aboriginal title. The MFR process is geared to accommodating aboriginal rights to use forest resources, not to purchase the use of owned resources.

In light of this, MFR’s approach was to first identify the nature of asserted aboriginal rights and then assess the degree of infringement. If infringement was significant, MFR would then seek to mitigate, and only if there was significant non-mitigatable infringement would MFR go to justification (balancing the exercise and infringement of aboriginal rights with the needs of the broader society). Not until the end of this process would compensation be considered, because only justified, significant non-mitigatable infringement warrants compensation. To begin the process, MFR attempted to identify the nature of the asserted aboriginal rights by consulting with First Nations about the nature of activities taken pursuant to aboriginal rights. They could not take this step because this information was not provided by the Society to MFR. It was apparently detailed in the land use and occupancy study, but was withheld from MFR because

⁴⁶ *Tsilhqot’in Nation v. British Columbia*, [2007] B.C.J. No. 2465, paragraph 1290.

the ministry would not sign the MOU with confidentiality restrictions. Without the information to characterize the aboriginal rights, the rest of MFR's consultation was rendered ineffective:

- Without information on the nature of aboriginal rights, MFR could not assess the degree of infringement of those rights.
- Without knowing the degree of infringement, there was nothing against which to balance the societal benefits of forest practices.
- Without such balancing, there could be no justification.

However, the Society was also seeking compensation for use of, and interference with, any and all of the land and resources that it claims under aboriginal title, but this, too, could not be accomplished by MFR. Such recognition occurs in government-to-government negotiation in the treaty process, but MFR cannot unilaterally recognize aboriginal title without the agreement of the provincial government as a whole. Nevertheless, the Society insisted that it had aboriginal title, and that infringement of its title had to be compensated. The result was that MFR's consultation attempts were negated by the Society's position, which was that there would be no discussion until the Society had justification and assurance of full compensation for any infringement of aboriginal title.

MFR district consultation was also hampered, although to a lesser extent, by the Society's insistence on strict confidentiality as a precondition on providing any specific information on aboriginal rights and interests. This created another impasse that made consultation ineffective and led to confrontation. The district was left to assess infringement of asserted aboriginal rights in the absence of information about where those rights exist, or what exercising those rights would entail.

In summary, the Board finds that the consultation was ineffective.

Did the minister reasonably exercise his discretion not to intervene under section 77.1?

Section 77.1 of FRPA applies if a forest stewardship plan for an area is approved. Such a plan was approved for an area that included the maiyoo keyoh. Before the minister can intervene, a couple of conditions must be met. The minister must conclude that carrying out a specified forest practice will result in a potential unjustifiable infringement of aboriginal right or title, and must also reach that conclusion based on evidence not known to the district manager who granted the approval. If these conditions apply, the minister must notify the licensee of the previously unavailable information and may vary or suspend the plan, the approved practice or a cutting permit. The minister can choose to intervene; there is no requirement to do so.

The minister explained his decision not to intervene in his February 2008 letter to the Society. The minister noted that the Society had declined to provide the land use and occupancy study to the district unless confidentiality was assured, but that the study was nevertheless known to the district manager. The essence of the study was summarized by the licensee, which did have

access to it, and the study didn't identify cultural features in the proximity of the proposed cutblocks. Thus, a precondition for intervention was not present.

The Society maintains that the detailed information in the study was not known to the district manager. While it is true that the district manager did not have the details, neither did the minister. Again, the result is that the minister did not receive and consider new information; that precondition also was not present.

It may also be significant that it was the Society that required the condition of strict confidentiality. That condition was not accepted by MFR, so the information was withheld. The minister stated that, if the details of the information in the land use and occupancy study were important for the district manager's approval, the Society should have supplied that information to the district.

Given that the district manager was generally aware of the study, that the minister was also generally aware and was provided no more specific information, and that the information would have been considered if the Society had provided it, the Board found that the minister's decision not to intervene was reasonable.

Conclusions

1. The Fort St. James Forest District staff engaged in good faith consultation and persisted in efforts to make the consultation meaningful.
2. The Society representatives engaged in good faith consultation and initially made efforts to make the consultation meaningful. However, as the Society increasingly insisted upon recognition of aboriginal title over the entire keyoh, the consultation became unmeaningful.
3. Consultation was ultimately ineffective as the participants' positions became entrenched and inflexible.
4. The minister reasonably exercised his discretion to not intervene.

Commentary

The Dakelh's concern about infringement of the exercise of their rights is clearly warranted, given the past and impending widespread forest practices in the keyoh and the long history of adverse impacts on the Dakelh people and on their exercise of aboriginal rights. That concern, expressed by the Society, makes effective consultation urgent, but consultation was ineffective in the circumstances of this complaint, ending in confrontation instead of reconciliation. What went wrong?

Consultation occurred in good faith, but it became unmeaningful and was ineffective. The Board concluded that the primary stumbling block was the uncompromising assertion by the Society that MFR had to acknowledge the Society's aboriginal title to the entire keyoh area as a precondition for consultation. That left little room for consultation and accommodation. Assertion of most kinds of aboriginal rights does not give the holders of those rights a veto over what can be authorized by government regarding land and resources. However, aboriginal title could do so, because the ownership aspect of aboriginal titles raises issues of veto and expropriation. The Society's assertion of ownership of all of the land and resources on the maiyoo keyoh left virtually nothing on which to consult—no room for negotiation, compromise, accommodation or reconciliation. Neither the Board nor MFR is qualified, or able, to determine where the Dakelh First Nation has aboriginal title. The forum for such negotiation and determination is the BC Treaty Commission and, potentially, the courts.

Nevertheless, the problem of infringement of aboriginal rights remains. Even if there was little infringement from activity on the two cutblocks, there has been, and will be, considerable infringement of aboriginal rights in the maiyoo keyoh as additional salvage harvesting proceeds. Thus, potential aboriginal rights to use forest resources must be recognized and accommodated in the course of planning and carrying out forest practices in the Dakelh territory. Consultation between MFR and the Society is likely to continue to be ineffective unless the inflexible spectre of aboriginal title is somehow set aside.

It is up to the participants to find a way to consult effectively. It may be that the Society could leave its assertion of aboriginal title to the treaty negotiation process and, in the interim, consult with MFR on accommodation for infringement of its other aboriginal rights. In fact, it may already have done so; the reference to aboriginal title appears to have disappeared from recent correspondence. As for MFR, it could increase its efforts to reach an information sharing agreement with the Society.

Regardless, both MFR and the Society clearly appreciate the need to consult, and both have made significant efforts to inform themselves and engage in meaningful dialogue. The Society, in particular, has made, and continues to make, remarkable efforts to defend its interests, given that it is in fact a very small group of volunteers.

Appendix 1

Aboriginal Interests, Aboriginal Rights and Aboriginal Title

The term aboriginal interests is a collective term that includes aboriginal rights. Aboriginal rights, in turn, can include aboriginal title. There is a distinction between aboriginal title and other aboriginal rights,⁴⁷ a distinction that is important in the context of this complaint.

Most aboriginal rights are rights to engage in particular activities. Aboriginal rights tend to involve some uses of land, but not all uses. An aboriginal right to use land or resources is also not necessarily exclusive. Thus, an aboriginal right to hunt may include the right to hunt at particular times or by particular means that cannot be exercised by those who do not have aboriginal rights, but those without aboriginal rights can still hunt for the same species and in the same areas.

This non-exclusive nature of most aboriginal rights thus involves shared use; it is possible to consult and find mutually acceptable ways to share the use of resources between those holding aboriginal rights and other resource users. However, land and resource use must minimize interference or infringement of the exercise of aboriginal rights. If infringement is limited, there may be little need to accommodate aboriginal rights to use resources, but if infringement is significant, agreements about use must accommodate those rights. Compensation is one form of accommodation for serious infringement issues; compensation for minimal infringement of aboriginal rights to use resources may not be required at all.

Aboriginal title is a particularly strong aboriginal right. Where it exists, it includes a right to exclusive use, occupation and possession of land, similar to ownership. The concept of shared use with possible compensation does not fit well with the exclusive ownership of land and resources that is a feature of aboriginal title. While compensation may be required for unjustifiable infringement of aboriginal rights to use some resources, aboriginal title has a strong economic component, which would ordinarily lead to compensation whenever that title is infringed.

In other words, it is easier to modify forest practices to accommodate or mitigate their interference with exercise of aboriginal rights to use land and resources than it is to mitigate interference with the exclusive ownership of land and resources that makes up aboriginal title. Assertion of aboriginal title considerably complicates consultation about land and resource use on land subject to that title.

⁴⁷ The evolution of definition of aboriginal title in the Canadian courts was recently summarized by the BC Supreme Court in *Tsilhqot'in Nation v. British Columbia*, [2007] B.C.J. No. 2465; see paragraphs 538-540.



**Forest
Practices
Board**

PO Box 9905, Stn Prov Govt
Victoria, BC, Canada V8X 9R1

Tel. 250.387.7964 | Fax 250.387.7009 | Toll Free 1.800.994.5899

For more information on the Board, please visit our website at: www.fpb.gov.bc.ca