FM-54-13

Court File No./No du dossier

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

NOTICE OF PRELIMINARY MOTION
(FORM 37B)

COUR DU BANC DE LA REINE

DIVISION

CIRCONSCRIPTION JUDICIAIRE DE

AVIS DE MOTION PRELIMINAIRE
(FORMULE 37B)

BETWEEN:

ELSIPOGTOG FIRST NATION
Applicant

-and-
ATTORNEY GENERAL OF NEW BRUNSWICK; MINISTER OF ENERGY AND MINES;
SWN RESOURCES CANADA INC. and **THE ASSEMBLY OF FIRST NATIONS' CHIEFS IN NEW BRUNSWICK**
Respondents

AUTEUR

En application de la règle_____ des Règles de procédure.

DESTINATAIRE:

BY: ELSIPOGTOG FIRST NATION

_____ demandera à la Cour à _____ (lieu précis) _____, le _____ 2013__, à _____ h, d'ordonner (indiquer l'ordonnance demandée, les motifs à discuter et les renvois aux dispositions législatives ou règles qui seront invoquées);

Under Rule 40.01(a), 40.02, 40.04 and 40.05 of the *Rules of Court of New Brunswick*

TO: **Ex Parte**

COURT OF QUEEN'S BENCH
FREDERICTON, NB
RECEIVED AND FILED
NOV 14 2013
COUR DU BANC DE LA REINE
FREDERICTON, N-B
REÇU ET DÉPOSÉ

The Applicant, Elsipogtog First Nation, will apply to the Court at Fredericton, New Brunswick, on the 15 of November 2013 at 1 ~~a.m.~~ (~~or~~ p.m.) for an order that:

ORDER SOUGHT

1. Pursuant to Rules 40.01(a), 40.02, 40.04 and 40.05 of the *Rules of Court of New Brunswick,* N.B. Reg. 82-73 and section 2, 26 and 33 of the *Judicature Act*, R.S.N.B., c.

J-2, the Applicant seeks an order in the nature of an interlocutory injunction in the form hereto attached as Schedule 'A' against the Defendant the Minister of Energy and Mines and the Defendant SWN Resources Inc.) **("SWN")** suspending all operations pursuant to New Brunswick oil and gas licenses and permits conferred on SWN Resources for shale gas exploration in the Signitog District of Mi'kmaki;

2. Pursuant to Rules 37.04 (2) and (3), 40.01 and 40.02 (1), the Applicant also seeks such relief *ex parte* on an extremely urgent interim basis and to avoid serious consequences, upon the undertaking of the Applicant to commence the proceeding without delay;

3. Pursuant to Rule 40.04, dispensing the Applicant from undertaking to be liable for damages arising from the order sought;

4. Pursuant to Rule 37.04 (2) and (3), issue the order of the Court *ex parte* without service.

5. Costs awarded against the Respondents Attorney General of New Brunswick, Minister of Energy and New Brunswick and SWN;

6. Such further and other relief as this Honourable Court deems just.

GROUNDS TO BE ARGUED

The order in the nature of an interlocutory injunction, and for relief *ex parte* on an extremely urgent interim basis, is sought on the following grounds:

1. As detailed hereinafter, the Applicant is entitled to the order it seeks, in accordance with the criteria set in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, provided that further to *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, par. 12-15, the test an interlocutory injunction should not be applied in a way that effectively denies the Applicant its conditionally protected rights under the *Constitution Act, 1982*, including the Crown duty of consultation and accommodation, before they can be addressed on the merits.

Urgent interim *ex parte* to preserve civil peace

2. New circumstances have arisen whereby the Applicant is constrained to seek, *ex parte* on an extremely urgent interim basis and to avoid serious consequences, an order suspending all operations pursuant to New Brunswick oil and gas licenses and permits conferred on Respondent SWN for shale gas exploration and development in the Signitog District of Mi'kmaki.

3. Such an *ex parte* order of the Court is urgently required to preserve civil peace and the Rule of Law, so that the rights of the Applicant to be addressed through appropriate negotiations or through adjudication on the merits.

4. Specifically, only such an order, granted *ex parte* on an extremely urgent basis, can preserve the peace and the rights of the Applicant in the face of the collision of opposing intentions and actions that is once again taking shape.

5. On the one hand, the Government if New Brunswick, as represented by the Respondent Attorney General and by the Respondent Minister of Energy and Mines is engaging in what amounts to impermissible self-help that is inconsistent with the requirement of honourable conduct.

6. This behaviour, in violation of the supreme law of Canada, takes the form of unrelenting and uncompromising Crown affirmation of the rights it purported to grant to SWN, without regard for the rights of the Applicant.

7. The behaviour of the Crown in turn provides support to the Respondent SWN in its insistence on exercising those rights in the coming days, without regard for the need for negotiation or judicial determination of the rights of the Applicant.

8. On the other hand, there is credible evidence that outside radical elements are converging in significant numbers on New Brunswick and the vicinity of the shale gas exploration work that the Respondent SWN proposes to recommence.

9. As of Wednesday, November 13, 2013, the Respondent SWN was positioning its equipment and protesters were beginning to gather, but still in relatively small numbers.

10. These circumstances combine to create a very real danger that, as active seismic exploration is recommenced in the coming hours and days, outside radical elements, the Respondent SWN and the RCMP, other police and even military forces, all interact so as to cause a repeat or escalation of the unacceptable and dangerous events that took place in Rexton on October 17, 2013.

11. The Court of Queen's Bench, in its role as a superior court with compendious powers in law and in equity, possesses the inherent power and responsibility to protect civil peace, uphold the Rule of Law and the *Constitution of Canada* and control its process, all in such a way that the rights of the Applicant and the Respondents can be properly determined on the merits.

12. It is within the power of the Court and an appropriate exercise of this judicial authority to issue, on an extremely urgent *ex parte* basis, the order sought by the Applicant herein.

13. In summary terms, the Applicant seeks an order in the nature of an interlocutory injunction against the Respondent Minister of Energy and Mines and the Respondent SWN suspending all work pursuant to New Brunswick oil and gas licenses and permits conferred on Respondent SWN for shale gas exploration in the Signitog District of Mi'kmaki.

14. It is just and convenient to issue, on an extremely urgent *ex parte* basis, an order in the nature of an interlocutory injunction in the form hereto attached as Schedule 'A', as there is a serious issue to be tried, the Applicant has and will continue to suffer irreparable harm as a result of the actions and failures to act of the Respondents and the balance of convenience and the public interest weigh in favour of granting the order sought.

Serious issue

15. There is a serious issue to be tried regarding the constitutionally protected fundamental rights of the Applicant; the claim of the Applicant is certainly not vexatious or frivolous.

16. Notably, pursuant to *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, and subsequent decisions, the Crown has a duty to meaningfully consult Elsipogtog and accommodate their interests prior to decisions that may affect their rights, lands, waters and resources.

17. The Applicant has inherent Aboriginal rights and title and Treaty rights in and to lands, waters and resources of the Signitog District of Mi'kmaki, including a right to peaceful enjoyment and possession and to exclusive use and occupation thereof, for a variety of traditional and modern economic purposes, as well as jurisdiction thereover.

18. The Applicant Elsipogtog has never ceded any of its lands, waters and resources.

19. For close to 300 years, the Applicant Elsipogtog has had a sacred relationship with the Crown under the Treaties of Peace & Friendship, under which its rights are protected.

20. The Aboriginal rights and title and Treaty rights and jurisdiction of the Applicant are constitutionally guaranteed under sections 35 and 52 of the *Constitution Act, 1982*.

21. The ownership and legislative jurisdiction asserted by the Crown over lands, waters and resources in the Province of New Brunswick, and any resource rights granted under its legislation, are, by virtue of section 109 of the *Constitution Act, 1867* subject to the rights of the Applicant, and now those rights are in addition constitutionally protected under section 35 of the *Constitution Act, 1982*.

22. The Defendant the Minister of Energy of New Brunswick purports to have granted in 2010, to Defendant SWN, Oil and Natural Gas Licences to Search (ONG/lic 10-01 to 10-32) to search, explore and bore for oil and natural gas in an area of the province covering over 1,000,000 hectares, and in 2013 Geophysical Licences and Geophysical Permits to Operate Geophysical Equipment to search, explore and bore for oil and natural gas, including geophysical exploration for oil, natural gas, or bituminous shale and seismic exploration.

23. The purpose pursued by the Defendants the Minister of Energy and Mines and SWN is exploration for and development of shale gas to be extracted by hydraulic fracturing.

24. The Signitog District includes the areas concerned by the Oil and Natural Gas Licences, Geophysical Licences and Permits.

25. The decisions and actions of the Respondent Minister of Energy and Mines to proceed with exploration and development of shale gas using hydraulic fracturing in the Signitog District, the conferring of rights to that end and the exploration activity thereunder by the Respondent SWN are all illegal, unconstitutional, null and void, and should be so declared, in that they:

    a. are all in violation of the Applicant's Aboriginal rights and title and Treaty rights;

    b. do not respect the Crown's obligation of honourable conduct and the requirements of good faith negotiation to address the rights of the Applicant: and,

    c. have occurred in the absence of prior meaningful consultation and accommodation of the Applicant at the strategic planning level, as is required of the Crown.

26. The Crown, as represented by the Respondent the Minister of Energy and Mines, notably failed to fulfil the requirements of the duty to consult and accommodate by:

    a. misapprehending the scope and depth of the consultation and accommodation required;

    b. failing to modify Crown land and resource legislation so as to provide a regulatory scheme to fulfil its obligation of consultation and accommodation, relying instead on administrative discretion that risks repeatedly infringing Aboriginal rights;

    c. engaging in purported consultation on piecemeal basis that denies the right to meaningful consultation at the strategic planning level with a realistic prospect of modification of the decisions proposed by the Crown regarding the lands, waters and resources of the Applicant Elsipogtog;

    d. failing to engage directly with the Applicant for the purpose of meaningful consultation; and

    e. purporting to delegate substantial aspects of the required consultation to the Respondent SWN.

27. These failures of the Crown were compounded by the inaction and inadequate engagement by the Respondent Assembly of First Nations' Chiefs in New Brunswick Inc. (the **"Assembly"**) with respect to consultation and accommodation.

28. In particular, the Applicant delegated the process of consultation to the Respondent Assembly, on the basis that the appropriate level of consultation and accommodation would occur.

29. The Respondent Assembly failed to respond in a timely and appropriate fashion to the attempts of the Crown to participate in consultations, with the result that the concerns of the Applicant Elsipogtog was never even heard. and much less accommodated.

30. Ultimately, it is the Crown that is responsible for fulfilling its duty to consult and accommodate pending the addressing of the rights of the Applicant through negotiation or judicial determination. This is required so that the lands, waters and resources in dispute are intact when the Applicants rights are finally addressed.

31. The failure to fulfil the duty of consultation and accommodation is a violation of the Applicant's constitutional rights.

    Deep consultation and accommodation of the Applicant Elsipogtog was constitutionally and legally required at the strategic planning level with respect to proposed Crown decisions respecting the allocation of vast lands for exploration and development shale gas resources through hydraulic fracturing because, as required by *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511:

    a. the Crown and the Respondents the Attorney General and the Minister of Energy and Mines unequivocally have real and constructive knowledge of the Aboriginal rights and title and Treaty rights of the Applicant, notably by virtue of the Peace and Friendship Treaties, the notorious facts of exercise by the Mi'kmaq of Elsipogtog of the rights to hunt, fish, cut timber and engage in other harvesting in the District of Signitog, the decisions of the Courts, pending litigation, claims, requests for negotiation, negotiations and their own acknowledgment;

    b. the rights relied on by the Applicant go far beyond the mere assertion, and reach the standard of a *prima facie* or strong *prima facie* case;

    c. the potential adverse impacts of the decisions the Respondent Minister of Energy and Mines has taken and proposes to take regarding the lands, waters and resources of Elsipogtog's Signitog District are significant, as is evidenced by:

        i. the extent of the rights conferred on Respondent SWN Resources regarding vast territories,;
        ii. the commitment of the Premier, the Respondent Minister of Energy and Mines and the Government of New Brunswick to proceed with large-scale shale gas development as the cornerstone of the Province's economic development and fiscal plan; and
        iii. the nature of the potential impacts of full-scale shale oil exploration and development.

32. Both the process and the substantive outcome of the process must respect the requirement of the honour of the Crown and protection of the rights of the Applicant.

Irreparable harm

33. Without the intervention of the Court to grant interlocutory relief, including on an extremely urgent interim basis *ex parte*, the Applicant will suffer irreparable harm, which cannot be compensated or adequately remedied in damages.

34. The said irreparable harm includes the following:

    a. Unless the Respondent SWN is enjoined, it will be continuing to operate under licenses and permits:
        i. granted by the Respondent the Minister of Energy and Resources contrary to the closing words of s. 109 of the *Constitution Act, 1867* and in violation of the constitutionally protected Aboriginal rights and title and Treaty rights of the Applicant , including exclusive use and occupancy of its lands and the right not to be deprived of discretion to choose the future path of land and resource use in ways that may diverge from the future envisaged by the Government of New Brunswick; and
        ii. in breach of the Crown obligation of good faith negotiation in a timely and effective process to address the Applicant's rights and achieve reconciliation;

    b. Unless the Respondent SWN is enjoined, it will continue and complete the seismic exploration phase, further illegally depriving the Applicant of respect for the Crown's duty of consultation and accommodation at an early strategic planning stage, in grave violation of the Applicant's constitutional rights.

    c. Unless the Respondent SWN is enjoined, completion of the seismic exploration phase of its programme will:
        i. facilitate its securing of the licenses, permits and ultimately leases to pursue exploration, drilling and production of shale gas through hydraulic fracturing by the fulfilment of license and permit work obligations that allow the Respondent SWN to proceed to the next levels of the regulatory process for oil and gas rights, whereby on the basis of an administrative process of filing with the Respondent Minter of Energy and Mines, it can obtain drilling permits. oil and gas leases, well licences and move onward to shale gas production under the provisions of the *Oil and Natural Gas Act*, R.S.N.B., c. O-2.1(including ss. 26 – 27.1) and the *Licence to Search and Lease Regulation*, N.B.Regulation 2001-66 (including ss. 11, 12 and 18.7);
        ii. allow it to create further equities in favour of pursuing shale oil exploration, drilling and production despite the process an substantive rights of the Applicant.

Balance of convenience

35. The balance of convenience favours the Applicant.

36. Any damages that the Respondent SWN may allege are or will be:

    a. self-generated by its uncompromising persistence in making commercial engagements and pursuing its exploration programme without regard for the rights of the Applicant;

    b. clearly compensable in damages, including by way of a claim by the Respondent SWN against the Crown for failure to furnish valid licenses and permits;

37. An order of the Court as sought by the Applicant is required to ensure respect for the Rule of Law, including the *Constitution of Canada* as the supreme law of Canada, the solemn Treaties of Peace and Friendship between the Crown and the Applicant, the peaceful and orderly administration of justice and the *status quo.*

38. Only such an order will afford the Applicant the opportunity to have its constitutionally recognized and affirmed rights properly adjudicated or addressed through negotiations and ensure respect for the process and substantive protections of the Crown duty of consultation and accommodation, without being deprived of those very rights in the interval, notably by the licenses and permits provided by the Respondent Minister of Energy and Resources and the shale gas exploration activities thereunder of the Respondent SWN.

39. The paramount public interest resides in respect for the *Constitution of Canada* and the rights thereunder of the Applicant, the requirement of the honour of the Crown and of reconciliation with First Nations.

40. In assessing the balance of convenience, the Court must look beyond the land areas, the duration and the immediate physical impact of this phase of the work of the Respondent SWN.

41. The licenses and permits issued to the Respondent SWN are part of regulatory chain that leads to a lease and permits for drilling and hydraulic fracturing to extract shale gas.

42. Despite a variety of other regulatory steps involved before drilling and actual extraction of shale gas will occur, the permits the granted by the Respondent Minster of Energy and Mines granted to the Respondent SWN, will allow the company, if it satisfies its obligations, to proceed to drilling and to a lease to extract shale gas.

43. The large land areas involved, and the ensuing grave implications for the rights of the Applicant Elsipogtog First Nation in and to the Signitog District and for the Applicant's

right have the option to decide on a future for its lands, waters and resources that does not involve shale gas exploration and exploitation, weigh heavily in the balance in favour of the Applicant.

44. The need for an order of the Court is confirmed and reinforced by the unconditional public commitment of the Province of New Brunswick, the Premier and the Defendant Minister of Energy and Mines to shale gas exploration.

45. Without an *ex parte* and interlocutory order of the Court, the effect will be to make it illusory that any negotiations, as the path to reconciliation, and the carrying out of the duty to consult and accommodate, or even eventual adjudication on the merits of the rights of the Applicant, can in fact be substantial and meaningful, with a real prospect of there being a possibility of the Applicant Elsipogtog First Nation choosing a future path of land and resource use without fracking for shale gas.

46. In the spirit of Peace and Friendship, the Applicant is committed to engagement with the Province of New Brunswick through a process that will address, with the Crown, the fundamental issues that are raised by the coexistence of Elsipogtog rights to lands, waters and resources on the one hand and the assertions of Crown ownership and legislative jurisdiction on the other.

47. By virtue their constitutional duties and under the laws of New Brunswick the legislature, the Cabinet and the Ministers of the Crown, including especially the Respondent Minister of Energy and Mines, have all of the authority that is required to ensure that that the short-term pursuit of shale gas exploration activities of Defendant SWN are suspended, its rights are extended or its work and financial obligations are varied. These powers exist notably under: the *Oil and Natural Gas Act*, R.S.N.B., c. O-2.1 (especially sections 13(2.1) ,16.01, 52, and 59(1) (a), (b.7), (c), (e), (h),(i) , (kk), (qq), (rr)). This will ensure the time and atmosphere of calm necessary to make reconciliation between the Crown and the Applicant possible through negotiation and through judicial determination of the issues on the merits.

48. Since the events of October 17, 2013, the Crown has failed to take any such legally effective actions, has failed to carry through on its undertakings to the Applicant to ensure a cooling off period through a pause in the activities of the Respondent SWN and has taken no steps to commence a structured process for discussions on rights, lands, waters and resources, including shale gas, with the Applicant.

49. The assistance of the Court is required now to provide the time and period of peace and calm necessary to allow the preferred option of negotiations to succeed and to protect the rights of the Applicant to have its rights addressed through adjudication on the merits.

Prudence in the application of the test for interlocutory injunctions

50. By reason of the forms of proceedings, the order sought by this Notice of Preliminary Motion takes the form of interlocutory injunction.

51. However, in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, the leading case on the constitutional duty of consultation and accommodation founded in the honour of the Crown, the Supreme Court of Canada held that that in the face of resource development plans and decisions of the Crown, the rights of Aboriginal peoples pending negotiated agreement or judicial determination on the merits, may not be adequately protected by the law governing interlocutory injunctions, and especially the balance of convenience branch of the applicable test.

52. In this context, the Applicant seeks the assistance of the Court to protect its rights and maintain the *status quo* pending a decision on the merits, but submits that this Court should exercise prudence in the application of the judicially elaborated test for the granting of an interlocutory injunction. Prudence is required so as to avoid frustrating the constitutionally protected rights of the Applicant and the process of Crown-First Nation reconciliation mandated by a generous understanding of the requirement of the honour of the Crown in the resolution of claims and the implementation of treaties.

Final

53. Service of this Notice of Preliminary Motion and supporting affidavit material cannot be effected because the delay necessary would entail serious consequences for the protection of the constitutional rights of the Applicant and the preservation of the peace.

54. The Applicant will commence proceedings against the Respondents without delay (on terms as directed by the Court), in which it will seek various forms of relief including, but not limited to judgments, orders and declarations that:

    a. The decisions and actions of the Respondent Minister of Energy and Mines to proceed with or authorize exploration and development of shale gas, including using hydraulic fracturing, in the Signitog District, the conferring of rights to that end and the exploration activity thereunder by the Respondent SWN are all illegal, unconstitutional, null and void, in that they:

        i. are all in violation of the Applicant's Aboriginal rights and title and Treaty rights;

        ii. do not respect the Crown's obligation of honourable conduct and the requirements of good faith negotiation to address the rights of the Applicant: and,

        iii. have occurred in the absence of prior meaningful consultation and accommodation of the Applicant at the strategic planning level, as is required of the Crown.

    b. The Respondent Assembly of First Nations' Chiefs in New Brunswick, as the delegate of the Applicant for the purposes of the carrying out of consultation and

accommodation with the Crown with respect to shale gas exploration and development:

i. failed by its inaction, inadequate engagement with the Crown and non-communication with the Applicant and with the Crown, to ensure respect the process and substantive rights of the Applicant to meaningful consultation and accommodation that the rights of the Applicant to the process of consultation to the Respondent Assembly, on the basis that the appropriate level of consultation and accommodation would occur.

c. It illegal and unconstitutional for the Crown, as represented herein by the Respondent Attorney General of New Brunswick and the Respondent Minister of Energy and Mines to grant any further rights and authorize and pursue exploration and development of shale gas resources, including by hydraulic fracturing in the Applicants District of Signitog;

d. It is illegal and unconstitutional for the Respondent SWN to pursue exploration and development of shale gas resources in the Applicants District of Signitog and granting an injunction to that effect against the Respondent SWN;

55. Such further and other grounds as counsel may advise.

AUTHORITIES AND RULES RELIED UPON

The Applicant intends to rely upon the following:

a. The Treaties of Peace and Friendship between the Crown and the Applicant Elsipogtog or its predecessors and representatives;

b. The *Constitution of Canada*, including the *Constitution Act, 1867* and notably s. 109 thereof, and the *Constitution Act, 1982*, and notably ss. 35 and 52 thereof;

c. The *Oil and Natural Gas Act*, R.S.N.B., c. O-2.1 and the Regulations thereunder;

d. The *Judicature Act*, R.S.N.B., c. J-2, *and notably ss.*2, 26 and 33 thereof; and

e. The *Rules of Court of New Brunswick,* N.B. Reg. 82-73, generally and particularly Rules 1.03(2), 2.02, 3.02(1), 37, 39, 40, and 59.

EVIDENCE

Upon the hearing of the preliminary motion the following affidavits or other documentary evidence will be presented:

A l'audition de la motion préliminaire, les affidavits ou les autres preuves lettérales suivantes seront présentées: (énumérer les

(list the documentary evidence to be used at the hearing of the motion).

preuves littérales suivantes seront utilisées lors de l'audition de la motion).

1. Affidavit of Chief Arren J. Sock, sworn to November 13, 2013.

You are advised that:

(a) your are entitled to present evidence at the hearing in English or French or both;

(b) the applicant intends to proceed in the English language; and

(c) if you intend to proceed in or present evidence in the other official language, an interpreter may be required and you must so advise the clerk at least 5 days before the hearing.

Sachez que:

a) vous avez le droit de présenter votre preuve à l'audience en français, en anglais ou dans les deux langues;

b) le requérant a l'intention d'utiliser la langue _____; et

c) si vous avez l'intention d'utiliser l'autre langue officielle ou de présenter la preuve dans cette autre langue, les services d'un interprète pourront être requis et vous devrez en aviser le greffier au moins 5 jours avant l'audience.

DATED at Fredericton, this 14 day of November, 2013.

FAIT à _____ le _____ 20__.

Solicitor for the Applicant,
Thomas J. Burke, Q.C.

_____
Avocat de l'auteur de la motion préliminaire

Name of solicitor for person making preliminary motion:

Nom de l'avocat de l'auteur de la motion préliminaire: _____

THERIAULT BURKE LAW
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