

Citation: ☀ R. v. Gwaii Wood Products Ltd., et al
2017 BCPC 6

Date: ☀20170109
File No: 6089-1
Registry: Masset

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN

AND:

**GWAII WOOD PRODUCTS LTD.
HOWE SOUND FOREST PRODUCTS LTD.
I. CROSBY CONTRACTING LTD.**

**REASONS FOR SENTENCE
OF THE
HONOURABLE REGIONAL ADMINISTRATIVE
JUDGE M. J. BRECKNELL**

Agents for the Director of Public Prosecutions (the Crown):	A. Switzer and Dr. L. Reynolds
Appearing for Gwaii Wood Products Ltd.:	A. Bellis and F. Collison
Appearing for Howe Sound Forest Products Ltd.:	No Appearance
Appearing for I. Crosby Contracting Ltd.:	No Appearance
Place of Hearing:	Masset, B.C.
Dates of Hearing:	April 15, June 24, August 11, September 14 and 15, 2016
Date of Judgment:	January 9, 2017

INTRODUCTON

[1] The three Defendants:

1. Gwaii Wood Products Ltd (Gwaii);
2. Howe Sound Forest Products Ltd. (Howe Sound); and
3. I. Crosby Contracting Ltd. (I. Crosby) (collectively the Defendants).

were each found guilty on October 19, 2015, of all 20 Counts on Information 6089-1 arising from logging and related activities carried out on District Lot 413, Queen Charlotte District, P.I.D. 015-696-286, (DL 413) located adjacent to Highway 16 approximately 3.5 kilometres northeast of the Village of Port Clements, in the Province of British Columbia, between June 24 and October 20, 2010.

[2] The 20 Counts referred to activities of the Defendants in unlawfully carrying on works or undertakings, to wit: logging and road construction that resulted in the harmful alteration, destruction or disruption of fish habitat, riparian vegetation and wetlands of three tributaries which flow into the Kumdis Bay estuary, three tributaries which flow into Mallard Creek and Mallard Creek itself, all in violation of section 35(1) of the *Fisheries Act* and thereby did commit an offence contrary to section 40(1) of the *Fisheries Act* (the *Act*).

[3] The trial decision can be found at 2015 BCPC 0292. The evidence at trial established beyond a reasonable doubt that the actions and/or omissions of the Defendants with respect to the impacts of logging, road construction, and damage to riparian vegetation on each of the eight bodies of water, and to the site in general, on

DL 413 resulted in the “harmful alteration”, and/or “disruption” and/or “destruction” (commonly referred to as HADD) of fish habitat at that location.

[4] The Crown seeks the following penalties for each of the three Defendants:

- a) Gwaii: a fine of \$300,000.00 pursuant to section 40(1) of the *Act*, and a further order for a payment to Her Majesty of \$550,000.00 to promote the proper management and conservation of fish and fish habitat on Haida Gwaii pursuant to section 79.2 (f) of the *Act*;
- b) Howe Sound: a fine of \$300,000.00 pursuant to section 40(1) of the *Act*, a further order for a payment to Her Majesty of \$1,000,000 to promote the proper management and conservation of fish and fish habitat on Haida Gwaii pursuant to section 79.2 (f) of the *Act*, and a prohibition from logging or other related activities for a period of ten years pursuant to section 79.2 (a) of the *Act*; and
- c) I. Crosby: a fine of \$300,000.00 pursuant to section 40(1) of the *Act*, a further order for a payment to Her Majesty of \$600,000.00 to promote the proper management and conservation of fish and fish habitat on Haida Gwaii pursuant to section 79.2 (f) of the *Act*, and a prohibition from logging or other related activities for a period of six months pursuant to section 79.2 (a) of the *Act*.

[5] Gwaii submits it should face the following penalties:

- a) a fine of between \$15,000 and \$20,000 pursuant to section 40(1) of the *Act*, a further order that Gwaii have prepared, at its expense, a fisheries biology study and report to ascertain the status and condition of fish habitat on DL 413 pursuant to section 79.2(b) of the *Act*, and a further order that Gwaii be permitted to salvage wood and clear debris from DL 413 pursuant to section 79.2(b) of the *Act*.

[6] Howe Sound and I. Crosby did not appear at trial or the sentencing hearing and made no submissions regarding the appropriate sentence and ancillary orders to be imposed.

THE LAW

Fisheries Act

[7] The Crown relied on provisions of the *Fisheries Act* in force at the time these offences occurred, including:

- a) **35.(1)** No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat,
- b) **40.(1)** Every person who contravenes subsection 35(1) is guilty of
 - (a) an offence punishable on summary conviction and liable, for the first offence, to a fine not exceeding three hundred thousand dollars.
- c) **79.** Where a person is convicted of an offence under this *Act* and the court is satisfied that as a result of committing the offence the person acquired monetary benefits or monetary benefits accrued to the person, the court may, notwithstanding the maximum amount of any fine that may otherwise be imposed under this *Act*, order the person to pay an additional fine in an amount equal to the court's findings of the amount of those monetary benefits.
- d) **79.2** Where a person is convicted of an offence under this *Act*, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing any one or more of the following prohibitions, directions or requirements:
 - (a) prohibiting the person from doing any act or engaging in any activity that may, in the opinion of the court, result in the continuation repetition of the offence;
 - (b) by directing the person to take any action the court considers appropriate to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence,
 - (f) directing the person to pay Her Majesty in amount of money the court considers appropriate for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat;

[8] The Court also considered and relied on the following provisions of the *Criminal Code*:

- a) **2.** In this Act, “organization” means
A public body, body corporate, society, company, firm, partnership, trade union or municipality,
- b) **718** The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
 - (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
 - (b) to deter the offender and other persons from committing offences;
 - (c) to separate offenders from society, where necessary;
 - (d) to assist in rehabilitating offenders;
 - (e) to provide reparations for harm done to victims or to the community; and
 - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
- c) **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender
- d) **718.2** A court that imposes a sentence shall also take into consideration the following principles:
 - (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
 - (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- e) **718.21** A court that imposes a sentence on an organization shall also take into consideration the following factors:

- (a) any advantage realized by the organization as a result of the offence;
 - (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
 - (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
 - (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
 - (e) the cost to public authorities of the investigation and prosecution of the offence;
 - (f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
 - (g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
 - (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
 - (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
 - (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.
- f) **734 (1)** Subject to subsection (2), a court that convicts a person, other than an organization, of an offence may fine the offender by making an order under section 734.1
- (a) if the punishment for the offence does not include a minimum term of imprisonment, in addition to or in lieu of any other sanction that the court is authorized to impose;
- (2)** Except when the punishment for an offence includes a minimum fine or a fine is imposed in lieu of a forfeiture order, a court may fine an offender under this section only if the court is satisfied that the offender is able to pay the fine or discharge it under section 736.

- g) **735 (1)** An organization that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law,
- (a) that is in the discretion of the court, where the offence is an indictable offence; or
 - (b) not exceeding one hundred thousand dollars, where the offence is a summary conviction offence.

(1.1) A court that imposes a fine under subsection (1) or under any other Act of Parliament shall make an order that clearly sets out

- (a) the amount of the fine;
- (b) the manner in which the fine is to be paid;
- (c) the time or times by which the fine, or any portion of it, must be paid; and
- (d) any other terms respecting the payment of the fine that the court deems appropriate.

(2) Section 734.6 applies, with any modifications that are required, when an organization fails to pay the fine in accordance with the terms of the order.

[9] The Court also considered s. 178(1) of the *Bankruptcy and Insolvency Act* which states:

- a) **178 (1)** An order of discharge does not release the bankrupt from
 - (a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

Case Law

[10] The Crown relied on the following cases in support of its submissions on sentence:

- a) *R. v. United Keno Hill Mines Ltd.*, 1980 Carswell Yukon 9;
- b) *R. v. Terroco Industries Ltd.*, [2005] A.J. No. 361;

- c) *R. v. Northwest Territories Power Corporation*, 2011 NWTTC 03;
- d) *R. v. Brown*, 2010 BCCA 225;
- e) *Canada v. Domtar Specialty Fine Papers*, 2001 Carswell Ont. 1572;
- f) *R. v. Larsen*, 2015 BCSC 1334;
- g) *R. v. Jovnic Ltd.*, 2011 ABPC 62;
- h) *R. v. Autobody Services Red Deer Ltd.*, 2014 ABPC 301;
- i) *R. v. Sinclair*, 2009 Carswell Ont 4894;
- j) *R. v. Northland Properties Corporation*, 2015 BCSC 1571;
- k) *R. v. 0702905 BC Ltd. dba Old Town Bay et al*, unreported, April 12, 2010 Salmon Arm Registry No.19840-1 (BCPC);
- l) *R. v. Henneberry*, 2009 NSCA 112;
- m) *R. v. H & H Fisheries Ltd.*, 2014 NSPC 61;
- n) *Desbois v. R.*, 2013 QCCA 2099 (CanLII);
- o) *R. v. First Prince George*, 2006 BCPC 0231;
- p) *R. v. Prince*, [1986] 2 S.C.R.480;
- q) *R. v. Kinnear*, 2005 Carswell Ont. 2423;
- r) *R. v. Snowfield Development Corp.*, 2008 NWTTC 15;
- s) *R. v. Larsen*, 2013 BCPC 309;
- t) *Ontario (Labour) v. Flex-N-Gate Canada Company*, 2014 ONCA 53;
- u) *R. v. Stubel*, 1990 ABCA 286;
- v) *R. v. Pearlman*, 2005 Can LII 99 (QCCS).

[11] The Court brought to the attention of the parties and considered the following cases:

- a) *R. v. Basso*, 2001 BCSC 801;

- b) *R. v. Metron Construction Corp.*, 2013 ONCA 541;
- c) *R. v. Sinclair*, 2009 Carswell Ont. 4894;
- d) *R. v. Goebel*, 2003 ABQB 422.

EVIDENCE

[12] Gwaii submitted a number of documents as evidence on the sentencing hearing including:

- a) a letter dated September 13, 2016, from Gwaii to the Court summarizing its position and its dealings with the other Defendants and Fisheries and Oceans Canada (FOC) concerning matters before the Court;
- b) a letter dated September 12, 2016, from Keith Atkinson, Chief Executive Officer of the BC First Nations Forestry Council;
- c) a Letter of Explanation to the Court dated September 13, 2016, from Mr. Stefan Winter, Registered Forestry Technologist of Off The Map Consulting Ltd., outlining his concerns surrounding the lack of a proper forest harvesting plan by Howe Sound;
- d) Bank records for Gwaii from Northern Savings Credit Union from December 31, 2012 to August 31, 2016;
- e) a letter dated October 20, 2015, from Gwaii to the Court concerning a request for an adjournment of the sentencing proceedings;
- f) a letter dated February 12, 2016, from the Crown to Gwaii concerning the Crown's creative sentencing position and their position on sentencing;
- g) a letter dated March 3, 2016, and marked "Without Prejudice" from Gwaii to the Crown outlining their proposal for a creative sentencing solution;
- h) a map of DL 413 and DL 418 indicating which portions of DL 413 Gwaii wish to transfer to a third-party as part of a creative sentencing solution;
- i) an appraisal dated July 3, 2014, prepared by Donovan C. Collins valuing the value of certain portions of DL 413 taken for use as a highway;
- j) ledger records for Gwaii from June 29, 2010 to May 13, 2011, pertaining to monies received from Pallan Group Ltd. (Howe Sound) with regard to the logging of DL 413;

- k) a letter, undated, from Gwaii to Pallan Group Ltd. concerning outstanding accounts as at May 12, 2011;
- l) a letter, dated August 4, 2011, from Gwaii to Pallan Group Ltd. and Howe Sound concerning the involvement of FOC and other issues arising from the Log Sales Agreement;
- m) a copy of the Log Sales Agreement between Gwaii and Howe Sound dated June 10, 2010.

SUBMISSIONS

Crown

[13] The Crown's initial submissions can be summarized as follows:

- a) the harmful alteration, disruption, and destruction (commonly referred to as HADD) of fish habitat in this case was of the greatest degree of seriousness involving extensive destruction of a unique and productive fish environment;
- b) the damage to fish habitat was as a result of a wilful, reckless, or extremely negligent series of decisions by the Defendants;
- c) there was an extensive loss of fish habitat over a wide area and the destruction will require a concerted effort over a lengthy period of time, at great expense, to effect even a modest rehabilitation;
- d) given the numerous aggravating factors and a lack of any mitigating factors, there is a need for severe penalties which result in the Defendants being stripped of any financial benefits they may have obtained through their actions.

[14] A review of the cases presented by the Crown clearly indicates that most of them rely heavily on the factors described in *United Keno* and *Terroco* describing what must be considered in arriving at a just and appropriate sentence. The Crown's submissions based on those factors fall under the following headings.

a) **Nature of the Environment**

[15] DL 413 is a unique, sensitive area and an essential wildlife and fish habitat. The contours of the land are such that there is a buffered flow of water from elevated areas to lower flat areas and upwelling from tidal waters and rain events which provides an ideal habitat for fish of many different species and various age groups. The environment provided plenty of feed for fish and lots of shady areas with a variety of stream flows ideal for spawning, rearing, and growing fish. It was located adjacent to, or very near to, other equally important environments protected as conservancy lands by the Provincial Government and a variety of non-government organizations.

b) Extent of Injury/Harm/Damage

[16] The actions of the Defendants caused extensive damage in manner, form, and scope throughout the entirety of DL 413. There was extensive damage done to all areas including 2.5 kilometres of stream and stream banks, riparian vegetation, and wetlands.

[17] The environment of DL 413 was not resilient and the damage done to the area may require a century or more to be fully naturally rehabilitated.

[18] The actual damage was extensive and there remains the potential for further damage that cannot be accurately ascertained at this time because it depends on environmental effects on the area. It is clear, however, that the fish habitat was destroyed and will remain so for years to come.

[19] The damage to DL 413 was widespread throughout the property amounting to complete devastation which will be of a long lasting and significant degree.

[20] None of the Defendants have taken any steps to attempt any sort of rehabilitation or reclamation of the area.

[21] Attempts to repair the damage done to DL 413 will require an extensive outlay of capital and resources. Some of the damaged areas simply cannot be fixed due to the manner in which the property was left.

[22] The damage done to DL 413 indicates a wanton disregard for the fish bearing habitat of the area as demonstrated by the manner of construction of stream crossings, attempts to drain the wetlands, the type of equipment used for access to and the removal of logs, and the destruction of riparian vegetation. The harm done affected all aspects of the habitat over an extensive area and was done purposely over time.

c) Size of the Corporation (Size, Wealth, Profitability)

[23] The size of a corporate Defendant may impact its ability to pay a fine as contemplated by the *Act*. I. Crosby and Howe Sound have given no evidence as to their financial circumstances.

[24] I. Crosby has been incorporated for two decades and its principal, Mr. Pineault, was on site regularly conducting logging operations. It is probably a smaller corporation and the evidence suggested it received approximately \$600,000.00 gross for six months' worth of work. It continued to operate in the logging industry on Haida Gwaii after the events at DL 413.

[25] Howe Sound had been incorporated for approximately two decades prior to it dissolving after the events of DL 413. It is part of a larger group of corporations and

operated as the middleman, buying logs from Gwaii, overseeing the logging operation by I. Crosby, and attending to the sale of the timber. The directors of Howe Sound continued to own and operate businesses under different corporate names engaged in timber harvesting and sales from offices in Campbell River.

[26] Gwaii was incorporated in 1995 and was the owner of the land and the timber mark. No evidence was presented about its history or past activities

[27] Given the manner in which logging activities were conducted on DL 413 and the callous and wanton disregard for fish habitat exhibited by the Defendants, particularly I. Crosby and Howe Sound, they must be stripped of any profits they obtained.

d) Criminality or Culpability of Conduct

[28] The nature of the behaviour of a corporate Defendant is a dominant factor in arriving at a just and appropriate sentence. Whether or not actions were intentional or unintentional will bear on that decision.

[29] In the case of I. Crosby, their actions were one of commission and were conducted in a deliberate, wilful, or reckless manner. Being in the business of log harvesting on Haida Gwaii for many years, it was reasonably foreseeable that its logging activities and road construction would cause extensive damage in many areas of DL 413, and the specific actions in relation to roadbuilding near and through streams and wetlands were entirely improper and done without any due diligence or adherence to proper logging practices.

[30] In the case of Howe Sound, its actions were one of commission in the hiring of I. Crosby to carry out the log harvesting without any supervision or an appropriate forest harvesting plan. Even when confronted by Fisheries Officers about the continuing nature of the destruction to DL 413, its representatives took no steps to properly supervise or curtail I. Crosby's activities on the site.

[31] In the case of Gwaii, its actions were one of omission by failing to properly supervise the actions of I. Crosby and Howe Sound as provided for in the various contractual arrangements. As landowners they did not take the necessary steps to ensure the proper stewardship of the land.

e) **Past Criminal Record**

[32] None of the Defendants have any convictions for similar contraventions of the *Act*.

f) **Attempts at Compliance**

[33] None of the Defendants made any genuine attempt to comply with the Inspector's Directions issued by the Fisheries Officers. In addition, despite promising to provide documentation of a forest harvesting plan, Howe Sound provided no such documentation to the Fisheries Officers. Gwaii was cooperative with FOC by attending meetings as requested, but did not provide the level of oversight expected by a landowner to ensure environmental impacts were minimized.

g) **Remorse and Acceptance of Responsibility**

[34] I. Crosby refused to take steps to comply with the Inspector's Directions issued by the Fisheries Officers and provided no disclosure voluntary or otherwise concerning its actions. It indicated no remorse and took no steps to affect any clean-up of DL 413. It showed no respect for the Court's process by failing to attend the trial even though its principals reside on Haida Gwaii.

[35] Howe Sound provided no real assistance in the investigation of the events. It showed no remorse, made no attempts to have I. Crosby stop its destructive practices, and took no steps to assist in the clean-up of DL 413. It was subsequently dissolved and did not appear at trial.

[36] When confronted, the directors of Gwaii cooperated with the investigation and diligently attended the trial but made no voluntary reporting of what was occurring on DL 413 before the investigation began.

h) Profits Realized - Gross vs. Net

[37] Based on the estimates at trial of the expert, Mr. Musgrave, concerning the monies generated by each of the Defendants, the full amount of the value of the timber generated from the logging on DL 413 should be ordered by the Court to be recovered as penalties under the *Act*.

[38] The estimated gross amounts received by each of the Defendants from the logging of DL 413 were:

- a) approximately \$1,000,000 by Howe Sound;
- b) approximately \$600,000 by I. Crosby; and

- c) approximately \$550,000, as disclosed by Gwaii's ledger documents.

[39] The Court should order the gross (and not the net) amounts received by each of the Defendants be paid to Her Majesty under section 79.2(f) of the *Act* as was done in *Henneberry* and *H & H Fisheries*.

i) **Other Orders**

[40] The Court should make the following orders pursuant to section 79.2(a) to prevent the Defendants from engaging in log harvesting and sales:

- a) I. Crosby for a period of 6 months; and
- b) Howe Sound for a period of 10 years.

FINE PRINCIPLES

[41] The Crown referred the Court to *Stubel*, *Flex-N-Gate*, and *Goebel* in support of its submission that concurrent fines cannot be imposed and that the fines imposed for each Count on the Information must take into account the seriousness of the offence. Only at that point should the Court consider the totality principle as described in section 718.2 of the *Criminal Code*.

[42] The Crown did acknowledge that the number of Counts on which fines should be imposed may be affected by the application of the principles described in *R. v. Kienapple*, (1974) 15 C.C.C. (2d) 524 (S.C.C.).

[43] What the Crown did not do is suggest a fine amount for each of the Counts, preferring to maintain a position that each Defendant should be fined a total of \$300,000.00.

THE KIENAPPLE PRINCIPLE

[44] The Crown referred the Court to the extensive analysis of the *Kienapple* principle set out in *Prince* which directs that there must be both a factual and legal nexus between the charges to ensure that multiple convictions are not recorded if they arise from the same "cause", "matter", or "delict", and if there is sufficient proximity between the offences. The requirement of sufficient proximity between offences will only be satisfied if there are no additional or distinguishing elements contained in the offence for which a conviction is sought that is precluded by the application of the *Kienapple* principle.

[45] The Crown noted that the *Kienapple* principle may be applied in this case given that the different activities all occurred on the same parcel of land and that in some instances similar illegal acts occurred in different aspects of the habitat.

[46] On that basis, the Crown submitted that the following Counts could be sufficiently related to one another to require only one penalty to be imposed:

- a) Count 1 - logging on the tributary noted as KS#1 and Count 3 - logging the riparian vegetation located on the banks of KS#1;
- b) Count 4 - logging on the tributary noted as KST#1 and Count 6 - logging the riparian vegetation located on the banks of KST#1;
- c) Count 7 - logging on the tributary noted as KS#2 and Count 9 - logging the riparian vegetation located on the banks of KS#2;

- d) Count 10 - logging on the tributary noted as MT#1 and Count 11 - logging the riparian vegetation located on the banks of MT#1;
- e) Count 12 - logging on the tributary noted as MT#1.1 and Count 13 - logging the riparian vegetation located on the banks of MT#1.1;
- f) Count 14 - logging on the tributary noted as MT#2 and Count 16 - logging the riparian vegetation located on the banks of MT#2;
- g) Count 18 - logging in the wetland areas and Count 20 - logging the riparian vegetation located in the wetland areas.

[47] The Crown submitted that the logging of the riparian vegetation can be subsumed by the more general logging damage done to the various streams and wetland areas but that road construction across many of those streams and the wetland areas was a different activity and as such a distinct delict.

Gwaii

[48] Gwaii's submissions on sentence can be summarized as follows:

- a) the Court proceeding has been a long, frustrating, and troubling journey for each of the directors of Gwaii, Mr. Collison and Mr. Bellis, who have been well known and prominent members of the Haida Nation for many years;
- b) prior to deciding to log DL 413, Gwaii checked on the value of the property and did other due diligence and found that some portions of the property were hiding areas for juvenile salmon;
- c) a decision to log the property was held in abeyance for four years on the strength of representations from the Nature Conservancy that it wished to buy DL 413, but eventually that plan did not come together and a decision was made to clear the land so that third parties could purchase it for farmland;
- d) Gwaii wished to get into the business of secondary, value added, wood manufacturing and much of the income earned from the logging of DL 413 went into paying outstanding bills and purchasing equipment for that enterprise;

- e) Gwaii had no wood harvesting experience and conducted sufficient due diligence in determining that the Pallan Group (Howe Sound) was a credible company to do business with on the basis of its lengthy history in conducting similar business throughout the coast of British Columbia and its Internet presence;
- f) utilizing a boilerplate timber harvesting agreement obtained with the assistance of Keith Atkinson, R.P.F., the Chief Executive Officer of the BC First Nations Forestry Council, Gwaii concluded that Howe Sound was contractually required to comply with all legislation, regulations, and policies surrounding logging and to ensure that any of their subcontractors did the same;
- g) the directors of Gwaii were unable to regularly attend at DL 413 and supervise the work of Howe Sound and I. Crosby because both had medical or other health limitations at the time;
- h) when Gwaii became aware that I. Crosby was logging incorrectly and without a forest harvesting plan, they raised their concerns with representatives of Howe Sound but Howe Sound did not provide the appropriate level of supervision;
- i) when FOC representatives first became aware of I. Crosby's noncompliance they could have, and should have, required the work to stop immediately but they only issued Inspector's Directions and let matters proceed;
- j) Gwaii had a good working relationship with FOC and willingly permitted their experts to have extensive access to DL 413 because they wished to cooperate;
- k) subsequent to the FOC experts completing their studies, there were no directions given by any Fisheries Officers to Gwaii to take any further steps to rehabilitate DL 413;
- l) the Crown did not present any evidence of real habitat damage or loss of fish resources because there was no evidence presented concerning the original condition of DL 413 as a fish habitat;
- m) Gwaii had no motivation to destroy or damage DL 413. The directors had a plan to employ many local people and to preserve the integrity of the property;
- n) Gwaii did not receive all the monies due under the contract with Howe Sound being short changed by approximately \$50,000;
- o) the directors of Gwaii remain confused as to why they were prosecuted over this matter in light of the Provincial Crown entering

a stay of proceedings on related charges against Gwaii on the basis of the presence of culturally modified trees being located on DL 413;

- p) Gwaii attempted to resolve matters with the Crown through an alternative justice program but they were unable to reach what they believed to be a fair and just resolution because the Crown refused to entertain any creative resolutions;
- q) there remains other difficulties surrounding DL 413 requiring Gwaii to have dealings with both the Ministry of Forests and the Ministry of Transportation and Highways over water escaping from rights of way on to DL 413;
- r) Gwaii would like to conduct further rehabilitation of DL 413 and to have permission from FOC to take further clean-up steps and to "wind farm" adjacent property belonging to Gwaii. After that has been accomplished, the directors anticipate winding up Gwaii;
- s) Gwaii was cooperative throughout the trial process and its directors diligently attended all court proceedings.

[49] Gwaii made no submissions on the totality principle with regard to fines or on the *Kienapple* principle.

Howe Sound and I. Crosby

[50] Howe Sound and I. Crosby did not attend the trial or provide any submissions on sentence.

DISCUSSION

Purpose of Environmental Legislation

[51] Like other environmental protection legislation, the *Act* is grounded on the social welfare concerns of the greater Canadian community. They are not strictly criminal offences but occupy the middle ground between criminal offences and absolute liability

offences. If a prohibited act is proven by the Crown, a corporate accused can avoid liability if it can show it has taken all reasonable care.

[52] The importance to the community at large of environmental protection legislation was described in *R. v. Royal Oak Mines Inc.*, 2001 BCPC 37 at paragraph 21:

[21] ...the *Fisheries Act* and its enforcement is premised on the need to protect our natural environment for the fish and wildlife that inhabit it as well as for the use and enjoyment of all the citizens of our community, our province and our country. This protection of the environment is a particular social interest in our geographic area where the lifestyle includes the use of wildlands for fishing, hunting, camping and other outdoor recreations.

[53] That statement applies unequivocally to the ecosystems as unique, fragile, and internationally recognized as on Haida Gwaii.

Introduction

[54] The factors specific to these types of offences as described in *United Keno*, *Terroco*, and subsequent decisions must be thoroughly reviewed. They amount to the aggravating and mitigating factors that must be considered in arriving at a just and appropriate sentence.

[55] However, they must also be considered in light of the paramount sentencing principles set out in Part XXIII of the *Criminal Code* and particularly ss. 718 through 718.2 as described in *Basso*. Within that sentencing framework the principles of denunciation, general deterrence, and specific deterrence are the primary sentencing objectives.

[56] The purposes of the *Act*, to protect the fishery environment and fish habitat, must also be given careful consideration in light of the extensive damage done by the actions or omissions of each of the Defendants.

[57] As a starting point, it is appropriate to reflect on the evidence of one of the Crown's experts.

[58] Mr. Al Cowan, with over 30 years' experience in the area of assessment of fish habitat and impacts on fish habitat, having studied hundreds of streams and prepared over 1000 timber harvest reviews on Haida Gwaii said in his evidence at trial:

Well for me this area is, you know I can't remember the term that I came up for but it's -- I called it a fish factory at one point but I think it was something more than a fish factory. I was just overwhelmed with the productivity of that area. That would have been a phenomenal area prior to logging. It kind of breaks my heart yet. I have never seen anything like this before, I've -- I've seen lots of streams, I've seen lots of Mallard Creeks, I've seen lots of tributaries, but I have not seen such an intense suprient imposition of all the streams, wetland features in such a small area, with an estuary on it for the fish to move back and forth.

United Keno and Terroco Factors

a) Nature of the Environment

[59] The environment of DL 413 was a diverse and productive ecosystem excellently situated for the rearing of fish in a variety of life stages. There are other properties either adjacent or nearby that are protected by government conservation designation or owned by conservation based non-government organizations.

[60] Gwaii was well familiar with the unique environment of DL 413 because it knew that portions of it were habitat for juvenile salmon and it had been in communication for

several years with the Nature Conservancy about selling DL 413 to that organization. When those talks broke down, Gwaii decided to have the land logged because it wished to sell it to a purchaser for farming purposes.

[61] Despite Gwaii's submissions to the contrary, there was abundant evidence that DL 413 and the adjacent Mallard Creek were rich and productive fish habitats.

b) Extent of Injury/Harm/Damage

[62] It is difficult to accurately and completely express in words the extent of the devastation to the fish bearing streams and wetlands depicted in the photographic evidence and described by the Fisheries Officers and the expert witnesses. It would not be an exaggeration to describe the damage to DL 413 from the actions of I. Crosby under the lack of supervision by Howe Sound and Gwaii as cataclysmic.

[63] I. Crosby paid little, if any, heed to proper logging practices resulting in downed trees being left in various streams and wetlands clogging the channels, impeding fish movement, and removing the temperature - buffering canopy trees provide. Road construction was haphazard and done without regard to ensuring proper stream flow protection. Stream crossings were constructed in substandard fashion causing further stream damage and destruction of the fish habitat. The harvesting equipment used on the site and the manner in which it was deployed exacerbated the damage done.

[64] I. Crosby's actions, by continuing to log and remove timber from DL 413, after having been given the Inspector's Directions requiring it to take immediate remedial measures, were further aggravating factors.

[65] The damage done to the fish habitat of DL 413 amounted to a near total annihilation which will require extensive and expensive rehabilitation. Even if that occurs, the productivity of the fish habitat will be compromised for many decades to come.

c) Size of the Corporation (Size, Wealth, Profitability)

[66] In many of the cases provided by the Crown, the size and wealth of corporate offenders was of considerable importance, particularly as it applies to determining a suitable fine amount. The cases refer to imposing fines as a specific deterrence to ensure that they are more than a “slap on the wrist” (*Terroco*), ensure there won’t be a reoccurrence (*Leon-Ram*), but that it not be fatal to the corporation (*United Keno*). Not having the information about a corporation’s wealth is problematic because it makes it extremely difficult for the Court to properly measure the paramount principle of sentencing in regulatory offences - deterrence.

[67] This challenge was discussed at length in *Metron Construction*. In that case, the court first analysed the applicability of *Criminal Code* sections 734 (Power of the Court to Impose a Fine), 735 (Fines on Organizations) and 718.21 (Additional Factors relevant to Sentencing Organizations). In interpreting those sections, and particularly section 734(2), the court determined that taking into account an offender’s ability to pay does not apply to corporations.

[68] The court, in *Metron Construction*, continued its analysis by considering section 718.21 and determined that while the economic viability of the organization was a factor to consider, the prospect of bankruptcy should not be precluded. Next, the court noted

the relevance of a corporation's importance to the community through its employees and other economic drivers.

[69] In this case, none of that relevant information was provided by I. Crosby or Howe Sound and only limited information was provided by Gwaii.

[70] In the case of I. Crosby it appears that it was, at the time, a small local logging operation that employed its two principals and a few other employees or sub-contractors engaged in the logging, road building, and log hauling operations. It continued to operate on Haida Gwaii after DL 413 was logged. It grossed approximately \$600,000.00 from its contract with Howe Sound for its activities on DL 413.

[71] Howe Sound went into receivership and then was dissolved a few years after the logging of DL 413. It was one of what appeared to be a number of related companies or divisions of companies engaged in log buying and selling along the coast of British Columbia operated by common directors from offices in Campbell River, BC. Evidence at the trial suggested that it went into bankruptcy in 2014. It grossed approximately \$1,000,000.00 from the logging of DL 413 after paying I. Crosby and Gwaii.

[72] Gwaii maintained that it owned DL 413 for about four years before logging commenced but land transfer documents indicate it went from being a part owner to sole owner of DL 413 in the summer of 2010.

[73] Gwaii called no evidence at trial concerning its financial situation, but it did provide to the Court financial and banking records as evidence in conjunction with its submissions at the sentencing hearing. Gwaii contended that it was short-changed

\$50,000.00 by Howe Sound in the amount they were to receive under the contract. It also contended that much of the money it received was reinvested into a value added wood manufacturing enterprise.

[74] Gwaii's financial records indicate that it received slightly over \$554,000.00 from Howe Sound under the contract between June 2010 and May 2011. During that same period the directors, Mr. Collison and Mr. Bellis, received management fees totalling \$341,000.00 and Gwaii retired a mortgage for an additional \$73,000.00. Gwaii provided no explanation concerning how those funds were used.

d) Criminality or Culpability of Conduct

[75] I. Crosby had been involved in logging operations on Haida Gwaii for many years. They were selected by either, or both, of Howe Sound and Gwaii to be the primary contractor to log DL 413. Given I. Crosby's experience, its approach to the logging and road construction near and through streams and wetlands was clearly without regard for the legal requirements for proper timber harvesting. I. Crosby was well aware of the extensive damage it was causing and persisted in those activities despite the Inspector's Directions to cease logging and related activities.

[76] Howe Sound was part of a consortium that had been involved in log buying and selling on coastal British Columbia for many years. It did not prepare or provide to I. Crosby a forest harvesting plan. It did not properly supervise I. Crosby's work on DL 413 to ensure compliance with forestry, environmental, and fisheries regulations and practices. Its representatives misled Gwaii with regard to the steps it would take to bring I. Crosby into compliance. On several occasions its representatives misled

Fisheries Officers who were investigating matters including indicating its acceptance of responsibility to remediate the damage done by I. Crosby.

[77] Gwaii's legal culpability lies in not properly supervising the activities of I. Crosby and Howe Sound and in failing to put a stop to the damaging logging and road construction activities before they went too far even though Gwaii's directors were concerned about I. Crosby's actions one month into the timber harvesting.

[78] Gwaii maintained it was unable to properly supervise I. Crosby and Howe Sound due to the medical conditions of its two directors during the relevant period. However, it provided no explanation why it did not send its alternate representative named in the Log Sales Agreement "to undertake random inspections at the harvest site".

[79] Despite the overall value of the Log Sales Agreement (over \$2,000,000.00 gross) Gwaii declined to obtain any legal advice prior to entering into a contract with Howe Sound. Instead, it provided to Howe Sound a boilerplate precedent contract it had obtained and altered to fit the circumstances and then relied on that contract, in its defence of the charges without any appreciation of its overarching legal responsibility as the landowner. That legal responsibility would have been quickly explained to its directors by any lawyer familiar with that area of the law.

e) **Past Criminal Record**

[80] None of the Defendants have any convictions for similar contraventions of the *Act*.

f) **Attempts at Compliance**

[81] Given the level of devastation visited on DL 413, it is clear that no attempts were made by I. Crosby to comply with the required regulatory framework. In addition, it continued in its actions despite receiving two Inspector's Directions to cease activity and begin remediation efforts.

[82] Similarly, Howe Sound made little, if any, attempts to meet its obligations within the regulatory framework. It did not prepare a forest harvesting plan. It did not properly supervise I. Crosby's activities. It deflected and misled the Fisheries Officers in their investigations.

[83] The representatives of Gwaii made some late attempts to cooperate and assist the investigating Fisheries Officers. However, it made little effort to properly supervise the activities of I. Crosby and Howe Sound.

g) Remorse and Acceptance of Responsibility

[84] Despite its principals residing on Haida Gwaii, I. Crosby exhibited absolutely no remorse or acceptance of any responsibility for its actions, either at the time of the events, during the investigation, or through the trial and sentencing process.

[85] Howe Sound did exhibit some professed responsibility and concern when initially confronted by Fisheries Officers in the early part of the investigation but that attitude was not genuine. It took no steps to act on its obligation to supervise I. Crosby's actions even though it was responsible for doing so both contractually and by regulation.

[86] The directors of Gwaii were somewhat cooperative with the investigation. They diligently attended the trial and participated by cross-examining witnesses. Gwaii chose

to base its defence on the contractual terms making Howe Sound responsible for regulatory compliance. During the early portion of the trial when Gwaii was represented by counsel, he said they would be calling a due diligence defence. But, later in the trial, after counsel had been discharged, Gwaii declined to call any evidence. It held to that position despite several attempts by the Court to urge its representatives to seek legal advice on possible defences.

[87] Mr. Collison and Mr. Bellis are members of the Haida Nation and are lifelong residents of Haida Gwaii. In the past they have held positions of responsibility, authority, and importance within their cultural and the greater community.

[88] They have expressed great remorse for the devastation visited upon DL 413 and their regret that it occurred when they were the landowners. They maintain that they were misled by Howe Sound, and that may well be true, but they minimized Gwaii's ultimate responsibility at law throughout the trial and sentencing process.

h) Profits Realized - Gross vs. Net

[89] In addition to any fines, which are meant to be penal in nature, there must be at least some recovery of what each of the Defendants received as a result of their illegal actions on DL 413.

[90] The gross amounts received by I. Crosby and Howe Sound were based on estimates prepared as part of an expert's report. The gross amount received by Gwaii is confirmed by their corporate records.

[91] The Crown does not seek an additional fine under section 79 of the *Act*. If an additional fine is imposed, then the monetary benefits (gross revenue) generated by each of the Defendants may be subject to that fine. That is what occurred in *Henneberry* and *H & H Fisheries*. Such an additional fine would go into the general revenue of the Federal Government.

[92] What the Crown is seeking is an order under section 79.2 (f) of the *Act* requiring the payment of money for the purpose of providing management, control, conservation, and protection of fish habitat on Haida Gwaii. Such a payment is meant to assist in the rehabilitation and amelioration of damage done to fish habitats similar to that visited by the Defendants on DL413.

[93] The Crown submits that the reasoning in *Henneberry* and *H & H Fisheries* concerning section 79, which has been followed by courts in British Columbia, should also be applied to section 79.2 (f). With respect, such reasoning is flawed. The purpose of the two sections are quite different; section 79 is meant to punish and section 79.2 (f) is meant to be rehabilitative by having a defendant contribute to the restoration of habitat similar to what it damaged.

[94] Therefore, although significant orders will be made for each of the Defendants to pay an amount contemplated by section 79.2 (f), they will not be based on the "monetary benefits" they each received as provided for by section 79.

i) **Other Orders**

[95] Based on the Crown's submissions and the provisions of section 79.2(a) of the *Act*, it is appropriate and just to impose a period of prohibition on I. Crosby and Howe Sound from doing any act or engaging in any activity that may result in the continuation or repetition of the offences.

[96] In the case of I. Crosby, given the estimated small size of that corporation, it will be a hardship on its operations and the financial status of its principals and sub-contractors or employees, but it is necessary to impress upon it the need to comply with the regulatory provisions designed to protect the forests, the environment, fish, and fish habitat.

[97] In the case of Howe Sound, given its present legal status, such an order will be a somewhat pyrrhic result for the community at large, but it may serve as general deterrence to others corporations inclined to such illegal activities.

[98] In the case of Gwaii, given that it is generally not in the business of logging and in light of its greater cooperation in the investigation and its participation in the Court process, there will be no order made against it pursuant to this section.

THE KIENAPPLE PRINCIPLE

[99] The *Kienapple* principle was discussed in *Larsen* where Skilnick PCJ quoted from paragraph 17 of *R. v. Wigman*, (1987) 33 C.C.C. (3d) 97 (S.C.C.):

...[A] two-part test must be met for the *Kienapple* rule to apply: it must be both a factual and legal nexus between the charges. Multiple convictions are only precluded under the *Kienapple* principle if they arise from the same "cause", "matter", or "delict", and if there is sufficient proximity between the offences charged. This requirement of sufficient proximity

between the offences will only be satisfied if there is no additional and distinguishing element contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle.

[100] In applying the *Kienapple* principle, there is an argument that there are not two delicts, logging and road construction, committed against seven streams, a wetland area, and the riparian vegetation associated with them that comprise the 20 Counts on the Information, but rather the two delicts were committed against one legally identifiable parcel of land that comprised a single expansive fish habitat and ecosystem.

[101] The Crown doesn't accept that interpretation but did allow that some Counts related to the logging of certain streams and their associated riparian vegetation could be considered jointly. This approach was taken in *Larsen*, and in a different context in *Snowfield Development*.

[102] Careful consideration of the Counts in the Information, the evidence called and the facts found at trial and the application of the case law that has interpreted the *Kienapple* principle, permits a combination of some further Counts beyond those submitted by the Crown. That would result in the Counts involving certain minor tributaries being combined with the Counts concerning the streams they flow into.

[103] That results in the Counts being combined as follows:

- a) Count 1 - logging on the tributary noted as KS#1, Count 3 - logging the riparian vegetation located on the banks of KS#1, Count 4 - logging on the tributary noted as KST#1 and Count 6 - logging the riparian vegetation located on the banks of KST#1;
- b) Count 2 - road construction on the tributary noted as KS#1 and Count 5 - road construction on the tributary noted as KST#1;

- c) Count 7 - logging on the tributary noted as KS#2 and Count 9 - logging the riparian vegetation located on the banks of KS#2;
- d) Count 8 - road construction on the tributary noted as KS#2;
- e) Count 10 - logging on the tributary noted as MT#1, Count 11 - logging the riparian vegetation located on the banks of MT#1, Count 12 - logging on the tributary noted as MT#1.1 and Count 13 - logging the riparian vegetation located on the banks of MT#1.1;
- f) Count 14 - logging on the tributary noted as MT#2 and Count 16 - logging the riparian vegetation located on the banks of MT#2;
- g) Count 15 - road construction on the tributary noted as MT#2;
- h) Count 17 - logging the riparian vegetation located on the banks of Mallard Creek;
- i) Count 18 - logging in the wetland areas and Count 20 - logging the riparian vegetation located in the wetland areas; and
- j) Count 19 - road construction in the wetland areas.

[104] This analysis reduces the total number of Counts for sentencing purposes from 20 to 10, namely Counts 1, 2, 7, 8, 10, 14, 15, 17, 18 and 19.

FINE PRINCIPLES

[105] Although concurrent jail sentences are available to an accused, concurrent fines are not. Where there are convictions on a multiple count information, each count must attract a separate fine. (*Stubel, Flex-N-Gate*)

[106] The proper approach to be taken in such circumstances was discussed in *Goebel* where the court said at paragraph 86:

[86] ... It is an error for a Judge to simply impose the same fine on each of 15 counts, regardless of the nature and severity of the breach. When an accused is charged with multiple counts, he's entitled to be found guilty on each count individually, and he's entitled to be sentenced for each

count. The totality principle only comes into play at the end of the process... The totality principle can only be effective in reducing what would otherwise be an excess of global sentence. It is not an appropriate way of initially setting a sentence in the case of multiple convictions on multiple counts.

[107] The totality principle, as it pertains to fines, was discussed at length in *Pearlman* where the Court said in portions of paragraphs 44 through 47:

[44] ... The totality principle is a particular application of the more general principle of proportionality in sentencing, that is, that the punishment must be fundamentally connected to the general principle of the offender's criminal liability. Under the totality principle, consecutive sentences imposed for multiple offences must not exceed the overall culpability of the offender...

[45] It seems to me that the totality principle should be qualified when imposing consecutive fines arising from the commission of several separate offences. Whereas in criminal offences, the freedom of individuals is at stake and the accumulation of consecutive sentences may well exceed the applicant's overall culpability or constitute cruel punishment within the meaning of the Charter, the same considerations do not apply as strongly to offences for which a monetary penalty is provided. Consequently, I find it difficult to support the contention that the aggregate of fines for separate offences is not to exceed the maximum provided for a given offence,... In the event of continuing offences that can generate significant profits, as in the present case, that would be tantamount to quantifying the right to contravene the law, which is obviously contrary to the very principle of sentencing.

[46] Moreover, setting an aggregate ceiling for fines resulting from a number of offences at the maximum amount provided for an offence seems to me to be inconsistent with the legislation itself, which provides for a separate offence for each day with the maximum for each offence. A judicial creation would thus be best to go against the very intention of Parliament.

[47] This does not mean, however, that the fines for each of the offences can be added up without ultimately considering whether the aggregate of the fines imposed is just and appropriate and whether it actually reflects the offenders' overall culpability and takes into consideration the other purposes and principles in section 718 and 718.2 of the *Criminal Code*. Both can be reconciled without creating a fictitious limit that was not set by Parliament.

[108] Imposing the appropriate fines on each Count and then properly applying the totality principle is both challenging and complex in this case given the number of Counts to be considered and the nature of the damage done to various locations on DL 413.

[109] The wording of section 40(1) of the *Act* permits and the case law requires a separate fine for each Count. Each Count could attract the maximum fine available. In theory at least each of the Defendants could be facing total fines of \$6 million (\$300,000 x 20 Counts). Such a result would obviously not be a just and appropriate sentence in these circumstances.

[110] The Crown's submission of a \$300,000 fine for each Defendant, without further submissions on the appropriate fine each Count should attract, sounds suspiciously like the suggestion of a global sentence which is not permitted.

[111] The Crown did not make any submissions on whether any Count or Counts on the Information were more serious delicts than others.

[112] Similarly, the evidence at trial, with one exception, Mallard Creek (Count 17), did not indicate that the circumstances of one Count required a harsher or lighter sentence than any other Count.

[113] With regard to Mallard Creek, Mr. Cowan's evidence indicated that it had been an important and productive salmon spawning environment for many years and that such production would be interfered with for many years to come as a result of the logging

and road construction done on DL 413 in the area of the tributaries that flow into Mallard Creek.

[114] The case law provided by the Crown set out the penalties imposed in a variety of circumstances where HADD occurred in various locations in British Columbia and elsewhere. However, those cases are of only limited assistance in arriving at a just and appropriate sentence here because the facts of each of them are very dissimilar to this case.

[115] After considering the evidence of the damage done to DL 413, taking into account the responsibility of each of the Defendants for that damage, applying the facts of the case to the analysis described in *United Keno* and *Terroco* and applying the *Kienapple* principle to the Counts on the Information, the starting point for the fines to be imposed for each Defendant would be:

- a) Counts 1, 2, 7, 8, 10, 14, 15, 18 and 19: \$50,000 each, and
- b) Count 17: \$150,000

For a total of: \$600,000 each or \$1,800,000.00 total.

[116] The Crown's submission that each of the Defendants should face the same total fine of \$300,000 would generate a grand total in fines of \$900,000. That amount, with respect, would be excessive in the circumstances for the following reasons:

- a) DL 413 although unique in its fish habitat complexity, does not cover such a large geographic area as to warrant the imposition of the maximum fine on each of the Defendants;
- b) the Crown's position does not allow for any consideration of the factors described in *United Keno* and *Terroco*, including the relative liability and culpability of each of the Defendants for the damage done as described by each of the Counts.

[117] When it comes to the totality principle for fine amounts, Howe Sound clearly stands out as the main player and the most responsible for the destruction of DL 413. It had many years' experience in log buying contracts and it failed in its responsibility to properly supervise I. Crosby's work and to protect Gwaii's position as landowners. It took advantage of Gwaii's inexperience in the area of log buying agreements to Gwaii's great detriment.

[118] I. Crosby's actions make it far more liable than Gwaii for the damage done to DL 413. It was experienced in logging and logging road construction on Haida Gwaii but ignored both the regulatory requirements and sound logging practices to extract the maximum timber value in the minimum amount of time using the most economical means available, regardless of the damage done. It continued to carry out the work and undertaking on DL 413 after being served with Director's Instructions to cease work.

[119] Gwaii's accountability is tempered by the naivety of its directors when it came to the legal requirements and responsibilities surrounding logging of private land.

However, Gwaii and its directors profited from the actions of Howe Sound and I. Crosby. Once it became aware of the destructive logging practices occurring on DL 413, it did not intervene to stop the work until FOC became involved.

Creative Sentencing

[120] Prior to making formal submissions to the Court on the matter of fines and other payments to be made by Gwaii, the Crown and Gwaii's representatives attempted to come to an accord on a creative sentence that would have seen a transfer of some of Gwaii's real estate holdings to a nongovernmental organization.

[121] The Court permitted the Crown and Gwaii several months to attempt such a resolution but it was not successful. Although such discussions between the Crown and a Defendant are usually considered to be on a “without prejudice” basis, in its submissions Gwaii alleged that the Crown was acting unreasonably when it refused an offer for Gwaii to transfer approximately 55% of DL 413 to a yet to be agreed upon nongovernmental organization.

DECISION

[122] Counts 3, 4, 5, 6, 9, 11, 12, 13, 16, and 20 on the Information are conditionally stayed.

[123] Pursuant to section 40 (1) of the *Fisheries Act*, the Defendant I. Crosby Contracting Ltd., shall pay a fine, due immediately, totalling \$180,000.00 broken down between the Counts on the Information as follows:

- a) Counts 1, 2, 7, 8, 10, 14, 15, 18 and 19: \$15,000.00 each
- b) Count 17: \$45,000.00.

[124] Pursuant to section 40 (1) of the *Fisheries Act*, the Defendant Howe Sound Forest Products Ltd., shall pay a fine, due immediately, totalling \$300,000.00 broken down between the Counts on the Information as follows:

- a) Counts 1, 2, 7, 8, 10, 14, 15, 18 and 19: \$25,000.00 each
- b) Count 17: \$75,000.00.

[125] Pursuant to section 40 (1) of the *Fisheries Act*, the Defendant Gwaii Wood Products Ltd., shall pay a fine due by June 30, 2017 totalling \$120,000.00 broken down between the Counts on the Information as follows:

- a) Counts 1, 2, 7, 8, 10, 14, 15, 18 and 19: \$10,000.00 each
- b) Count 17: \$30,000.00

[126] Pursuant to section 79.2 (f) of the *Fisheries Act*, the Defendant I. Crosby Contracting Ltd., shall immediately pay Her Majesty the amount of \$400,000.00, to the Receiver General for Canada, for the benefit of Fisheries and Oceans Canada for the purposes of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat on Haida Gwaii.

[127] Pursuant to section 79.2 (f) of the *Fisheries Act*, the Defendant Howe Sound Forest Products Ltd., shall immediately pay Her Majesty the amount of \$800,000.00, to the Receiver General for Canada for the benefit of Fisheries and Oceans Canada, for the purposes of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat on Haida Gwaii.

[128] Pursuant to section 79.2 (f) of the *Fisheries Act*, the Defendant Gwaii Wood Products Ltd., shall pay Her Majesty the amount of \$400,000.00, to the Receiver General for Canada, for the benefit of Fisheries and Oceans Canada for the purposes of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat on Haida Gwaii.

[129] In the case of Gwaii Wood Products Ltd., its obligations, pursuant to section 79.2(f) of the *Fisheries Act*, will be satisfied if it transfers clear title to DL 413, save and except for an easement in its favour sufficiently large to permit Gwaii access to DL 418, to a non-governmental conservancy organization as agreed to by the Crown, and failing such agreement by further order of the Court as provided for in ss. 79.2(b) and (i) of the *Act*. To permit time for such arrangements to be attempted, the provision of the Order pursuant to section 79.2 (f) of the *Fisheries Act*, as it pertains to Gwaii Forest Products Ltd., shall be adjourned to the Judicial Case Manager on Tuesday January 10, 2017, by telephone, for the purpose of setting a date to speak to a consent order or an application to the Court for a further order not sooner than April 30, 2017.

[130] Pursuant to section 79.2 (a) of the *Fisheries Act*, the Defendant I. Crosby Contracting Ltd., is prohibited from carrying out any work or undertaking related to logging or road construction related to logging, or entering into any contractual arrangements for any other person or corporation, to undertake those activities on its behalf or for its benefit for a period of six months commencing on March 1, 2017.

[131] Pursuant to section 79.2 (a) of the *Fisheries Act*, the Defendant Howe Sound Forest Products Ltd., is prohibited from entering into contracts for the purchase or sale of logs, or carrying out any work or undertaking related to logging or road construction related to logging, or entering into any contractual arrangements for any other person or corporation to undertake those activities on its behalf or for its benefit for a period of five years commencing on March 1, 2017.

M. J. Brecknell
Regional Administrative Judge

Northern Region
Provincial Court of BC