

CANADA / JUDGMENT

Teal Cedar Products Ltd. v. British Columbia

2025 BCSC 595

COURT

Supreme Court of British Columbia

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2025 BCSC 595 Teal Cedar Products Ltd. v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Teal Cedar Products Ltd. v. British Columbia,

2025 BCSC 595

Date: 20250331

Docket: S169119

Registry: Vancouver

Between:

Teal Cedar Products Ltd.

Plaintiff

And

His Majesty the King in the Right of the Province of British Columbia and the Haida Gwaii
Management Council

Defendants

Before: The Honourable Justice B. Brown

Reasons for Judgment

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- [1] In December 2010, the Province of British Columbia (the "Province") enacted the Haida Gwaii Land Use Objectives Order ("LUOO").
- [2] Teal Cedar Products Ltd. ("Teal") says that, as a result of the LUOO, its ability to harvest on its Tree Farm Licence 58 ("TFL 58") and Forest Licence A16870 ("FL A16870") has been negatively impacted and it has suffered business losses. It seeks damages from the Province.
- [3] It advances its claims on three bases:
1. breach of the duty of good faith;
 2. constructive taking; and
 3. promise to keep Teal whole.
- [4] It says that any one of these is sufficient to ground Teal's claim and support its recovery of essentially the same measure of damages.
- [5] I will deal with each of these claims in turn.

The BC Forestry Scheme

- [6] The plaintiff describes BC's forestry scheme generally in its opening submissions as follows.
- [7] The Province grants tenure to private entities permitting them to exploit public resources in exchange for paying annual fees. The Province grants rights to harvest Crown timber by way of written agreements entered into between the Minister of Forests (the "Minister") and the licencees who have rights to the tenures in the form stipulated by s. 12 of the Forest Act, R.S.B.C. 1996, c. 157 [Forest Act]. This case involves two types of tenure: forest licences and tree farm licences
- [8] A forest licence is a volume-based tenure which grants the licence holder a nonexclusive right to harvest Crown timber from within a given zone of the province as specified in the licence. These zones are known as "timber supply areas". A tree farm licence is an area-based tenure which grants the licence holder the exclusive right to harvest Crown timber from the area specified in the licence, known as a "tree farm licence area", over the term of the licence.
- [9] Both forms of tenure are long-term and replaceable.

- [10] Each tree farm licence and forest licence has a specified amount of Crown timber associated with it that the licensee can harvest annually. This is known as the Allowable Annual Cut or "AAC".
- [11] The Forest Act, R.S.B.C. 1996, c. 157 [Forest Act], provides for the periodic redetermination of the AAC associated with forest licences and tree farm licences.
- [12] AAC determinations are based in part on the information generated by a timber supply review process. This process is a modelling exercise directed at determining the amount of timber that is projected to be available for harvesting over a specified time under a particular management regime. This information informs statutory decisions about the volume that the Province will permit to be harvested in a given timber supply area or tree farm licence area over the ensuing period. When there is a reduction of the overall AAC for a timber supply area, that reduction is generally allocated proportionately among forest licences. The determination of the AAC for a tree farm licence area is separately determined. AAC determinations, and the associated timber supply review, are generally required at least once every 10 years.
- [13] The specific areas of Crown land authorized for harvest (known in the industry as "cutblocks") are identified in cutting permits issued to the licence holder from time to time, on application by the licence holder, and under the applicable tree farm licence or forest licence.
- [14] I do not understand the parties to take issue with this description of the forestry scheme. However, since 2010, some decisions such as the AAC for Haida Gwaii were made by the HGMC, described in more detail below.

Background

- [15] On December 22, 1997, Teal entered into an agreement with TimberWest Forest Corp. ("TimberWest") to acquire TimberWest's Sandspit forestry operations. The agreement included two tenures: FL A16870 and TFL 58. Until 2008, Teal managed these tenures as TimberWest's agent. On February 14, 2008, the Minister granted approval of the transfer to Teal which concluded on March 13, 2008.
- [16] Teal operated the tenures until it sold its operations on Haida Gwaii to A&A Trading Ltd. ("A&A") on December 17, 2016.
- [17] Teal is an integrated forest company. It holds forest tenures on which it carries out harvesting operations and owns several mills for processing logs into finished products.
- [18] Teal used its licences (the tenures) on Haida Gwaii to provide a portion of the fibre supply for its mills. Teal obtains the fibre for its operations from its own harvesting activities as well as from other sources of fibre, such as trades and purchases on the Vancouver log market.

- [19] The regulatory regime that applies in the Province has evolved over time. From 1996 to January 30, 2004, the key operational statute was the Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159 [Forest Practices Code]. From January 31, 2004 to the present, the key statute has been the Forest and Range Practices Act, S.B.C. 2002, c. 69 [FRPA].
- [20] A few years after Teal became managing agent and started operating the tenures, the Haida and others on Haida Gwaii, including forestry licensees, and the Province embarked on a land use planning process under the auspices of the Commission on Resources and Environment. That process did not result in consensus and was ultimately overtaken by government-to-government negotiations and agreements between the Province and the Haida Nation.
- [21] In May 2005, the Province and the Council of the Haida Nation ("CHN") signed a letter of understanding related to land use planning on Haida Gwaii.
- [22] In September 2007, the Province and the Haida, represented by the CHN, entered into the Strategic Land Use Agreement (the "SLUA"). The SLUA contemplated that the Province and the Haida would complete a detailed joint strategic planning process to operationalize the objectives laid out in the SLUA for the protection of various areas and Haida cultural values, and to establish and develop a series of ecosystem-based management objectives ("EBM").
- [23] The Haida and the Province engaged in a joint strategic planning process over the next 30 months which resulted in the LUOO being enacted on December 16, 2010.
- [24] At the same time, the Province and the CHN entered into the Kunst'aa guu - Kunst'aayah Reconciliation Protocol (the "KKRP"). The KKRP committed the parties to creating the Haida Gwaii Management Council ("HGMC") as a joint Province/Haida decision-making body to be charged with implementing the SLUA, developing land use objectives, and determining the AAC for Haida Gwaii.
- [25] The LUOO was enacted on December 16, 2010, pursuant to the Minister's power under s. 93.4 of the Land Act, R.S.B.C. 1996, c. 245 [Land Act]. It was brought into force to fulfill the commitment made to the Haida Nation under the SLUA to operationalize the objectives outlined therein.
- [26] The LUOO introduced new or changed constraints on the land base. These included new reserves where no harvesting was permitted and increased the scope and effect of certain constraints existing under the then current regulatory regime. The effect of these changes was to reduce the available land base that licensees were able to access for harvesting. The cost of planning, development and harvesting of timber increased under the LUOO.

- [27] The first determination by the HGMC of AAC occurred in April 2012. The aggregate harvest level on Haida Gwaii was reduced from approximately 1.8 million m³ to 929,000 m³. The determination of the individual AAC for each of TFL 58, Tree Forest Licence 60 ("TFL 60") and Timber Supply Area 25, also known as the Haida Gwaii Timber Supply Area ("TSA 25"), was also reduced by the Deputy Chief Forester on September 20, 2012.
- [28] The 2012 AAC determinations were based on the application of the LUOO.
- [29] Teal became concerned with respect to the available timber for harvest and commissioned two reports, one in 2011 and a follow-up one in 2014, for planning purposes and to update management.
- [30] In 2014, Jerry Miehme, a consultant for Teal at Ecora Resource Group Ltd., prepared a report indicating that, in the immediate term, Teal would reach a "pinch point" where Teal would be unable to find sufficient available volume to meet its AAC. Teal's experts and the Ministry engaged in a debate about hydrological recovery and available timber. However, on the ground, Teal's forester, Rob Sandberg, was having difficulty locating compliant cut blocks to be harvested by Teal.
- [31] In or around 2014, Mr. Sandberg prepared a report for Teal's management indicating that he expected to be able to find only approximately 30,000 m³ per year beginning in 2016 and that, within a few years, there may be no volume at all due in large part to the state of hydrological recovery in certain watersheds. At the same time, there were higher costs of operating under the LUOO.
- [32] Ultimately, Teal's management formed the view that only a company in the business of exporting logs (which Teal was not and could not be for operational reasons) could operate the tenures in an economically viable way. It identified an export company, A&A, willing to buy the tenures for \$5,400,037.

The Tenures

- [33] TFL 58 provides, in part, that for 18 years and 3 months, beginning on December 1, 2006, the holder has the exclusive right to harvest from specified lands. TFL 58 also provides that its licensee can only harvest under a cutting permit, road permit or special use permit. To obtain a cutting permit, specifically, the licensee must submit an application to the District Manager appointed under the Ministry of Forests and Range Act, R.S.B.C. 1996, c. 300. The District Manager would issue a cutting permit subject to certain considerations and, according to the terms of TFL 58, may consult with Aboriginal people, impose conditions to address an Aboriginal interest, or refuse to issue a cutting permit if it would unjustifiably infringe on an Aboriginal interest. Aboriginal interest is defined as "[meaning] potential for Aboriginal right(s) and/or title".
- [34] The licence is subject to the Forest Act and regulations, as well as the Forest Practices Code and regulations and standards.

[35] There are similar provisions in FL A16870.

Duty of Good Faith

[36] Teal argues that the LUOO was established for the purpose of reconciliation. Teal says that purpose is extraneous to the purposes of the venture to which the tenures give effect. Accordingly, in enacting the LUOO, the Province breached its duty to exercise its contractual discretion reasonably.

[37] The Province argues that Teal mischaracterizes the tenure agreements. It says that they are not private law contracts but are agreements that are closely controlled by statute. The Province says that the tenure agreements do not confer any contractual discretion on the Province. Rather, the Province's powers arise from its power to regulate the management regime that governs harvesting and to determine the AAC. The Province says, in addition, that reconciliation is part of the constitutional and statutory backdrop. It says that the LUOO was enacted for a variety of purposes and the fact that reconciliation was one such purpose does not taint the process.

[38] Teal's good faith claim arises from the Supreme Court of Canada's decision in *Wastech Services Ltd. v. Greater Vancouver Sewage and Drainage District*, 2021 SCC 7, which held that there is a duty to exercise contractual discretion in good faith [Wastech].

[39] The principle at issue in this case that arises from *Wastech* is straightforward: "the duty to exercise contractual discretion is breached only where the discretion is exercised unreasonably, which here means in a manner unconnected to the purposes of the underlying discretion": at para. 4.

[40] The issues between the parties concerning this principle are:

- a) whether this principle applies to the tenure agreements between the Province and Teal; and
- b) whether the exercise of contractual discretion is extraneous to the underlying purposes.

Discussion

[41] Beginning with the first issue, the Province's position is that *Wastech* does not apply in this case. It submits that the enactment of the LUOO and the determination of the AAC do not arise as exercises of discretion in the tenure agreements, rather, they are exercises of statutory power. The power to determine the AAC comes from s. 8 of the *Forest Act*. Similarly, the LUOO was enacted on December 16, 2010, pursuant to the Minister's power under s. 93.4 of the *Land Act*. As such, neither is an exercise of contractual discretion and, as a result, *Wastech* does not apply.

[42] In reply, Teal argues that the discretion possessed by one party to a contract need not be expressly provided for in the contract for *Wastech* to apply. Teal relies on two decisions, *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.*, 1994 ABCA 94 [Mesa] and *The Riverside Professional Centre Inc. v. The Ottawa Hospital*, 2021 ONSC 1705

[Riverside], in support of this argument. Teal says both make clear that even if a contract does not contain an express term referring to a party's contractual discretion, that discretion is constrained by a "good faith limit".

- [43] As Teal explains, in *Mesa*, the Alberta Court of Appeal held that the party with the contractual discretion to select a method of pooling (which was not an express term of the contract) could not exercise this discretion in a way that could nullify the objectives of the contract or cause significant harm to the other party's expectations: at paras. 19, 21 and 22.
- [44] Similarly, in *Riverside*, Teal notes that the defendant hospital was held subject to the Wastech duty to exercise contractual discretion in good faith despite their discretionary power to issue parking passes for their parking lot not being expressly stated in their parking lease agreement with the plaintiff: at paras. 72-76.
- [45] I find the *Mesa* and *Riverside* cases to be distinguishable from the present. In this case, the Province is not simply arguing that the powers to enact the LUOO and set the AAC cannot be exercises of contractual discretion because there was no express term to that effect in the tenure agreements. Rather, the Province argues that these powers were not matters of contractual discretion because they were exercises of statutory power. Neither discretionary power in *Mesa* or *Riverside* stemmed from a statutory authority.
- [46] In contrast, in this case, the power to establish objectives such as the LUOO comes from s. 93.4 of the Land Act, which states in part:
- For the purposes of the Forest and Range Practices Act, the minister by order may establish objectives for the use and management of (b) Crown land .
- [47] The LUOO itself recites that it is established pursuant to s. 93.4 of the Land Act. Nothing in the LUOO suggests that it was issued pursuant to a discretionary power conferred on the Minister by the tenure agreements.
- [48] The power to determine the AAC for the tenures is set out in ss. 8 and 8.1 of the Forest Act. It may be increased or reduced (s. 1(1)).
- [49] Section 2.01 of FL A16870 recognizes that the Minister may change the AAC under the Forest Act or regulations.
- [50] TFL 58 also recognizes the Minister's power to determine the AAC in accordance with the requirements of the Forest Act. In doing so, both FL A16870 and TFL 58 make clear that the discretionary power to increase or reduce the AAC arises from statute.
- [51] For these reasons, I am not persuaded that this case involves an exercise of contractual discretion such that Wastech would apply.
- [52] Regardless, I find Teal's argument fails on the second issue. I am not persuaded that in passing the LUOO, the Province acted for extraneous reasons such that it could be said to be a breach of contractual discretion.

- [53] Teal argues that the purpose of the LUOO was to further the Province's reconciliation efforts with the Haida Nation, a purpose extraneous to the tenure agreements, properly construed. Teal says the true purpose of the tenure agreements was to facilitate an economically productive timber harvesting operation for the benefit of both the licensee and the Province. Teal contends that their argument is supported by the severe impact the LUOO had on harvesting in TFL 58.
- [54] In response, the Province argues that the tenure agreements clearly contemplate that the pursuit of reconciliation will influence their administration by the Province. Therefore, reconciliation is not extraneous to the tenure agreements and to their legislative framework.
- [55] I agree with the Province. Teal's tenure agreements are part of a broader statutory and regulatory framework. That framework includes the Constitution Act, 1982 [Constitution Act], the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, and court decisions regarding those two, which recognize and affirm Aboriginal rights and the honour of the Crown. The rights conferred by the tenure agreements are all subject to this statutory scheme.
- [56] Moreover, the tenure agreements themselves provide the Province with the power to consider and accommodate the impacts of harvesting on both proven and asserted Aboriginal rights.
- [57] The agreements themselves make various references to the accommodation of "Aboriginal People". Schedule D of TFL 58 makes clear that licensees submitting a draft management plan must propose management objectives addressing how they will integrate their harvesting activities in the licence area with use of the licence area for other purposes, including use by "Aboriginal people claiming an Aboriginal interest in or to the area".

[58] TFL 58 also provides that:

2.33

Before approving a proposed management plan under paragraph 2.28, the Chief Forester may consult persons who may be interested in or affected by operations under or associated with this Licence, including but not restricted to Aboriginal people.

2.38

If the Chief Forester considers that interference with an Aboriginal right [has] rendered the management plan in effect under the Licence inadequate, the Chief Forester, in a notice given to the Licensee, may require that the management plan be amended.

- [59] Teal itself, in its Management Plan 3 document, recognizes that the impact of Aboriginal rights must be taken into account in resource management decisions:

On June 25, 1993, the British Columbia Court of Appeal ruled that aboriginal rights were not extinguished on Crown land. As a result, resource management decisions must now be examined to determine if they will infringe on aboriginal rights. Teal will cooperate with the MOF in meeting its aboriginal rights policy.

[60] When submitting applications for cutting permits, ss. 8.07-8.09 of TFL 58 provides that the District Manager may consult with Aboriginal people, impose conditions in a cutting permit to address an Aboriginal interest, or refuse to issue a cutting permit if it would result in an unjustifiable infringement of an Aboriginal interest.

[61] FL A16870 contains similar language.

[62] In addition, s. 20.08 of TFL 58 provides:

Subject to this Licence and all applicable legislation, including but not restricted to the Acts, regulations and standards referred to in paragraph 9.01, the Minister will ensure that the obligations under this Licence of the Ministry employees referred to in this Licence are fulfilled.

[63] Finally, in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, the provisions of a TFL agreement that were at issue are identical to those in TFL 58. The Supreme Court of Canada stated the following:

[55] The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d)). Finally, the government can control by legislation, as it did when it introduced the Forestry Revitalization Act, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government "has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" ((2002), 2002 BCCA 462 (CanLII), 5 B.C.L.R. (4th) 33, at para. 119. Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

[64] In sum, the legislation, the tenure agreements themselves and the applicable case law all contemplate recognition and protection of Aboriginal interests and rights on Haida Gwaii. They confer on decision-makers (i.e. the Chief Forester, the District Manager or Teal, as well as the Province) a duty to act to protect Aboriginal interests. Therefore, "reconciliation" is not extraneous to the tenure agreements. Reconciliation is not distinct from the recognition and protection of Aboriginal interests and rights. Recognition and protection of rights and interests are aspects of reconciliation. As the Supreme Court of Canada made clear in *R. v.*

Van der Peet, [1996] 2 SCR 507, "reconciliation" is centred on reconciling the fact that Aboriginal people "lived on the land in distinctive societies, with their own practices, traditions and cultures with the sovereignty of the Crown": at para. 31.

[65] The Province did not act in bad faith vis-à-vis Teal in enacting the LUOO.

Constructive Taking / Injurious Affection

[66] Teal says forest tenures confer a form of property interest that is susceptible to a constructive taking and that by prohibiting logging in certain areas, including reserves such as upland streams and watersheds, the LUOO effected a taking of Teal's harvesting rights in those areas, particularly, their property interest in TFL 58. The effect was to diminish the value to Teal of its harvesting rights under the tenures.

[67] Teal argues that the law of constructive taking is concerned with regulatory action, short of formal expropriation, which amounts to a taking of property. The taking is a forcible acquisition by the Crown of privately owned property for public purposes.

[68] Teal says that the Supreme Court of Canada recently clarified the test for constructive taking in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 at para. 4, stating that a constructive taking occurs where: (1) a beneficial interest - understood as an advantage - in respect of private property accrues to the state, which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource; and (2) the impugned regulatory measure removes all reasonable uses of the private property at issue.

[69] However, Teal's position depends on whether you look at the restricted areas alone or at the tenures as a whole, because Teal did not lose the ability to harvest in non-restricted areas.

[70] Teal argues that a constructive taking may be partial. Teal points to *Rock Resources Inc. v. British Columbia*, 2003 BCCA 324 [Rock BCCA], where a portion of the plaintiff's mineral claims fell within the boundaries of the newly created Goat Range park. *Rock Resources Inc.* was compensated for that partial taking. Similarly, in *TFL Forest Ltd. v. British Columbia*, 2002 BCSC 180 [TFL Forest], a portion of TFL 46 was turned into a park and *TFL Forest Ltd.* was compensated for that taking. Teal says that where a partial constructive taking has occurred, the doctrine of injurious affection provides for the recovery of the diminution value of the remainder.

[71] Teal says that *Rock BCCA* and *TFL Forest* indicate that you do not need to look at the tenures as a whole. It argues that some portions of the LUOO are equivalent to the creation of a park, and the fact that Teal retained harvesting rights elsewhere in the tenures can only go to quantum.

- [72] Teal also argues that even if the whole of their tenure is assessed, there is no remaining reasonable use. Harvesting the Channel (an area within the TFL) is not economically viable. And the hope for permits in the Deena and the Copper (also areas within the TFL)--areas of high sensitivity to the Haida--is also not reasonable.
- [73] Teal references a Manitoba Court of Appeal decision, *A Maze in Corn Inc. v. Manitoba Emergency Measures Organization et al*, 2023 MBCA 92 [A Maze] to argue that even a temporary taking can constitute a constructive taking.
- [74] The HGMC (whose submissions are adopted by the Province) argues that there is no loss of all reasonable use of the entire area, as indicated by the sale to A&A and Teal's continuing rights to have the first right of refusal to harvest timber. Therefore, Teal must rely on partial constructive appropriation together with injurious affection to support its claim.
- [75] Which brings me to Teal's injurious affection claim.
- [76] Teal argues that injurious affection provides for compensation for the diminution of land value in three scenarios: (a) partial takings giving rise to severance damages, where the mere fact of a parcel being expropriated has the effect of reducing the value of the owners remaining interest; (b) partial takings involving "pure injurious affection" where the diminished value of the remaining property is attributable to the actual or intended use of the expropriated portion; and (c) where injurious affection, in the absence of a taking, allows compensation in respect of harmful government activities on adjacent or nearby land.
- [77] Teal says that the latter two categories of injurious affection are not applicable in this case.
- [78] Teal's claim for injurious affection falls into the first category--severance damages.
- [79] Teal refers to *Adroit Resources Inc. v HMTQ (British Columbia)* 2010 BCCA 334 as the leading case on injurious affection in the context of a partial constructive taking of an interest in natural resources.
- [80] Teal argues that *Annapolis* makes clear that compensation for expropriation is a common law right. At common law, the taking of property by the state must be authorized by law and triggers a presumptive right to compensation which can be displaced only by clear statutory language showing a contrary intention.
- [81] Teal argues that the LUOO effected a partial constructive taking of Teal's interest in the tenures. The LUOO operates by prohibiting the exercise of harvesting rights in prescribed areas. Teal argues that the cumulative effect of the various constraints under the LUOO drastically restricts Teal's harvesting opportunities in TFL 58. The remaining opportunities were either economically non-viable or unlikely (such as the possibility of obtaining cutting permits in areas of extreme sensitivity to the Haida).

- [82] In essence, Teal argues that the combination of temporary and permanent no-go areas for harvesting, combined with other restrictions in the LUOO, makes harvesting on its tenures unviable.
- [83] The issue is whether this satisfies the "loss of all reasonable use" test in CPR/Annapolis despite the fact that the LUOO constraints are geographically limited. First, Teal recognizes that theoretically it could still exercise its harvesting rights in the remaining portions of TFL 58 and TSA 25. Second, the LUOO constraints pertaining to watersheds and upland streams were limited in time, in the sense that certain areas would be available for harvest depending on the state of hydrological recovery and rate of harvest. Third, certain of the LUOO constraints were amenable to minor variances.
- [84] Teal argues that, despite these facts, the elimination or reduction of harvesting rights in specified areas constituted a partial constructive taking giving rise to severance damages. If the relevant parcel consisted only of the zones of the TFL 58 and TSA 25, in which no harvesting may occur, Teal would have and did suffer a loss of all reasonable use with respect to its harvesting rights in those areas. On the other hand, if the relevant parcel consists of the tenure as a whole, it becomes necessary to consider whether Teal retained the theoretical ability to exercise its harvesting rights elsewhere within the tenures.
- [85] Teal argues that Rock BCCA and TFL Forest make clear that there is no rule requiring the loss of reasonable use to be assessed at the level of the tenures as a whole. The LUOO is tantamount to the creation of a park and is, therefore, appropriately treated as a partial constructive taking. The fact that Teal retained harvesting rights elsewhere in the tenures can only go to quantum.
- [86] Teal also argues that the LUOO is not a general public policy that has incidental effects on land use. It argues that the LUOO is an instrument designed to eliminate a portion of Teal's private rights in satisfaction of a government-to-government commitment made by the Province to the Haida Nation. Teal maintains that the constructive taking of harvesting rights differs from the taking of a physical parcel because a harvesting right only has one reasonable use: to harvest trees. Therefore, reducing the area in which harvesting rights can be exercised eliminates the rights themselves. Teal argues that compensation provided by the Forest Act shows the reasonable expectation that a restriction on the land base that reduces harvesting rights is compensable. Specifically, it points to the since-repealed ss. 34 and 60.2, which provided for compensation for deletions of land from a TFL where the effect was to reduce the AAC by at least 5%; Part 13, which provides for the creation of designated areas that allow for the cancellation and refusal of cutting permits and give rise to a right of compensation if they persist for more than four years; and Part 15, which provides for the creation of "special purpose areas", including for "First Nations purposes", giving rise to compensation under Part 16.

- [87] Teal says that it is no answer to say that the value of the tenure had merely been diminished as opposed to eliminated. The value of the tenures was reduced because a portion of the rights were eliminated.
- [88] Teal argues that even if the assessment occurs at the level of the tenures, as a whole, the result is the same. Once the relevant parcel has been defined, the defendant may defeat a constructive taking claim by showing a single reasonable use of the parcel. A non-economic harvesting program in the Channel area or a doomed attempt to obtain cutting permits in the Copper watershed could not be characterized as a reasonable use of TFL 58. As well, FLA 16870 was injuriously affected in so far as it was economically non-viable to Teal in the absence of a workable harvesting operation on TFL 58.
- [89] Finally, Teal argues that harvesting prohibitions that are temporary in nature nonetheless attract compensation. Teal quotes para. 60 of *A Maze*:

The constructive takings in cases like *Manitoba Fisheries*, *CPR*, *Tener*, *Teal Cedar Products Ltd.* and *Annapolis* involved permanent or at least very long-term takings, while in this case, it was short-term or temporary. The fact that a taking is of short duration, rather than long-term or permanent, does not in any way diminish the foundational principles of a constructive taking as explained in the jurisprudence, and there is nothing in the jurisprudence that suggests that the taking must be permanent to be compensable. Further, while the duration of the actual taking may be short, the effects could be as extensive and devastating as a long-term or permanent taking. In my view, the fact that the taking was temporary does not make the principles of constructive taking and compensation inapplicable or irrelevant.

- [90] The HGMC (whose submissions are adopted by the Province) submits that Teal's injurious affection claim is not supported by the law. The law does not recognize partial constructive takings as a legal basis capable of supporting an injurious affection claim, and damages from injurious affection must stem from the Expropriation Act, not the common law. In support of the latter, it cites *Gautam v. South Coast British Columbia Transportation Authority*, 2020 BCCA 135, in which our Court of Appeal said the following:
- [88] Even though expropriation claims in British Columbia are now brought in the Supreme Court and may be joined with common law actions, it remains necessary to establish that the claim falls within the ambit of the Expropriation Act in order to claim damages for injurious affection.
- [91] Ultimately, the HGMC argues that Teal's injurious affection claim must fail for four reasons: (a) it fails to properly plead injurious affection; (b) there is no statutory right to compensation for their claim; (c) it fails to satisfy the test for injurious affection where no land is taken; and (d) it fails to satisfy the test for severance damages.

Discussion

- [92] The leading authorities on constructive taking are *CPR* and *Annapolis*.

[93] In *CPR, Canadian Pacific Railway Co.* ("CPR") argued that the city bylaw took away any economical use of its land and sought compensation. The Supreme Court of Canada set out the test for constructive taking at para. 30:

For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property (see *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 696 (N.S.C.A.), at p. 716; *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101; and *The Queen in Right of British Columbia v. Tener*, [1985] 1 S.C.R. 533.

[94] The Court concluded that: (1) the city had not acquired a beneficial interest even though the bylaw restricted use of the entire property; and (2) the bylaw had not removed all reasonable uses of the property, as CPR could still run trains even though that was not a practical or economic use of the land: at paras. 31-34.

[95] In *Annapolis*, the Court said:

[17] It is useful to begin with a brief overview of the law of takings. Given the facts of this appeal, our focus is on expropriation through regulation -- which, again, we refer to as a "constructive taking" in preference to other commonly applied terms such as "de facto" or "regulatory taking", as in our view it more accurately captures the nature of the state action at issue and the effect on the landowner (see e.g., M. Lavoie, "Canadian Common Law and Civil Law Approaches to Constructive Takings: A Comparative Economic Perspective" (2010), 42 *Ottawa L. Rev.* 229).

[18] A "taking" is a "forcible acquisition by the Crown of privately owned property . . . for public purposes" (K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at § 5:1). It may take the form of a constructive taking (effective appropriation of private property by a public authority exercising its regulatory powers), or a *de jure* taking (formal expropriation), by (in the case of land) taking title.

[19] To be clear, not every instance of regulating the use of property amounts to a constructive taking. Governments and municipalities holding delegated provincial regulatory authority (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 2) validly regulate land in the public interest without effecting "takings", properly understood (see *Compliance Coal Corporation v. British Columbia (Environmental Assessment Office)*, 2020 BCSC 621, 13 L.C.R. (2d) 215, at para. 91). The line between a valid regulation and a constructive taking is crossed where the effect of the regulatory activity deprives a claimant of the use and enjoyment of its property in a substantial and unreasonable way, or effectively confiscates the property (Horsman and Morley, at § 5:2). Put simply, "in order for a Crown measure to effect a constructive taking of property, private rights in the property must be virtually abolished, leaving the plaintiff with 'no reasonable use' of the property" (Horsman and Morley, at § 5:13 (emphasis added)).

- [20] A series of lower court judgments affirm that, in general, Canadian courts require a "total loss of the plaintiff's interest in property for the Crown's action to constitute a taking" (Horsman and Morley, at § 5:13; see also *Lynch v. St. John's (City)*, 2016 NLCA 35, 400 D.L.R. (4th) 62; *Sun Construction Company Limited v. Conception Bay South (Town)*, 2019 NLSC 102, 87 M.P.L.R. (5th) 256). Courts have, therefore, dismissed claims for compensation where the regulation left the owner some reasonable use for the property (*Genevieve Holdings Ltd. v. Kamloops (City)* (1988), 42 M.P.L.R. 171 (B.C. Co. Ct.); *Steer Holdings Ltd. v. Manitoba*, [1992] 2 W.W.R. 558 (Man. Q.B.), aff'd (1992), 99 D.L.R. (4th) 61 (Man. C.A.); *Purchase v. Terrace (City)* (1995), 26 M.P.L.R. (2d) 126 (B.C.S.C.); *Harvard Investments Ltd. v. Winnipeg (City)* (1995), 129 D.L.R. (4th) 557 (Man. C.A.)).
- [96] And later:
- [44] In sum, we affirm that the test to show a constructive taking is that stated by CPR, properly understood. The reviewing court must decide: (1) whether the public authority has acquired a beneficial interest in the property or flowing from it (i.e. an advantage); and (2) whether the state action has removed all reasonable uses of the property. This gives effect to this Court's acknowledgement of a common law right to compensation where the two-part CPR test is satisfied. It accords with imperatives of justice and fairness, which underpin the court's assessment of expropriation claims, and remedies situations where cases do not neatly fit within the expropriation legislative framework and would otherwise "fall between the cracks" (Warchuk, at pp. 686 and 690).
- [45] To this, we would add that, because the test focusses on effects and advantages, substance and not form is to prevail. A court deciding whether a regulatory measure effects a constructive taking must undertake a realistic appraisal of matters in the context of the specific case, including but not limited to:
- (a) The nature of the government action (i.e., whether it targets a specific owner or more generally advances an important public policy objective), notice to the owner of the restrictions at the time the property was acquired, and whether the government measures restrict the uses of the property in a manner consistent with the owner's reasonable expectations;
 - (b) The nature of the land and its historical or current uses. Where, for example, the land is undeveloped, the prohibition of all potential reasonable uses may amount to a constructive taking. That said, a mere reduction in land value due to land use regulation, on its own, would not suffice; and
 - (c) The substance of the alleged advantage. The case law reveals that an advantage may take various forms. For example, permanent or indefinite denial of access to the property or the government's permanent or indefinite occupation of the property would constitute a taking (*Sun Construction*, at para. 15). Likewise, regulations that leave a rights holder with only notional use of the land, deprived of all economic value, would satisfy the test. It could also include confining the uses of private land to public purposes, such as conservation,

recreation, or institutional uses such as parks, schools, or municipal buildings.

- [97] Applying this test, I am not persuaded that the Province has constructively expropriated Teal's interest.
- [98] First, there is no benefit appropriated by the Province. The LUOO regulates the "what, where, and how" of forestry on Haida Gwaii. This is not novel--the Province has been regulating forest harvesting in BC for decades. The LUOO simply puts different or modified parameters in place. This does not give a benefit or advantage to the Province any more than any legislation or regulation provides a benefit to the Province. As the Court said in Annapolis at para 19:

To be clear, not every instance of regulating the use of property amounts to a constructive taking. Governments and municipalities holding delegated provincial regulatory authority (Toronto (City) v. Ontario (Attorney General), 2021 SCC 34, at para. 2) validly regulate land in the public interest without effecting "takings", properly understood (see Compliance Coal Corporation v. British Columbia (Environmental Assessment Office), 2020 BCSC 621, 13 L.C.R. (2d) 215, at para. 91). The line between a valid regulation and a constructive taking is crossed where the effect of the regulatory activity deprives a claimant of the use and enjoyment of its property in a substantial and unreasonable way, or effectively confiscates the property (Horsman and Morley, at § 5:2). Put simply, "in order for a Crown measure to effect a constructive taking of property, private rights in the property must be virtually abolished, leaving the plaintiff with 'no reasonable use' of the property" (Horsman and Morley, at § 5:13 (emphasis added)).

- [99] This case is akin to Altius Royalty Corporation v. Alberta, 2024 ABCA 105. There, legislation was passed which the plaintiff companies argued constructively expropriated their interest in coal mines. The Alberta Court of Appeal rejected this argument, saying:
- [19] To state the obvious, expropriation pertains to property. Without a property interest, there can be no expropriation, whether de jure or constructive. Here, for example, the appellants have taken pains to show their royalty interest is proprietary rather than merely contractual.
- [20] The concept of "acquisition" in the CPR/Annapolis test must be understood as pertaining to property. In the words of Annapolis, a constructive expropriation may arise where a "beneficial interest - understood as an advantage - in respect of private property accrues to the state, which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource": at para 4 [emphasis added].
- [21] Regardless of how the interest is characterized, there must be some correspondence between the expropriated interest and the acquired interest. The cases of CPR, Manitoba Fisheries Ltd v The Queen, 1978 CanLII 22 (SCC), [1979] 1 SCR 101 [Manitoba Fisheries], The Queen in Right of the Province of British Columbia v Tener, 1985 CanLII 76 (SCC), [1985] 1 SCR 533 [Tener], and Mariner Real Estate Ltd v Nova Scotia (Attorney General), 1999 NSCA 98 [Mariner], all demonstrated such correspondence.

And:

- [32] Canada's prediction of the health and environmental benefits resulting from the reduction of greenhouse gas emissions describes benefits to the public, not, as expressed by the majority in *Annapolis*, "an 'advantage' flowing to the state": para 38. From cases decided before *Annapolis*, in reliance on precedents which *Annapolis* did not change, courts have concluded that a generalized public benefit cannot constitute an acquisition flowing to the Crown. For example, in *Club Pro Adult Entertainment Inc v Ontario (Attorney General)* (2006), 27 BLR (4th) 227, 2006 CanLII 42252 (ONSC) at para 82; *aff'd* 2008 ONCA 158, the court wrote, "[i]t is too far fetched to suggest that the public gets a benefit from [anti-smoking regulations] such that there has been a 'taking' by the province". In *Magnum Machine Ltd (Alberta Tactical Rifle Supply) v Canada*, 2021 FC 1112 at para 39, the court held achievement of the public purpose behind a regulation was "not an asset the government acquired".
- [33] More importantly, the appellant's interpretation would unduly broaden the scope of the CPR/*Annapolis* test.
- [34] All government regulation and legislation is intended to be in the public interest. Extending the concept of "advantage" as the appellant suggests could have a tremendous impact on the public purse and legislative decision making. It is questionable whether the application of the common law can, or should, intrude to this extent on decisions made by legislators in the public interest. Even academic commentators who were unsatisfied with the acquisition requirement in the CPR test urged courts to apply the concept of advantage narrowly "so to contain the risk that the financial exposure of public authorities": Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th Edition (Toronto: Thomson Reuters Canada, 2020) (WL Can) at § 29:8. At its core, "the weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts": *R v Imperial Tobacco Ltd*, 2011 SCC 42 at para. 87. (emphasis added)
- [100] Similarly, enacting legislation, orders, etc. which determine the manner, location and volume of timber harvesting do not provide a benefit to the state as contemplated by CPR/*Annapolis*. The LUOO does not effectively confiscate the property, the tenures.
- [101] Second, I am not satisfied that the LUOO has virtually abolished Teal's rights or left Teal with no reasonable use of the tenures.
- [102] Looking at effects and advantages, as the court in *Annapolis* directs at para. 45:
- a) The government action does not target Teal. The LUOO applies throughout Haida Gwaii. It advances important public interests, recognizing the interests of the Haida and implementing an ecosystem-based management framework ("EBM"). These interests were in play at the time that Teal acquired the property. The types of restrictions could be anticipated by Teal. Changes in forest regulation are not uncommon: for example, the regulatory scheme under the Forest Practices Code is different from that under the FRPA. EBM had been discussed in forestry and environmental circles for many years. It was not a

novel concept. It was implemented elsewhere in BC before (and after) the enactment of the LUOO, as part of a larger movement to better steward BC's forest resources. The Haida were also asserting their rights to Haida Gwaii and the Province's obligations to accommodate their interests. As the Haida decision indicates, the Haida had objected since at least 1994 to transfer and replacement of forest licences. There was no hidden agenda to pursue reconciliation in an attempt to harm Teal's interests.

- b) Although the value of the tenures may be reduced, they still have value, as the sale to A&A, and A&A's subsequent harvesting demonstrate.
- c) Teal is not left with only notional use nor deprived of all economic value. The tenures have use and economic value, although arguably reduced value to Teal and more to a company that exports logs. (I have not embarked on an analysis of the loss to Teal in this judgment, so I express it conservatively as "arguably reduced value"). That A&A was prepared to pay more than \$5 million for the tenures shows that they retained value which Teal realized through the sale. And Teal still retains rights under its agreement with A&A.

[103] Teal argues that constructive expropriation of specific areas of its tenures constitutes "partial constructive expropriation" and that the balance has been injuriously affected so that Teal can recover damages for the whole. In other words, because Teal cannot log in certain spatialized areas, i.e. X meters from a culturally modified tree or a marbled murrelet nesting habitat, this has reduced Teal's ability to harvest throughout. Partial constructive expropriation, combined with injurious affection permits recovery.

[104] I note that Teal's tenures did not give rights to harvest on any particular portions of the area covered by the tenures. Permits are required before any particular area may be harvested.

[105] I am not persuaded that Canadian law recognises "partial constructive expropriation" as advanced by Teal.

[106] First, partial constructive expropriation eviscerates the "no reasonable use" requirement from CPR and Annapolis. The portions of the area available for harvesting are simply excluded in Teal's approach when determining if there has been constructive expropriation.

[107] Second, Teal relies on the Rock/Adroit series of decisions to support its argument that the law recognizes partial constructive expropriation and this, combined with injurious affection, permits recovery. I am not persuaded that this series of cases assists the plaintiff.

[108] The background facts in those cases, briefly, are: under its newly enacted Park Amendment Act, S.B.C. 1995, c. 54, the Province created 80 new parks, including Goat Range Park. The effect of this new park was to prevent Rock Resources Inc. (later known as Adroit Resources Inc.) from exploring for, or developing, minerals in parts of two of its mineral claims that fell within the park: Rock BCCA at para. 1. The plaintiff company brought forward a successful constructive taking claim that was the subject of the Rock decisions. The later Adroit decisions addressed the issue of the amount of compensation.

- [109] The Rock decisions, which determined liability, were decided before CPR and do not follow the CPR/Annapolis analysis. Because they were decided pre-CPR, none of the Rock decisions contemplated how the Crown takings impacted the plaintiff's mineral claims situated outside the boundaries of the new Goat Range park. The Adroit decisions determine damages and find injurious affection of the properties/portions not taken, but do not analyse the law of injurious affection or its application. In other words, while a portion of the property was taken and the remainder was said to be injuriously affected, there is no legal analysis that assists the plaintiff in its position. Lastly, because there was no access to the untaken portions of the property, Rock/Adroit was left with no reasonable use of the entire property, meeting the requirements of CPR/Annapolis. As a result, these cases do not support Teal's partial constructive taking claim.
- [110] In TFL, TFL held a tree farm licence. The parties instructed the court to assume that the interest of TFL, the right to harvest timber, was a profit a prendre. The court found a constructive expropriation on the then legal test. The issue was whether compensation for the creation of a park on a portion of the area covered by TFL's tree farm licence should be pursuant to the Forest Act or the Expropriation Act. TFL predated CPR. There was no analysis of the CPR/Annapolis test or of the application of injurious affection in the absence of a concession of a profit a prendre. The legal analysis in TFL does not assist in this case.
- [111] For these reasons, Teal's constructive taking claim must fail.
- [112] I also find their injurious affection claim is unsupported, and unsuccessful. I agree with the HGMC that the Young (Young v. British Columbia, 2014 BCSC 2445) and Pacific Properties (Minister of Highways for British Columbia v. British Pacific Properties Ltd. [1960] SCR 561) cases Teal relies on are distinguishable from the present, because they concerned a de jure taking and a statutory right to compensation, neither of which apply to this case.
- [113] I am not persuaded that the tenures conferred a property interest or right on Teal like a profit a prendre. Tener (The Queen in Right of British Columbia v. Tener, [1985] 1 S.C.R. 533) describes a profit a prendre as "a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil": at 9. In this case, the tenures were not a vested right. Rather, their use was contingent on the licensee obtaining various permits or authorizations, like a road or cutting permit.
- [114] Finally, that legislation provides for compensation in specific instances does not assist Teal, as its claims are not brought under those provisions.

Promise to Keep Whole

- [115] Teal says that there is a binding contract, an oral agreement, that the Province would "keep Teal whole", requiring the Province to provide replacement volume if Teal's AAC decreased. Teal says the oral agreement was made at a meeting in November 2008.

[116] Three witnesses gave evidence on behalf of Teal regarding this alleged commitment: Dick and Tom Jones, who are brothers and principals of Teal and Teal's then Chief Financial Officer, Hanif Karmally. All agree that this promise was made at a meeting with then Minister of Forests Patrick Bell and members of his staff. Dick Jones recalled the meeting but could not place it in time. He said it took place at the Vancouver Convention Centre. Tom Jones recalled that the meeting took place in Vancouver at the Convention Centre. Hanif Karmally placed it in late 2008 at the government offices above the Vancouver Convention Centre.

[117] Teal says that it had a further meeting with Minister Bell in January 2010 where the keep whole promise was discussed. Although, Tom Jones, Mr. Karmally and Minister Bell attended the meeting, none of them has any recollection of the meeting. Dick Jones and John Pichugin (Teal's Manager of Forestry and Engineering) gave evidence that at this meeting Minister Bell softened the commitment made to Teal and that the Jones brothers reacted negatively to the message. Mr. Pichugin said it was the first time he had met with the Minister and he was very excited to do so. He testified that both Jones brothers, Mr. Karmally, Minister Bell and the Minister's assistant, Bruce Strongitharm, were at the meeting. He recalled an argument between the Jones brothers and the Minister, stating:

And what I recall was it was quite heated with Teal representative saying something like you promised to keep Teal whole and Minister Bell said as whole as possible and it went back and forth. And it was almost like finger-pointing and raising voices.

[118] Teal argues that subsequent conduct and communications from the Ministry of Forests confirm the existence of a commitment. From September 2008 to June 2009, draft briefing notes and versions of strategy regarding harvesting on Haida Gwaii were prepared. These show Teal being kept whole. An initial version of the tenure strategy was first approved in May 2008. That strategy maintained Teal's harvest at 121,312 m³ per year. Stephen Rogers (a ministry employee), who prepared these notes, confirmed that the recommended options through this period kept Teal whole. He testified that his role in writing these briefing notes was to write options that could be advanced to the decision maker.

[119] On September 30, 2008, an internal government meeting confirmed the Ministry's intention to maintain Teal at 121,312 m³ per year.

[120] On February 24, 2009, Sharon Hadway and Len Mundt (ministry employees) exchanged emails regarding Minister Bell's expectations for the allocation. They said the Minister assumed an AAC of 1,000,000 m³ and expected Teal to be kept whole.

[121] Between June 2009 and October 2009, the tenure strategy was changed and the proposal that was ultimately approved by Minister Bell did not maintain Teal's volume, despite a decision note in which the Minister had communicated an intention to maintain Teal's volume.

- [122] On October 29, 2009, Minister Bell approved a target distribution of volume for Haida Gwaii which included only 106,284 m³ per year for Teal. On page 10 of the briefing note it states, "[t]he minister as well as the previous deputy minister communicated an intention to maintain Teal's volume at pre-SLUA levels however there is no written commitment in place."
- [123] On January 11, 2010, the Ministry of Forests staff prepared "bullets" for a meeting that day between Teal and Minister Bell. The bullets referred to the fact that the previous Deputy Minister had discussed keeping Teal whole at 121,000 m³ per year. The Minister was advised that no licensee would be kept whole through this process and that he should anticipate that Teal would respond very negatively to the message on this topic, given their expectations.
- [124] Teal says that these events evidence a valid and enforceable oral agreement. Teal argues that there was a clear intention to contract between the parties, because their meeting with Minister Bell took part privately, as opposed to a broad policy pronouncement, and a binding commitment was made.
- [125] Teal says that the terms of the contract are sufficiently certain--ministry staff did not struggle to understand the alleged commitment in briefing notes or otherwise. Teal argues that it required the Province to keep Teal whole in respect of its Haida Gwaii operations in terms of volume and harvest opportunity (including the kind of timber and cost to extract).
- [126] Teal argues that if consideration is required to establish an ongoing contractual relationship, it has provided consideration by continuing its ongoing operation of the tenures and investing in those forest operations for the benefit of the Province directly through stumpage and indirectly through employment opportunities on Haida Gwaii and at Teal generally.
- [127] Finally, Teal says that the Province had legal authority to enter into the keep whole contract as there was no statutory prohibition preventing the Minister from entering such a contract. For these reasons, Teal argues that the Province was contractually obligated to keep Teal whole.
- [128] Teal says that the Province's promise to keep Teal whole meant the provision of a harvest opportunity equivalent to the harvest opportunity that Teal had on Haida Gwaii (which was capable of yielding a harvest of 120,000 m³). An equivalent harvest opportunity would include equivalency in terms of the volume of harvest, the kinds of trees being harvested and the cost to harvest those trees at that volume. Teal argues that the parties would not reasonably have contemplated that the timber supply review and AAC determination would result in Teal being allocated an AAC that was not actually achievable. Had they turned their minds to it at the time, they would have agreed that the flexible approach is the one that would advance the purposes of their bargain.

- [129] Teal argues that the Province breached its oral agreement to keep Teal whole by restricting their harvest opportunity through the harvesting constraints imposed by the LUOO and by implementing a reduced AAC for Teal's tenures.
- [130] Teal argues, in the alternative, that the Province failed to use its best efforts to keep Teal whole.
- [131] In response, the Province argues that there was no intention on the part of the parties to make a promise with contractual intent. The Province says that the Minister had no authority or power to offer a guarantee of the nature suggested by Teal. Further, the evidence does not establish a basis for finding the essential elements of a contract. There was no certainty of terms and no consideration, or at least a failure of that consideration.
- [132] The Province argues that there is no evidence of a mutual intention to enter a binding or enforceable contract. It says that, to an objective observer, a politically motivated assurance given to a private entity would not be evidence of an intention to contract.
- [133] The Province says that there is no evidence whatsoever that it entered into a contract with Teal to ensure that Teal would be kept whole "in their AAC allocations with respect of volume, timber type, accessibility and operability". There is no evidence of any discussion between Minister Bell and Teal on those terms.
- [134] The Province says that the evidence comes down to Minister Bell agreeing that he might have "made a comment like we will keep you as whole as possible" and the "Teal-Jones Briefing Note" dated February 8, 2011, which recites, "Teal-Jones received Ministerial support that our AAC level would be maintained as 'close as possible' to 121,312 m³ per year". The Province says that this falls far short of a binding agreement between the parties as asserted by Teal. Ministerial support does not rise to the level of creating contractual obligations. Nor do these notes establish the mutual understanding asserted by Teal. For example, Teal says that the contract would extend "in perpetuity". There is no evidence that this was ever discussed. The idea of perpetuity was first raised in the examination for discovery of Mr. Pichugin who was not at the 2008 meeting with Minister Bell.
- [135] The Province argues that the lack of specificity concerning what the alleged contract required of the Province is sufficient to dispel any contractual force to the statement made by Minister Bell. The Province argues that the evidence shows that there is no certainty over the terms of the alleged contract.
- [136] The Province also addresses Teal's argument that they provided consideration for the contract by maintaining its Sandspit operation, or, in other words, continuing their "business as usual". The Province rebuts this argument, saying that Teal did not do this. There was no "business as usual", in fact, Teal shut down its Sandspit operation in 2011 when its AAC was still at the pre-SLUA level of 121,312 m³. Hence, if there was an enforceable contract, Teal did not perform its consideration.

Discussion

[137] For the following reasons, I have determined that Teal's keep whole claim cannot succeed:

- a) I am not able to determine what was said at the meeting of November 2008. I accept the evidence of Tom Jones, Dick Jones and Mr. Karmally that they understood from what was said at the meeting that Teal would be protected from the effect of the LUOO. I also accept the evidence of Minister Bell and Douglas Konkin (then Deputy Minister of Forests) that they could not and did not promise to keep Teal whole;
- b) I am not persuaded that whatever was said could have been understood to have contractual force; and
- c) I am also not persuaded, in any event, that the terms of the "contract" were sufficiently clear to create a binding agreement.

[138] Turning first to the evidence of an oral agreement, four witnesses from Teal said that they had attended meetings with Minister Pat Bell discussing the "keep whole" promise: Tom Jones, Dick Jones, Mr. Karmally and Mr. Pichugin.

Dick Jones

[139] Dick Jones testified that Teal required a volume of 120,000 m³ to remain financially viable on Haida Gwaii. He said that the AAC kept coming down and down and "then the last straw was when they dropped it under the 120 [in] 2008. Something like that". He later amended this to after "the land use" or LUOO.

[140] He said that one time they met with Pat Bell who was Minister of Forests. He believed that Mr. Konkin, the Deputy Minister of Forests, was at that meeting and perhaps Jessica Parker, the Deputy to the Premier, was also there. On behalf of Teal there was his brother Tom Jones, Mr. Karmally, as well as Bernie Zimmerman, Teal's logging manager at the time.

[141] He testified that Minister Bell asked:

I guess it would be Doug Konkin, what is the volume down there? And Doug Konkin said 120. And Pat Bell said: that shouldn't be hard. Small amount. The cutback will be a small amount. He said we will keep you whole.

[142] Mr. Jones understood Minister Bell's words to mean that the Province would keep them whole, not almost whole or close to whole, but whole.

[143] Mr. Jones testified further:

Well I recall my brother telling him if you take one damn tree, you can take them all and give us a cheque.

[144] Mr. Jones also testified that three or four years later there was a second meeting with Minister Bell, and at this meeting, referring to the status of Sandspit, Minister Bell said, "I promise to keep this whole as possible". Mr. Jones testified that his brother, Tommy, was not very happy and made the same remarks about "the damn tree" to Minister Bell. He said, "I was completely shocked I said you told us [you] would keep us whole". He said, in response, Minister Bell said, "oh no, no, no, I meant I meant [as] close to whole as possible". He testified that he was very, very disappointed in Minister Bell.

Tom Jones

[145] Tom Jones testified that he met with Minister Bell at the Convention Centre in Vancouver. Jessica McDonald and Doug Konkin were there, as were Minister Bell, Bernie Zimmerman, Hanif Karmally and his brother Dick Jones. Mr. Jones testified:

Mr. Bell was sitting right across from me talking about reduction in the - - coming to us. I told him if he takes one tree away from us to send us a cheque for \$75 million.

[146] Mr. Jones testified that there were then some discussions between Minister Bell and his staff. He said Minister Bell was looking down the table at the Deputy Minister, noticed some people talking down there, and then looked at him and said "we'll keep you whole". To Mr. Jones keep us whole meant that there would be no reductions.

[147] Mr. Jones did not recall the date of the meeting with Mr. Bell at the Convention Centre. He did not recall the year of the meeting. He had no recollection of other meetings with Minister Bell.

John Pichugin

[148] Mr. Pichugin testified that senior management from Teal met with the Minister of Forests in 2008, but he was not present for that meeting.

[149] The first meeting that Mr. Pichugin attended with Minister Bell was in 2010. He said that there was an argument between Minister Bell and either Mr. Karmally or Tom or Dick Jones talking about the notion of keeping whole. He recalled that the argument got quite heated, with Teal representatives saying "you promised to keep Teal whole" and Minister Bell saying "as whole as possible" and it went back and forth. He testified that the whole meeting was short and the argument was about a minute long.

[150] Mr. Pichugin took notes of the 2010 meeting. Dana Hayden was at the meeting, as was Bruce Strongitharm.

Hanif Karmally

[151] Mr. Karmally testified that Teal needed a minimum of 120,000 (cubic metres) in harvestable volume to be kept whole.

- [152] He recalled one meeting in particular in late 2008. It was held in the Vancouver Convention Centre in government offices. Tom Jones was there, as was Bernie Zimmerman. From the government side, Minister Bell was there with his deputy Doug Konkin and his aide Bruce Strongitharm. The Deputy to the Premier, Jessica McDonald, was there as well.
- [153] At a point in the meeting, he said Tom Jones made a point very strongly, stating that "if you take one tree from us you can take it all and pay us \$75 million".
- [154] He further testified that Minister Bell took notice of Mr. Jones' comment, and turned to his left to an aide (Bruce Strongitharm, Doug Konkin, or maybe another aide) and asked what the issue was about. Mr. Karmally said they told Minister Bell it is 20,000 metres of cut (later clarified to 120,000). At that point, Minister Bell turned and spoke to Tom Jones: "I don't have a recollection of the exact words, but the message was clear. It was like you don't have to worry about this. We got it. We'll take care of it. Right. You will not suffer from this." Mr. Karmally then said after that, it was like it was done, and Minister Bell moved on to the next subject.
- [155] Mr. Karmally understood from this that Teal would receive volume and kind, specifically, harvestable volume at an appropriate chance. To him, kind means a similar profile with a similar chance of getting logs, to cover the value and cost element.
- [156] After referring to notes, Mr. Karmally identified November 19, 2008, as the likely date for the meeting with Minister Bell.
- [157] Two witnesses gave evidence on behalf of the Province with respect to the "keep whole" promise: then Minister Bell and then Deputy Minister Konkin.

Patrick Bell

- [158] Mr. Bell said that he did not make a promise to Teal to maintain its AAC at 121,000 m³. He would not be in a position to make that sort of commitment. The AAC is determined by the Chief Forester and then the regional staff make the recommendation on how that cut is distributed. He did not have the authority or power to direct the Chief Forester in his AAC determination.
- [159] He was asked if he had discussions about keeping Teal whole on Haida Gwaii in terms of the AAC and said:

they may have requested that I do that work. it was not something we could do. And so I would never - - I might make a comment like we will keep you as whole as possible, but we will also keep Husby as whole as possible and we will also keep Western as whole as possible, or in any other situation in any other part of the province. But no, not directly to a single licensee a commitment that would then put other licensees at disadvantage in the same area, because you are working from one confined plot of timber that has to be distributed and you make a promise to one of no impact then you disadvantage others in the process.

- [160] When asked if he had any recollection of a meeting with Teal on November 19, 2008, he said if there were such a meeting attended by his staff, there would be minutes. If it were a casual meeting, something like a golf tournament, he said there would not be staff there necessarily and there would be no minutes.
- [161] He testified that he did not give direction to staff to keep Teal whole at 121,000 m³. He could not give that sort of direction. Nor could he recall any meeting where a representative of Teal said, "Minister Bell you promised that we would be kept whole".
- [162] He further testified that he did not give Teal the assurance that their AAC would be maintained at existing levels because it was not possible for him to make that kind of a commitment.
- [163] He said he was not aware of any senior managers within the Ministry of Forests telling Teal that their AAC allocations with respect to volume, timber type, accessibility and operability would be kept whole. If such a thing happened, there would have been a briefing note that would have come forward to him.
- [164] Lastly, he said he would not have made a commitment to keep Teal whole. While he may have said he would try to keep them as whole as possible, the term "whole" is not one he would have considered.

Douglas Konkin

- [165] Mr. Konkin testified that he was first appointed as Deputy Minister of Forests in April 2002. In January 2009, he moved to be Deputy Minister of Environment. In March 2011, he returned as Deputy Minister of Forests and remained there until his retirement in 2013. He testified that it was his understanding that there was political support to try and mitigate and manage the impacts (of the SLUA) on licensees so he was interested and asked staff to start to think about and generate ideas about what they could do to move forward.
- [166] He said that he did not attend a meeting in November 2008, with the Jones brothers and Minister Bell. He was at a different meeting for senior managers on November 19, 2008, and believes that it was Jim Gowriluk, who was the acting regional manager at the time, who went to the meeting with Teal.
- [167] Mr. Konkin said that he did not make the promise asserted by Teal:
- I can strongly say I did not and would not to any licensee ever say something as non-equivocal like you will be kept whole or I will look after you, I will solve your problems. I would never do that. It is not consistent with the legal framework. I have no power to make those decisions. I consider those kind of decisions really significant.
- [168] He was never given any direction from anyone to implement any promise to maintain Teal whole at 121,000 m³:

I believe there had been a political statement around the interest of that we were the Minister was sympathetic with their interests. I am not going to speak for the Minister but that was my understanding. Nobody told me to do it. If the Minister told me to do it I frankly would have gone to the Deputy Premier and say I do not know how it is to do this and it is not right because we're independent decision-makers that need to be done. And I would have brought it up to the Deputy Premier, in my experience I have done that kind of thing in the past, and I would have had a meeting with the Minister and talked about it. I did not feel the need to do that because I did not feel I was being instructed to do that. I thought we had a shared interest in trying to mitigate the impacts on all licensees and I will go further and say that in particular Jones because they were the smallest.

[169] After being referred to an information note dated October 2, 2012, Mr. Konkin had the following to say:

Q: This says that Teal says that they believe the Honourable Pat Bell had made a commitment to keep Teal whole in terms of allowable annual cut, AAC, even though the Ministry has clarified on more than one occasion to Teal that such a commitment was not made. Was that a clarification that you communicated to Teal?

A: Yes as I mentioned earlier I did we did have discussions about this and they believed that they had a significant commitment and I would tell them that based on my discussions with the Minister, he had an interest but had not made a commitment.

[170] When he was subsequently turned to the third para. of the third page, and asked, "on September 20, 2012, Teal again expressed their desire for additional operating area that might see them through their perceived short-term timber shortfall is that what you were referring to earlier" he responded, "it is". Likewise, he responded affirmatively when asked if he had also previously been referring to the document's reference to a 60,000 m³ short term forestry licence to cut and the commitment by the Ministry to provide Teal with a 60,000 m³ direct award to mitigate impacts of Teal's licences on Haida Gwaii. He said this was one of the documents he had received telling him why they were moving forward as they were.

[171] As I have said, I accept the evidence of then Minister Bell and Deputy Minister Konkin that they would not have made the promise that Teal believed had been made. In the fall of 2008, there were significant changes on the horizon for forestry on Haida Gwaii. There was a great deal of uncertainty. The parties expected that the AAC on Haida Gwaii would be reduced from 1.77 million m³/year to 800,000-1,000,000 m³/year. The land base was limited. There were three major licensees who harvested on Haida Gwaii: Teal, Husby Forest Products Ltd. ("Husby"), and Western Forest Products Inc. ("Western"). Their AAC pre-SLUA was: Husby: 316,367 m³; Western: 378,724 m³; Teal: 121,312 m³. In addition, BC Timber Sales ("BCTS") required a volume of at least 187,000 m³. The local communities had an AAC of 25,000 m³. Post SLUA/LUOO, the Haida were to receive an AAC of 120,000 m³. The local communities wanted to expand their AAC. The licensees wanted to protect their existing

AAC.

- [172] The new AAC for Haida Gwaii would be determined by the HGMC, made up of representatives of the Province and the Haida. After that determination, the Chief Forester would determine how the overall AAC would be allocated to each licensee. In addition, it was expected that the implementation of the LUOO with its EBM and cultural restrictions would further restrict harvesting. The Haida were opposed to the current tenure strategy and were to be consulted on any new tenure strategy.
- [173] Minister Bell and Mr. Konkin would have been well aware of these issues, as the internal documents demonstrate. In this atmosphere of increasing demand and restricted capacity, in my view, neither would have made the promise Teal believed it had received. The evidence of the witnesses is inconsistent. No notes were produced from the meeting. No one confirmed what was said in writing.
- [174] It is apparent that Mr. Konkin, the Minister, and other ministry employees, knew that Teal believed that it required an AAC of 120,000 m³ to remain economically viable. As Mr. Konkin testified, they wanted to support Teal's operations, and various drafts of the Forest Tenure Strategy contemplated keeping Teal's AAC at 120,000 m³. At the same time, various ministry employees/officials advised Teal that there was no promise to keep Teal whole. That the ministry tried to keep Teal's AAC at 120,000 m³ and told Teal of their efforts, does not satisfy me that there was an agreement to do so.
- [175] Although, I cannot determine exactly what was said at the meeting, I accept the evidence of Minister Bell and Mr. Konkin that they did not tell Teal it would be kept whole, at the meeting in November 2008 or otherwise.
- [176] The relevant legal principles that apply to oral agreements are summarized in *Chiu v. Lam*, 2016 BCSC 299 as follows:
- [39] The relevant legal principles are conveniently summarized by Mr. Justice Cohen in *Clifford v. Flores*, 2004 BCSC 358. As in the case at bar, that case involved a plaintiff attempting to prove and enforce an oral contract, where the evidence concerning the alleged contract was in dispute as between the parties. Cohen J. stated:

39 As can be seen from the summaries of the parties' testimony and their respective positions on the evidence, Clifford, Flores and Cunha have given versions of the dealings between them on the key issues which are irreconcilable. Thus, the court must decide whose version of events is most reliable in order to decide the issues. The credibility of the witnesses must be tested against those facts that are not seriously in dispute, and with the preponderance of the evidence and the probabilities surrounding the events.

40 Although this task is primarily one of fact finding, some legal principles submitted by defence counsel are of assistance:

- a) First, the Plaintiff carries both the legal and evidentiary burden of proving, on a balance of probabilities, that the alleged oral contract was made.
- b) Second, the basic contractual principles of offer and acceptance, and certainty of terms are applicable. These principles are summarized in *Fridman, The Law of Contract in Canada* (4th ed.). at pp. 16-17, and 20, as follows:

Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the party's intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other parties said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms.

Sometimes it is a simple matter to decide what the parties have manifested to each other, and consequently, whether they have agreed, and if so, upon what. This is especially true where a document containing their agreement has been prepared and signed by the parties. If the plain wording of the document reveals a clear and unambiguous intent, it is not necessary to go further.

It is different, however, where the language is not unambiguous but vague and uncertain. In the absence of the requisite certainty and clarity the courts will not declare that a contract exists.

[Emphasis as in original.]

- [177] I do not find an oral contract promising Teal would be kept whole to have been made in this case. As I have stated, I accept Minister Bell and Mr. Konkin's testimony that no such promise was made.
- [178] In addition, considering the circumstances of this case, viewed objectively, I am not persuaded that a contractual commitment of this magnitude would be made in a brief discussion as described above. In other words, the comment from the Minister, whatever it might have been, would not have been understood by a reasonable person at the meeting to have contractual force. Had there been a prior exchange of terms and negotiation, then of course an agreement could be quickly reached, but there is no evidence of an exchange of clear terms.
- [179] I am also not persuaded that what was said was sufficiently certain to be legally enforceable. The meaning of "keep whole" is not clear: did it simply mean keeping the AAC for Teal at 120,000 m³? Or did it mean providing Teal with the same volume, type of trees and cost to harvest as it had pre-SLUA, which Teal ultimately concluded would require doubling its land base on Haida Gwaii? Was it a one-time compensation? If not, how long was this promise to apply? For the transition period while the parties came to grips with the LUOO? Until the next AAC determination? Or indefinitely, as Teal asserts? These are all very significant terms which I would expect to be made clear in an agreement to protect Teal's

interest, and without which I cannot find the necessary contractual element of "certainty of terms" to be satisfied: Chiu at para. 39.

- [180] In any case, what Teal was seeking was a significant commitment, not one that would be made quickly after a brief discussion between the Minister and his aides following a comment from Teal. Surely such an issue would have been the focus of the meeting, with both parties prepared in advance.
- [181] For these reasons, on a balance of probabilities, I do not find an oral agreement was made between the parties and, as a result, need not consider the consideration issue or whether such an agreement was breached.
- [182] Teal argues in the alternative that the Province made a commitment to keep Teal as whole as possible. My analysis above applies equally here: I am not persuaded that whatever was said could have been understood to have contractual force. It was a very brief discussion in the midst of a meeting. The commitment would be significant. It was not confirmed in writing. No one made notes.
- [183] If Minister Bell said "we'll keep you as whole as possible", did that mean within resources available on Haida Gwaii? Or more broadly within the entire province? Onetime compensation or in perpetuity?
- [184] Based on Mr. Konkin's evidence, the ministry did try to protect Teal's interests, although I am not persuaded that whatever was said rose to the level of a contractual commitment to keep Teal as whole as possible.

Application to Reopen

- [185] On November 1, 2024, the Province applied to reopen its case for the purpose of adducing new evidence and making further submissions. Specifically, the Province wished to adduce evidence concerning Teal's insolvency, due to the erosion of the lumber markets from 2023-2024, decreasing lumber prices from 2022 onwards, inflationary pressures having increased Teal's labour and input costs, and rapidly increasing interest rates. In particular, it submits that Teal adduced evidence in a separate Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36 [CCAA] proceeding that shows its damages calculations in this one are seriously flawed.
- [186] In its notice of application filed October 10, 2024, the Province makes clear that where a formal order has not been entered, a trial judge has the discretion to reconsider or reopen a case: *Hansra v. Hansra*, 2017 BCCA 199 at para. 44. The Province also cites *Cox v. Swartz Estate*, 2022 BCSC 1494 for the test for reopening a trial to bring new evidence. The applicant must show, on a balance of probabilities, that: (1) a miscarriage of justice would probably occur without reopening the trial; and (2) the new evidence would probably have changed the result of the trial: *Cox* at para. 51, citing *Grewal v. Grewal*, 2016 BCCA 237 at para. 71.

- [187] On the first point, the Province submits that a miscarriage of justice would occur if the Court awarded damages to Teal without hearing evidence that would reduce or nullify their damages claim. On the second point, the Province argues that the CCAA proceeding is a new circumstance that has the potential to change the result at trial.
- [188] In its application response filed October 28, 2024, Teal says the Province has not met either component of the test. Teal argues that the Province has tendered no evidence to support why the new evidence they purport to include could not have been adduced at trial. In other words, the Province failed to conduct a necessary due diligence inquiry: *Barendregt v. Grebliunas*, 2022 SCC 22 at paras. 59-61. Teal says its financial statements were disclosed to the Province. Teal submits that it is not in the interests of justice to allow the Province to revisit its choices at trial and allow it to adduce evidence that was available to them, had they conducted a sufficient due diligence inquiry.
- [189] Further, Teal submits that the evidence, if presented at trial, would not change the result. Meeting this threshold requires more than the mere possibility that a different result might have been reached: *Cox* at para. 56. While the test for reopening a trial to adduce further evidence may be more relaxed pre-judgment than post-judgment, this power is to be used sparingly and only where a miscarriage of justice would occur if the trial were not reopened: *Hansra* at para. 52. A miscarriage of justice is a result that would leave one party with such an unfair benefit or advantage that a reasonable person would find it shocking and unconscionable: *Cox* at para. 56.
- [190] I agree with Teal's submissions. I am not persuaded that proceeding without the Province's additional evidence would render an outcome so unfair it would constitute a miscarriage of justice.
- [191] Secondly, the Province's argument concerns the quantum of damages, and I will not be awarding damages in this case. Introducing further evidence in this regard would not change this outcome.

Conclusion

- [192] In summary, I find that Teal has failed to establish its claims of breach of the duty of good faith, constructive taking, or breach of an oral agreement to keep it whole. Because I have made these findings, I do not need to assess the issues of damages, the standing of the HGMC to be sued, or whether Teal's claims are barred by a limitation period. The action is dismissed.
- [193] If necessary, the parties may make submissions on costs.

"B. Brown J."

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